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COURIER**

April 13, 2015
File No.: 129316.1002

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
Yonge-Eglinton Centre
P.O. Box 2319
2300 Yonge Street, Suite 2700
Toronto ON M4P 1E4

Dear Ms. Walli:

**Re: wpd Sumac Ridge Incorporated (the "Applicant")
EB-2013-0442**

We are the solicitors for the Applicant. Attached please find two (2) copies of the Applicant's Submissions in response to Procedural Order No.4 which was filed by RESS on April 13, 2015.

Yours truly,


Patrick Duffy

PD/il
Enclosures

TORONTO

MONTRÉAL

OTTAWA

CALGARY

VANCOUVER

NEW YORK

LONDON

SYDNEY

IN THE MATTER of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, (the "OEB Act");

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 location for the applicant's distribution facilities on public road owned by the Municipality of Kawartha Lakes, Ontario, as set out in this application.

SUBMISSIONS OF WPD SUMAC RIDGE INCORPORATED IN RESPONSE TO
PROCEDURAL ORDER NO. 4

(EB-2013-0442)

INDEX

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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 location for the applicant's distribution facilities on public road owned by the Municipality of Kawartha Lakes, Ontario, as set out in this application.

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Submissions of wpd Sumac Ridge Incorporated
in response to Procedural Order No. 4

IN THE MATTER of the *Ontario Energy Board Act, 1998, S.O.*
1998, c. 15, Schedule B, (the “OEB Act”);

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 location for the applicant’s distribution facilities
on public road owned by the Municipality of Kawartha Lakes,
Ontario, as set out in this application.

SUBMISSIONS OF WPD SUMAC RIDGE INCORPORATED IN RESPONSE TO
PROCEDURAL ORDER NO. 4

1 **INTRODUCTION**

2 wpd Sumac Ridge Incorporated (“**Sumac Ridge**” or the “**Applicant**”) filed an application
3 with the Ontario Energy Board (the “**Board**”) on December 20, 2013 (the “**Application**”) for
4 an order or orders under section 41(9) of the *Electricity Act, 1998* establishing a location for
5 distribution facilities it proposes to locate within certain public rights-of-way, streets and
6 highways owned by the City of Kawartha Lakes (“**Kawartha Lakes**” or the “**City**”).

7 On April 2, 2015, pursuant to Procedural Order No. 4 dated March 16, 2015, Board Staff, the
8 intervenor Elizabeth Salmon and Kawartha Lakes each filed written submissions in respect
9 of the status of Gray Road and Wild Turkey Road. These submissions are filed pursuant to
10 Procedural Order No. 4 in reply to the submissions of Board Staff, Dr. Salmon and
11 Kawartha Lakes.

12 **SUBMISSIONS**

13 **The Board should disregard the Affidavits of Ron Taylor and Diane McFarlane**

14 Together with its submissions, Kawartha Lakes submitted affidavits of Ron Taylor, Director
15 of Development Services for the City of Kawartha Lakes, and Dianne McFarlane, Land

1 Management Coordinator for the City of Kawartha Lakes, both sworn on March 9, 2015.¹
2 This evidence was not previously in the record before the Board.

3 Sumac Ridge requests that the Board disregard the Taylor and McFarlane Affidavits because
4 they present an incomplete and distorted picture of a judicial review application before the
5 Divisional Court (Court File No. 37/15) involving the City and Sumac Ridge.² The
6 application was commenced by Sumac Ridge to challenge the City's refusal to permit Sumac
7 Ridge to upgrade and use Wild Turkey Road for the purposes of constructing and
8 maintaining turbines (not the location of distribution facilities). While there are overlapping
9 issues concerning the status of Wild Turkey Road, the outcome of the application before the
10 Divisional Court does not have a direct bearing on Sumac Ridge's rights under section 41
11 (and vice versa).

12 The Taylor Affidavit covers matters that are largely irrelevant to issue identified by the
13 Board in Procedural Order No. 4.³ With respect to the McFarlane Affidavit, Kawartha Lakes
14 did not inform the Board that Ms. McFarlane was cross-examined on her affidavit on April
15 1, 2015 and that the City, as detailed below, made significant admissions during cross-
16 examination that fundamentally undermine the accuracy of the position taken by the City on Wild
17 Turkey Road before the Board.

18 In the event the Board does not disregard the Taylor and McFarlane Affidavits, Sumac
19 Ridge asks the Board to accept into evidence the reply affidavit of Ian MacRae (affirmed
20 March 23, 2015)⁴ and the transcript of the cross-examinations of Ms. Farlane and Mr. Taylor

¹ Affidavit of Ron Taylor sworn on March 9, 2015, filed April 2, 2015 (the "**Taylor Affidavit**") and Affidavit of Dianne McFarlane sworn on March 9, 2015, filed April 2, 2015 (the "**McFarlane Affidavit**").

² Notice of Application for Judicial Review dated January 23, 2015, Court File No. 37/15. Appendix "A" to Submissions of wpd Sumac Ridge Incorporated in Response to Procedural Order No. 4.

³ To the extent that the Taylor Affidavit deals with the status of Wild Turkey Road, it relies upon the evidence in the McFarlane Affidavit; see paras. 11, 12, 100 and 101.

⁴ Affidavit of Ian MacRae affirmed March 23, 2015 (the "**MacRae Affidavit**"). Appendix "B" to Submissions of wpd Sumac Ridge Incorporated in Response to Procedural Order No. 4.

1 conducted on April 1, 2015.⁵ These documents will provide the Board with a more balanced
2 picture of the evidence filed in the Divisional Court application that relates to the status of
3 Wild Turkey Road.

4 **Unopened Road Allowances are Public Streets or Highways**

5 Board Staff agreed with Sumac Ridge's position that unopened road allowances are public
6 streets or highways for the purpose of section 41.⁶ Kawartha Lakes has likewise conceded
7 that unopened road allowances are public streets or highways and that section 41 grants
8 Sumac Ridge a right to place its distribution facilities within the roadway.⁷ Both Board Staff
9 and Kawartha Lakes also agreed that the Board should look to the definition of highway
10 under section 26 of the *Municipal Act, 2001* for guidance when interpreting section 41.

11 Dr. Salmon argues that only a road allowance opened by a municipality can be considered a
12 public highway under the section 26 of the *Municipal Act, 2001*.⁸ However, that requirement
13 does not appear anywhere in the statute nor is found in common law. As noted in *Russell on*
14 *Roads*, despite not being maintained by the municipality road allowances that are unopened
15 and unassumed "are, nevertheless, public highways."⁹ The language of paragraph 5 of
16 section 26 of the *Municipal Act, 2001* is unambiguous on this point – unless they have been
17 closed "[a]ll road allowances made by the Crown surveyors that are located in
18 municipalities" are highways.¹⁰

⁵ Transcript of Cross-examination of Diane McFarlane dated April 1, 2015 ("**McFarlane Cross-examination**"). Appendix "D" to Submissions of wpd Sumac Ridge Incorporated in Response to Procedural Order No. 4. Transcript of Cross-examination of Ron Taylor dated April 1, 2015 ("**Taylor Cross-examination**"). Appendix "C" to Submissions of wpd Sumac Ridge Incorporated in Response to Procedural Order No. 4.

⁶ OEB Staff Submission filed April 2, 2015 at pp. 2 to 5.

⁷ Submission of the Corporation of the City of Kawartha Lakes filed April 2, 2015 at pp. 1 to 2.

⁸ Submission of the Intervenor Dr. E. Salmon filed April 2, 2015 at paras. 86 to 89.

⁹ W.D. (Rusty) Russell, Q.C., *Russell on Roads* (Toronto: Thomson Canada, 2008) at p. 71. Appendix "E" to the Reply Submission of Sumac Ridge.

¹⁰ Appendix "C" to the Reply Submission of Sumac Ridge filed March 10, 2015.

1 Dr. Salmon also argues the road allowances are not highways under the *Highway Traffic Act*
2 because they are not capable of “conducting vehicular traffic in their current state.”¹¹ This
3 argument is flawed in both fact and law. It contradicts the evidence of Kawartha Lakes (the
4 owner) that the public can use its road allowances “in their unimproved state at their own
5 risk.”¹² Further, it runs contrary to the established jurisprudence that the public has a right
6 to access all road allowances in their current state.¹³ As noted in *Russell on Roads*:

7 Original road allowances, (i.e. concession roads, sideroads,
8 shore road allowances) whether “opened” or “not opened”,
9 “used” or “not used”, are public highways until closed
10 according to law. Yes, even when they extend over the most
11 inhospitable terrain.¹⁴

12 [Emphasis added.]

13 **Gray Road is a Public Street or Highway**

14 No party has challenged Gray Road’s status as an unopened road allowance; accordingly,
15 there is no impediment to the Board granting an order under section 41 with respect to the
16 location of Sumac Ridge’s distribution facilities in Gray Road.

17 **Wild Turkey Road is a Public Street or Highway**

18 Kawartha Lakes’ submission that Wild Turkey Road is not public street or highway is
19 premised upon scant evidence and should be viewed as an opportunistic attempt to obscure
20 matters and further delay the resolution of this proceeding.

¹¹ Submission of the Intervenor Dr. E. Salmon filed April 2, 2015 at paras. 66 to 67.

¹² McFarlane Affidavit at para. 7.

¹³ See the authorities cited in the Sumac Ridge’s Reply to the Submissions of the Intervenor Dr. Elizabeth Salmon filed March 10, 2015.

¹⁴ *Russell on Roads* at p. 59.

1 By way of background, Sumac Ridge submitted an application to Kawartha Lakes in April
2 2013 for access to municipal roadways for the Project. In respect of Wild Turkey Road,
3 Sumac Ridge seeks to place a 44 kV collector line underground from turbine 5 to turbine 4
4 for the purpose of transporting electricity generated by turbine 5 to the collector substation
5 (the “**WRT Collector Line**”).¹⁵

6 At no time prior to the delivery of the affidavit of Diane McFarlane (served on Sumac Ridge
7 on March 9, 2015) did the City advise Sumac Ridge that it was concerned about the
8 uncertain status of Wild Turkey Road. Under cross-examination, Ms. McFarlane (through
9 the City’s legal counsel) admitted the City first advised Sumac Ridge of the change in
10 position by way of her affidavit:

11 Q. And the first time the city told WPD about any of the
12 uncertainties [with the status of Wild Turkey Road] that we
13 have discussed today were in your affidavit on this
14 application sworn March 9th, 2015?

15 MR. COLE: Sorry, the first time that the city did?

16 MR. MAX: Yes, told WPD about the uncertainties that we
17 have discussed.

18 MR. COLE: I think that is a fair statement.¹⁶

19 According to Ms. McFarlane, the City’s change of position was due to information brought
20 to her attention in November 2014 by Mr. Herman Wimellbacher, a surveyor retained by the

¹⁵ Exhibit C-1-1 of the Application.

¹⁶ McFarlane Cross-examination, p. 49, Q. 154.

1 appellants in the Environmental Review Tribunal ("ERT") proceeding related to this
2 Project.¹⁷ She confirmed this evidence under cross-examination:

3 Q. So in addition to those two discoveries of the by-laws, you
4 have the information that was given to you by Mr.
5 Wimellbacher?

6 A. Correct.

7 Q. And it's the city's position that the information he
8 provides makes the status of Wild Turkey Road uncertain?

9 A. Correct.

10 Q. He told you in November of 2014 that he had evidence
11 that Wild Turkey Road was a forced road. If I can take you to
12 paragraph 8 of your affidavit. Paragraph 8.

13 A. Okay.

14 Q. "Recently in November 2014 -- "

15 A. Yes, that is correct.¹⁸

16 However, Ms. McFarlane was forced to concede that, even after receiving information from
17 Mr. Wimellbacher in November 2014, the City continued to maintain that Wild Turkey Road
18 was an unopened road allowance before the ERT:

19 Q. Can I take you to Tab A of your affidavit, please, and I
20 want to go to page 69 of that record, paragraph 233.

¹⁷ McFarlane Affidavit at para. 8.

¹⁸ McFarlane Cross-examination, p. 43, Q. 134 to 137.

1 "Mr. Taylor [Director of Development Services, City of
2 Kawartha Lakes] stated that he disagreed with Mr.
3 Wimellbacher's interpretation of the status of Wild Turkey
4 Road as a quarter sessions road and confirmed his
5 understanding it that it is an unopened road allowance under
6 the city's jurisdiction." [as read]

7 [...]

8 Q. Was that the city's position at the time?

9 MR. COLE: She can't testify to that. But I am going to tell
10 you, though, that I am, at the moment, not challenging
11 paragraph.

12 BY MR. FAITH:

13 Q. Well as far as this witness knows, was that the city's
14 position at the time that Ron Taylor gave his evidence at the
15 ERT hearing?

16 MR. COLE: I have no reason to disagree with that.¹⁹

17 In fact, Mr. Taylor, representing Kawartha Lakes, testified before the ERT that Wild Turkey
18 Road was under the jurisdiction of the municipality and that the City was obliged to
19 accommodate distribution facilities in the roadway:

¹⁹ McFarlane Cross-examination, pp. 54 to 56, Q. 182 to 185. In addition, as noted by Dr. Salmon in her submissions, Mr. Juan Rojas (Manager of Engineering Services at the Corporation of the City of Kawartha Lakes) submitted testimony to the ERT that "the unopened portion of Wild Turkey Road is an unmaintained road allowance."

1 [228] Mr. Taylor testified that the City has not granted
2 permission to the Approval Holder for road upgrades or
3 access to Wild Turkey Road, Ballyduff Road and Gray Road.
4 He noted that the City believes that upgrades to Wild Turkey
5 Road are not in keeping with the ORMCP or with the current
6 use of the road as a recreational trail. Mr. Taylor noted that s.
7 41.4 of the ORMCP prohibits opening of roads. He stated his
8 view that under the *Municipal Act*, roads can only be opened
9 and assumed by municipal council via by-law, and noted that
10 City Council has refused the Approval Holder's request to do
11 so. He also stated that under the *Electricity Act*, the City is
12 obligated to accommodate transmission lines; a process that is
13 being worked through at the Ontario Energy Board.²⁰

14 [Emphasis added.]

15 Kawartha Lakes had a clear strategic rationale for taking this position before the ERT – it
16 allowed the City to argue that Wild Turkey Road would need to be widened to municipal
17 standards if it was opened.²¹ In turn, it was alleged that the widening of the road would
18 result in serious and irreversible environmental harm because it might require the removal
19 of fencerows and hedgerows and would endanger a butternut sapling.²² The ERT rejected
20 these arguments and concluded that there was insufficient evidence that the Project would
21 cause serious and irreversible harm to fencerows and hedgerows and the butternut sapling
22 on Wild Turkey Road.²³

²⁰ McFarlane Affidavit, Exhibit “A” at para. 228. See also Taylor Cross-examination at pp. 144 to 146, Q. 359 to 365 and p. 149, Q. 374.

²¹ McFarlane Affidavit, Exhibit “A” at paras. 86.

²² McFarlane Affidavit, Exhibit “A” at paras. 104, 462 and 476.

²³ McFarlane Affidavit, Exhibit “A” at paras. 468 to 471 and 512 to 514.

1 It appears the City's position on Wild Turkey Road shifted only after the release of the
2 ERT's decision when it became advantageous to obscure the status of the Wild Turkey Road
3 for the purposes of this proceeding and the Divisional Court application. The evidence that,
4 according to Ms. McFarlane, prompted Kawartha Lake's shift in position is scant and does
5 not even apply to the portion of Wild Turkey Road in which the WRT Collector Line will be
6 located; in particular, Ms. Farlane relied upon:

- 7 • Two plans of reference that depict a forced road on parcel registers located north of
8 the segment of Wild Turkey Road crossed by the WRT Collector Line.²⁴
- 9 • An 1839 petition for an order by the Magistrate of Quarter Sessions creating a road in
10 the general area of Wild Turkey Road for which an order has not been located.²⁵
- 11 • The discovery of a copy of By-law MVB5513 from 1882 that is illegible and is
12 registered on parcels located south of the segment of Wild Turkey Road crossed by
13 the WRT Collector Line.²⁶
- 14 • The vague description of an unavailable by-law from 1850 that may or may not
15 relate to the segment of Wild Turkey Road crossed by the WRT Collector Line.²⁷

16 Even putting the obvious weakness of this evidence aside, the alleged uncertainty over the
17 status of Wild Turkey Road has no bearing on the placement of the WRT Collector Line. It
18 does not matter if Wild Turkey Road is a Crown surveyed road allowance, Quarter sessions
19 road, a road established by by-law, or a forced road – Sumac Ridge has a right to place the
20 WRT Collector Line within Wild Turkey Road in all of these scenarios.

²⁴ McFarlane Affidavit at para. 14. As shown in Appendix "A" to Exhibit D-1-2 of the Application, Sumac Ridge is seeking to locate its distribution facilities only in the portion of Wild Turkey Road bordered by PINs 0160 (referred to as Property D) and 0164 (referred to as Property E). The Plans of Reference attached to the McFarlane Affidavit are registered on PINs 0159 and 0161.

²⁵ McFarlane Affidavit at paras. 19 to 21.

²⁶ McFarlane Affidavit at para. 16.

²⁷ McFarlane Affidavit at paras. 24 to 25.

1 This conclusion can be demonstrated by reviewing each of the five possible scenarios
2 presented in the McFarlane Affidavit:

- 3 • *Crown-surveyed Road Allowance* – If Wild Turkey Road was established by a Crown
4 survey, it would have the same status as Gray Road and would qualify as a highway
5 by virtue of paragraph 5 of section 26 of the *Municipal Act, 2001*.
- 6 • *Quarter Sessions Road* – As acknowledged in the McFarlane Affidavit, a Quarter
7 Sessions road would be a road allowance under the jurisdiction of the municipality.²⁸
8 If Wild Turkey Road was created by the granting of a Quarter Sessions order, it
9 would be a highway that “that existed on December 31, 2002” under paragraph 1 of
10 section 26 of the *Municipal Act, 2001*.²⁹
- 11 • *Established by By-law MVB5513* – If Wild Turkey Road was established by By-law
12 MVB5513, it would be under the jurisdiction of the municipality³⁰ and is a highway
13 that “that existed on December 31, 2002” under paragraph 1 of section 26 of the
14 *Municipal Act, 2001*.³¹
- 15 • *Established by 1850 By-law* – If Wild Turkey Road was established by the 1850 by-law,
16 it would be under the jurisdiction of the municipality³² and is a highway that “that
17 existed on December 31, 2002” under paragraph 1 of section 26 of the *Municipal Act*,
18 *2001*.³³

²⁸ McFarlane Affidavit at paras. 6 and 21; McFarlane Cross-examination at p. 28, Q. 90.

²⁹ Quarter Sessions roads, which were laid out between 1788 and 1849 under the direction of justice sitting in Quarter Sessions, “continue to be public highways and many are in use to this day”: *Russell on Roads* at p. 99.

³⁰ McFarlane Cross-examination at p. 24, Q. 75 to 77.

³¹ *Russell on Roads* at p. 55. While Ms. McFarlane contends that By-law MVB5513 could have closed Wild Turkey Road, this is pure speculation that is not supported by any evidence whatsoever. In contrast, the continued existence and use of Wild Turkey Road since 1882 is strong evidence that By-law MVB5513 did not close the road.

³² McFarlane Cross-examination at p. 35, Q. 104 to 105.

³³ *Russell on Roads* at p. 55.

1 • *Forced Road* –

- 2 ○ *Created by dedication and acceptance* – Public highways can be created where an
3 owner of the land dedicates land for public passage and the land is accepted
4 by the municipality. Dedication and acceptance can occur formally or by
5 implication through decades of use.³⁴ There is no dispute that Wild Turkey
6 Road existed prior to December 31, 2002; if it was a dedicated and accepted
7 forced road, then Wild Turkey Road is under the jurisdiction of the
8 municipality and is a highway that “that existed on December 31, 2002”
9 under paragraph 1 of section 26 of the *Municipal Act, 2001*.³⁵
- 10 ○ *Trespass road on private land* – If Wild Turkey is a forced road that was not
11 dedicated and accepted, it is under the control of one or both of the adjoining
12 landowners (PINs 0160 and 0164). Sumac Ridge has lease agreements with
13 both of the adjoining landowners and these landowners have confirmed that
14 they are “willing to do what is necessary to allow for use and upgrade of
15 Wild Turkey Road.”³⁶ Therefore, the municipality’s consent is not needed for
16 the placement of the distribution facilities.

17 In her affidavit, Ms. McFarlane also contends that the precise location of Wild Turkey Road
18 is unknown and a survey is needed to confirm its boundaries.³⁷ This objection is entirely
19 baseless – the two adjacent landowners (PINs 0160 and 0164) have lease agreements with
20 Sumac Ridge, which renders the precise boundaries of Wild Turkey Road irrelevant in
21 determining where to locate Sumac Ridge’s distribution facilities.

³⁴ *Russell on Roads* at p. 94.

³⁵ *Russell on Roads* at pp. 55, 93 and 98.

³⁶ MacRae Affidavit at para. 9.

³⁷ McFarlane Affidavit at para. 26.

1 When put to Ms. McFarlane on cross-examination, the City's counsel agreed with the
2 characterization of the five scenarios and acknowledged that consent from the City and/or the
3 adjacent landowners was sufficient in all scenarios for the use and upgrading of the road:

4 MR. COLE: What has been put in issue through the affidavit
5 of the deponent here today, Diane McFarlane, is whether the
6 city has jurisdiction to grant the opening or access or
7 upgrading to Wild Turkey Road as requested by WPD prior to
8 this application and as a result of whatever order may be
9 made. The affidavit identifies concerns in that respect.

10 What we have discussed off the record is this: That if the city
11 has jurisdiction 100 per cent, then clearly it has jurisdiction. If
12 it turns out that landowners are the owners of what we call
13 Wild Turkey Road 100 per cent, then they would. And if it's
14 combination of the two, then in the event that the city and
15 landowners consent, then in the context of this discussion
16 there would be no impediment to upgrading and widening.

17 And just so that I am clear, we are talking about the
18 entitlement or the power to consent. We are not saying that
19 the city would consent or wouldn't consent, we are simply
20 talking about jurisdictional issues.

21 I might go further and say that I don't think we object to the
22 characterization of five options and their sub categories. And

1 if it expedites matters, you can take my general comments as
2 responsive to whatever additional questions you have.³⁸

3 [Emphasis added.]

4 The comments of City's counsel with respect to the use and upgrade of Wild Turkey Road
5 are directly applicable to the situation before the Board with one important modification –
6 the consent of the municipality to the placement of Sumac Ridge's distribution facilities is not
7 required under section 41. In light of the rights granted by section 41, and Sumac Ridge's lease
8 agreements with the two adjacent landowners, it is abundantly clear that the City has no
9 basis to object to to the placement of Sumac Ridge's distribution facilities within Wild
10 Turkey Road.

11 **CONCLUSION**

12 The Applicant reiterates its request that the Board issue an order under section 41(9) of the
13 *Electricity Act, 1998* establishing the location of its distribution facilities within Gray Road
14 and Wild Turkey Road.

15 In preparing this submission, Sumac Ridge noticed an irregularity in its corporate name in
16 the style of cause for this application and requests that the order be issued in the name of
17 “wpd Sumac Ridge Wind Incorporated”.

18 In light of the uncertainty around the status and boundaries of Wild Turkey Road, Sumac
19 Ridge would consent to have the order contain the following term:

20 Due to the uncertainty of the City's jurisdiction over Wild
21 Turkey Road, Sumac Ridge shall ensure that it has obtained
22 the consent of the landowners immediately adjacent to the

³⁸ McFarlane Cross-examination, p. 36 to 37, Q. 106.

1 portion of Wild Turkey Road crossed by the WRT Collector
2 Line to the location of its facilities.

3 Sumac Ridge also requests that the Board utilize its discretionary authority to sanction the
4 conduct of Kawartha Lakes by awarding Sumac Ridge costs for the preparation of these
5 submissions. Kawartha Lakes acknowledged fundamental flaws in the accuracy of its
6 position under cross-examination on April 1, 2015, yet still proceeded to file the McFarlane
7 Affidavit in this proceeding on April 2, 2015 with absolutely no modification or qualification.
8 Kawartha Lakes' conduct in this proceeding is deserving of sanction by way of a costs order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Toronto, Ontario, this 13th day of April, 2015

wpd Sumac Ridge Wind Incorporated
by its counsel
Stikeman Elliott LLP



Patrick Duffy

Appendix A

Court File No.

37/15

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

BETWEEN:

WPD SUMAC RIDGE WIND INCORPORATED

Applicant

and

CORPORATION OF THE CITY OF KAWARTHA LAKES

Respondent

NOTICE OF APPLICATION FOR JUDICIAL REVIEW

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following page.

THIS APPLICATION for judicial review will come on for a hearing before the Divisional Court on a date to be fixed by the registrar at the place of hearing requested by the Applicant. The Applicant requests that this application be heard at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the office of the Divisional

Court within thirty days after service on you of the Applicant's application record, or at least four days before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN TO IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date

Jan 23/15

Issued by

Romana J. J. J.

Registrar

Address of

court office: Osgoode Hall, 130 Queen Street West
Toronto, Ontario
M5H 2N5

TO: Corporation of the City of Kawartha Lakes
26 Francis Street
Lindsay, Ontario
K9V 5R8

AND TO: Attorney General of Ontario
Crown Law Office - Civil
720 Bay Street
8th Floor
Toronto, Ontario M7A 2S9

APPLICATION

1. wpd Sumac Ridge Wind Incorporated (“wpd”) makes application for an order:
 - (a) quashing the March 25, 2014 resolution of the Council of the Corporation of the City of Kawartha Lakes (the “Council”) to refuse any request submitted by wpd to the Corporation of the City of Kawartha Lakes (the “City”) for the use of the purportedly unopened portion of Wild Turkey Road in relation to wpd’s Sumac Ridge Wind Project;
 - (b) quashing the September 9, 2014 resolution of Council approving the draft template agreement entitled “Development Agreement Respecting Large Scale Renewable Energy Projects” and authorizing the Mayor and Clerk to execute all future “Large Scale Renewable Energy Project” agreements and associated documents in a form generally in keeping with the draft template;
 - (c) quashing the City’s By-Law 2014-238 and By-Law 2014-264 insofar as they establish illegal development charges for wind turbines;
 - (d) quashing the City’s By-Law 2014-273 establishing discriminatory fire regulations for wind turbine projects;
 - (e) directing the City:
 - (i) to consider and decide in good faith wpd’s applications to allow for the upgrading and use of Wild Turkey Road;

- (ii) to consider and decide in good faith wpd's applications for any municipal permits necessary for the expeditious construction and operation of wpd's Sumac Ridge Wind Project;
- (iii) to allow the expeditious construction and operation of wpd's Sumac Ridge Wind Project; and
- (f) awarding wpd its costs of this proceeding, plus all applicable taxes;

or such further and other relief as to this Honourable Court may seem just.

2. The grounds for the application are:

wpd and the Sumac Ridge Wind Project

- (a) wpd is a sustainable energy company currently developing the Sumac Ridge Wind Project, a five-turbine wind power project located in the City (the "**Project**").
- (b) The Project was approved under Ontario's Renewable Energy Approval ("**REA**") process on December 11, 2013. wpd has a Feed-in-Tariff ("**FIT**") contract with the Ontario Power Authority with respect to the operation of the Project.
- (c) Under wpd's FIT contract, wpd's milestone for the commencement of commercial operation of the Project was July 24, 2014. The commercial operation of the Project has been delayed by appeals currently before the Environmental Review Tribunal. A final decision from the ERT on these appeals is expected on February 19, 2015.

Council's attempts to squelch the Project

- (d) Council has made clear its opposition to the Project and to other renewable energy projects within its jurisdiction. For example,
 - (i) on February 5, 2013, by passing a resolution recommending the province refuse the Project;
 - (ii) on March 26, 2013, by passing a resolution stating that it “is not a willing host” for wind projects and seeking recommendations for legal options in the event the Province approved the Project; and
 - (iii) on or before March 19, 2014, by making it known to staff that it would not support the Project.
- (e) More recently, Council has misused its powers in an attempt to squelch the Project, defeat the purpose of wpd’s REA, and thwart wpd’s realization of its obligations under its FIT contract,
 - (i) by refusing to allow the upgrading and use of Wild Turkey Road, a key access route for certain of the Project’s proposed turbines specifically authorized under wpd’s REA for the Project;
 - (ii) by passing a resolution on September 9, 2014 that imposed a Byzantine and illegal regulatory process on renewable energy projects;
 - (iii) by enacting By-Laws 2014-238 and 2014-264 that imposed illegal development charges on renewable energy projects; and

- (iv) by enacting By-Law 2014-273 on October 14, 2014, which requires that the Project be serviced for fire emergency access by a publicly maintained road, which, as explained above, Council will not allow to be built.

The City's refusal to allow for the upgrading and use of Wild Turkey Road

- (f) The REA approves and requires “the construction, installation, operation, use and retiring of... five (5) wind turbine generators... sited at” specific locations set out in the REA.
- (g) Condition A1 of the REA approves the Project in accordance with the terms and conditions of the Application.
- (h) Section 2.1.2 of the Project Description Report, which comprises part of the Application, states:

Road upgrades will be required to accommodate delivery of turbine components as well as heavy construction equipment. Upgrades will be conducted in consultation with the local municipality...

Wild Turkey Road

Wild Turkey Road is a municipal road consisting of a gravel base closely lined on both sides with scrub brush. **This road will be used to deliver turbine components to the site during construction and will require widening of one additional meter and structural upgrading to support construction vehicles and accommodate the turning radius of the trucks carrying the tower, nacelle, and blades.** An existing culvert will not require upgrading to support the delivery of components and the upgrading of this road. Figure 1 shows the road upgrade which will be confirmed in detail by the construction contractor prior to construction.

[Emphasis added]

- (i) Accordingly, if wpd is not able to upgrade Wild Turkey Road, wpd will not be able to comply with its REA and will be unable to complete the Project.
- (j) wpd has previously offered to pay for the necessary improvements to and, if necessary, opening of Wild Turkey Road and to pay for its maintenance throughout the operation and retiring of the Project.
- (k) wpd's offers to pay for upgrades have been rejected by the City. The City has refused to work with wpd towards a negotiated solution, and has taken *proactive* steps to block any negotiation at any time in the future by passing a resolution to that effect.
- (l) The City's actions demonstrate a determined effort to thwart wpd's use of Wild Turkey Road as authorized by wpd's REA:
 - (i) On July 9, 2013, Council convened a closed session to consider wpd's request for permits relating to Wild Turkey Road and to consider "Advice that is Subject to Solicitor Client Privilege". In the closed session Council rejected wpd's applications and passed a resolution directing staff to advise wpd that any action not authorized by the municipality "shall be seen as trespassing... and authorities will be contacted to enforce";
 - (ii) In August 2013, following wpd's request to upgrade Wild Turkey Road at wpd's own expense, the City stated that if it were to review wpd's application, it would require studies consistent with a Municipal Class Environmental Assessment ("MCEA") process to support the request;

- (iii) wpd commenced the MCEA process at its own expense;
- (iv) On February 4, 2014, the City advised wpd that it would consider the results of the MCEA process in making its decision with respect to Wild Turkey Road;
- (v) On March 19, 2014, despite the fact that wpd had not yet completed the MCEA process, City staff advised that there was “no support on council” to open Wild Turkey Road and that a staff report would recommend that Wild Turkey Road not be opened for public access;
- (vi) On March 25, 2014, with the MCEA process still underway, the City adopted a resolution specific to the Project that “any request by [wpd] and/or future successors for use of the unopened portion of Wild Turkey Road for property access and/or other vehicular traffic to support proposed wind turbine development be refused...”;
- (vii) In September, 2014, wpd completed the MCEA process, the final report of which confirmed that use of Wild Turkey Road was the most suitable of all available options;
- (viii) On October 17, 2014, the City sent wpd a letter stating its opposition to the MCEA process and repeating its opposition to the use of Wild Turkey Road; and
- (ix) On January 20, 2015, the City reiterated its refusal to negotiate with wpd in good faith to upgrade Wild Turkey Road, and stated “the City’s position

remains consistent that no vehicular access and entrances to the unopened and unassumed portions of Wild Turkey Road will be granted, and no approvals to upgrade that road will be granted”.

- (m) By its actions, the City has acted in bad faith, inconsistently with provincial legislation, and with the ulterior, improper purpose of frustrating wpd’s ability to proceed with the Project.

The City’s discriminatory fire By-Laws

- (n) On October 14, 2014, the City enacted By-Law 2014-273, which creates fire regulations for “Industrial Wind Turbines”.

- (o) Section 2.08 of the By-Law states:

All Industrial Wind Turbine Proponents shall provide and maintain road access for emergency response vehicles capable of supporting the weight of responding apparatus to the base of the Industrial Wind Turbine and must be connected to a maintained public road.

- (p) The purpose and effect of this By-Law was to place wpd in an impossible catch-22: first denying wpd the opportunity to upgrade Wild Turkey Road to the standard of a maintained public road, and then passing a By-Law that requires access to one.
- (q) Further, By-Law 2014-273 is discriminatory. Section 2.05 states that “all costs related to emergency response of Industrial Wind Turbine shall be borne by the proponent on a full cost recovery basis.” The By-Law has the effect of requiring industrial wind turbine operators to pay for their own emergency services while the city provides such services to other businesses free of charge.

- (r) In passing By-Law 2014-273, Council acted in bad faith, inconsistently with provincial legislation, and with the ulterior, improper purpose of frustrating wpd's ability to proceed with the Project.

The City's illegal attempt to regulate Renewable Energy Projects

- (s) The *Green Energy Act, 2009*, S.O. 2009, c. 12 ("GEA"), of which the REA is a part, provides a complete regime for carrying out the Province's policy in facilitating and streamlining the process for developing green energy projects.
- (t) On September 9, 2014, Council resolved to effectively deny any municipal permits for renewable energy projects unless the proponent enters into a "Development Agreement Respecting Large Scale Renewable Energy Projects" with the City.
- (u) In October, 2014, the City told wpd it must obtain building permits from the City to construct the Project, but that no municipal permits would be issued until it entered into a Development Agreement.
- (v) The Development Agreement imposes a Byzantine layer of regulatory requirements specific to renewable energy projects that would frustrate or impede wpd's ability to fulfil its obligations under its FIT contract, and which run counter to the purpose of the GEA. The Development Agreement includes provisions that
 - (i) require that wpd complete all work "in a manner satisfactory to the Director of Development Services and/or the Public Works or their designate... **in accordance with the City's standards and design specifications**" [emphasis added];

- (ii) give the City the ability to inspect the installation and “stop any work in the event that in his opinion the services and works are being performed in a manner **which is not satisfactory to the city**” [emphasis added]; and
- (iii) allow the City to decommission the Project if there is a violation of the agreement.
- (w) Requiring wpd to enter into the Development Agreement would frustrate or impede the purposes of the GEA, wpd’s REA, and its obligations under its FIT contract.
- (x) Further, the City is acting without legal authority in deciding not to issue building permits unless wpd enters into the Development Agreement. The *Building Code Act, 1992*, S.O. 1992, c. 23, provides that building permits *shall* be issued except in very specific and limited circumstances, none of which include the requirements imposed on wpd in the Development Agreement.
- (y) In passing its September 9, 2014, resolution and in carrying out its policy, the City has acted in bad faith, inconsistently with provincial legislation, and with the ulterior, improper purpose of frustrating wpd’s ability to proceed with the Project.

The City’s illegal development charges

- (z) On August 12, 2014, the City enacted By-Law 2014-238, amended on October 14, 2014 by By-Law 2014-264, imposing, for the first time in the City’s history, an illegal development charge on renewable energy developments based on the “nameplate generating capacity” of an electrical generating project.

- (aa) The development charge is fixed at approximately \$12 / KW of nameplate generating capacity starting in 2015, and doubles in 2016. The expected cost of the charge to wpd is in the hundreds of thousands of dollars.
- (bb) In enacting the By-Laws introducing the development charge, the City failed to comply with sections 5 and 10 of the *Development Charges Act*, 1997, S.O. 1997, c. 27 ("DCA"), including that it failed to
 - (i) consider the anticipated amount, type, and location of the wind and solar developments on which the charge was to be imposed;
 - (ii) estimate the increase in the need for service attributable to the anticipated development;
 - (iii) consider whether the increase could be met using the municipality's excess capacity;
 - (iv) consider the extent to which the increased service benefitted existing development; and
 - (v) estimate the capital costs necessary to provide the increased services.
- (cc) The City did not and could not have complied with the DCA, as the development charge was never designed to compensate the City for any increased costs arising from the Project. In fact, the City has demanded that wpd pay for its own fire and emergency protection, and wpd has offered to pay for the upgrades to Wild Turkey Road required under its REA.

- (dd) As a result, Council has acted outside its authority in enacting By-Laws 2014-238 and 2014-264 and they should be quashed.

Urgent relief is needed

- (ee) wpd's FIT contract with the province has a fixed duration and a Milestone Date of Commercial Operation ("MDOC").
- (ff) wpd faces two adverse consequences as a result of the City's denials and delay:
 - (i) the frustration of its FIT contract entirely if it does not commence operation of the turbines within the grace period following the MDOC; and
 - (ii) if the contract is not frustrated, the costs of extending the term of its FIT contract to ensure wpd can maintain its 20-year term.
- (gg) wpd requests this matter be heard on an expedited basis to avoid the frustration of its contract and financial harm caused by further delay.

Legal authority

- (hh) The City's By-Laws and resolutions;
- (ii) The *Green Energy Act, 2009*;
- (jj) The *Development Charges Act, 1997*;
- (kk) The *Building Code Act, 1992*
- (ll) The *Judicial Review Procedure Act*;

- (mm) Such other grounds as counsel may advise.
3. The following documentary evidence will be used at the hearing of the application:
- (a) The affidavit(s) of representative(s) of wpd, to be sworn, and the exhibits attached;
and
 - (b) Such further and other evidence as counsel may advise and this Honourable Court
permit.

January 23, 2015

POLLEY FAITH LLP
The Victory Building
80 Richmond Street West
Suite 1300
Toronto, ON
M5H 2A4

Andrew Faith (47795H)
afaith@polleyfaith.com

Andrew Max (65624J)
amax@polleyfaith.com

Tel: 416.365.1600
Fax: 416.365.1601

Lawyers for the applicant

Exhibit A to Appendix A

This is Exhibit "A" referred to in the Reply Affidavit of Ian MacRae affirmed March 23, 2015.

A handwritten signature in blue ink, appearing to be 'JL', is written above a horizontal line.

Commissioner for Taking Affidavits (or as may be)
Jesse Long (LSUC # 58647L)

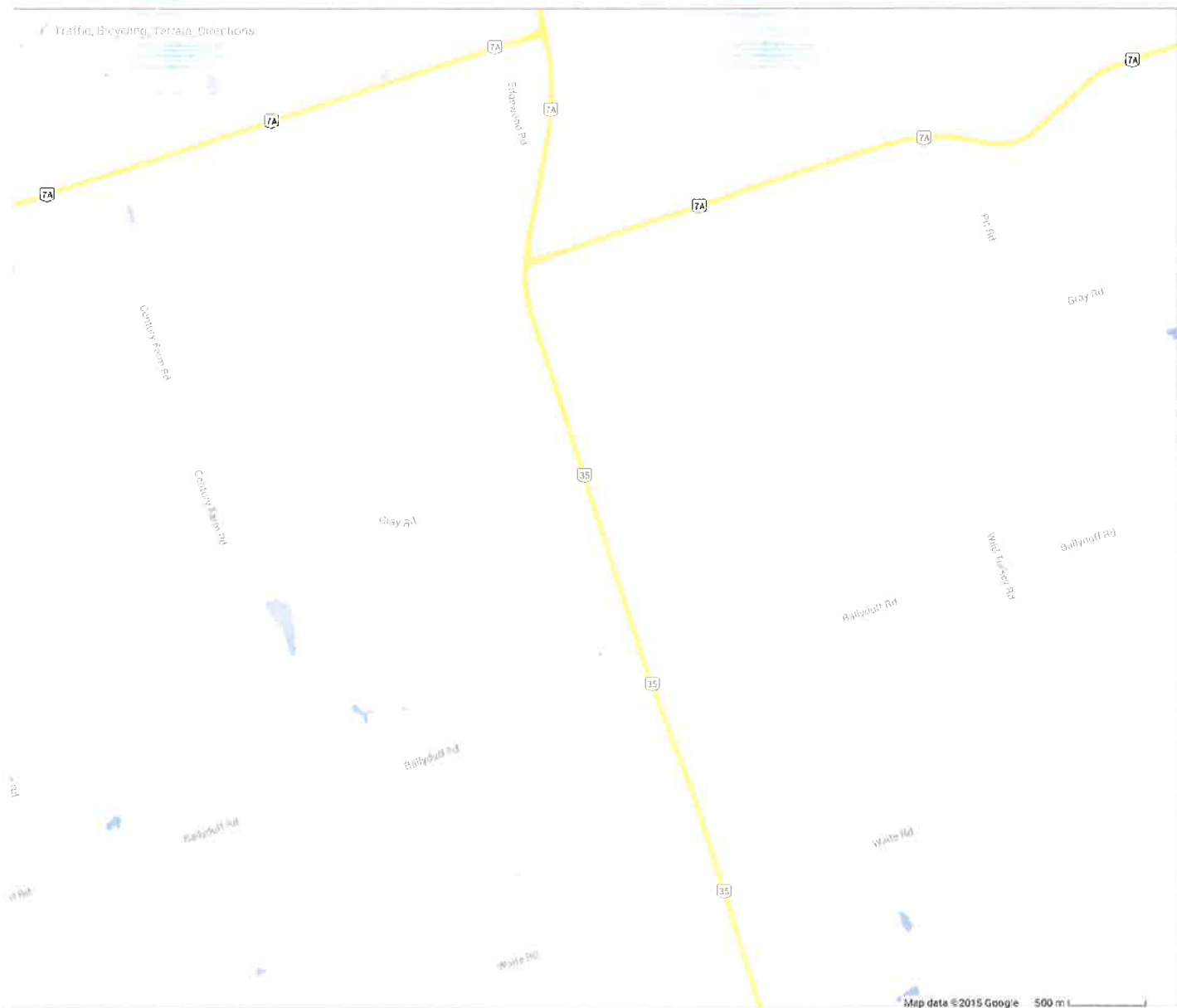



Exhibit B to Appendix A

This is Exhibit "B" referred to in the Reply Affidavit of Ian MacRae affirmed March 23, 2015.



Commissioner for Taking Affidavits (or as may be)
Jesse Long (LSUC # 58647L)

City of

KAWARTHA

Catch the Kawartha spirit

1 905 813 7487 Fax

**LIMITED SERVICE AGREEMENT
APPLICATION**

ROAD NAME:	Wild TURKEY		
UNASSUMED:	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	PRIVATE:	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
ROAD LENGTH:	North from Ballydaff 1 Km		


ASSOCIATION NAME: (If applicable)	
PROPERTY OWNERS REPRESENTATIVE: (If applicable)	
CONTACT PERSON:	MURRAY PORTER
ADDRESS:	801 Ballydaff
CITY:	Pontypool
PHONE NO.:	705 277 2299
FAX:	
E-MAIL:	

ROAD CRITERIA FOR LIMITED SERVICE:

- Width of road – a minimum of 4 metres
- Depth of Base – sufficient to grade (minimum of 5 cm.)
- Brushing – 5 metres overhead
- Turn-around – must have adequate turn-around – can be private with permission
- All culverts, etc. must be structurally sound

Once a request is received;

- Area Manager/Foreman inspects road to see if it meets minimum requirements
- Staff to confirm ownership of road
- If a road is not acceptable, requester will be notified as to what road upgrades must take place before an agreement can be entered into.
- If conditions are acceptable an agreement will be prepared
- Depending on ownership, the agreement is with either a private owner, private owners, incorporated entity or adjacent owners.
- The agreement is then sent out with instructions
- Once signed, the agreement is returned to the City for execution
- Copies are then returned to the signing party and the Area Manager for action.

Signature of Applicant: 	Date: May 28/14
--	--------------------



905 813 1701 FAX

The Corporation of The City of Kawartha Lakes
P.O. Box 9000, Lindsay, ON K9V 5R8

Public Works - Operations
12 Peel St., Lindsay, ON K9V 3L8
(705) 324-9411 Ext. 1171 Fax: (705) 328-3054

June 9, 2014

Mr. Murray Porter
801 Ballyduff Road
Pontypool, ON L0A 1K0

Dear Mr. Porter:

Re: Limited Service Application - Wild Turkey Road

Your application for limited service on Wild Turkey Road in the former Township of Manvers has been received and a site inspection was performed by the Area Supervisor on June 6, 2014.

The following deficiencies have been noted:

- road requires widening to a consistent minimum 4 m
- gravel must be added to the road base to a minimum of 5 cm
- the road must be brushed to a minimum 4 m width and all overhead branches removed.

Once these deficiencies have been addressed, please contact the Bethany Service Centre at (705) 277-2321, and arrangements will be made for a second inspection by the Area Manager/Supervisor. When the Area Manager/Supervisor are satisfied with the conditions as they relate to the minimum acceptable standards, the application will be forwarded to the City's Solicitor for the preparation of the agreement.

If you would like to meet with the Supervisor to discuss these deficiencies please contact the Service Centre at (705) 277-2321 to arrange a mutually agreeable time.

We look forward to hearing from you in the near future.

Yours truly,

Michelle Hendry
Director of Public Works

/ko
Atch.

c.c. Pat Russell, Manager, East Area Roads
Bill Cockburn, East Area Roads Supervisor
City Solicitor

Pat

1 905 813 7487 Fax

From MURRAY PORTER



LIMITED SERVICE AGREEMENT
CHECKLIST

ROAD NAME:	Wild Turkey		
UNASSUMED:	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	PRIVATE:	Yes <input type="checkbox"/> No <input type="checkbox"/>
ROAD LENGTH:	1100 Metres		
ROAD WIDTH:	(minimum of 4 metres) 3 to 3.5 M		
ROAD BASE:	(minimum of 5 cm.) \emptyset		
BRUSHING:	(minimum of 5 metres overhead) Needs Sides & Overhead Brushed		
TURN AROUND:	(adequate) Yes		
ROAD CULVERTS:	(structurally sound) Yes		

Once a request is received;

- Area Manager/Foreman inspects road to see if it meets minimum requirements
- Staff to confirm ownership of road
- If a road is not acceptable, requester will be notified as to what road upgrades must take place before an agreement can be entered into.
- If conditions are acceptable an agreement will be prepared
- Depending on ownership, the agreement is with either a private owner, private owners, incorporated entity or adjacent owners.
- The agreement is then sent out with instructions
- Once signed, the agreement is returned to the City for execution
- Copies are then returned to the signing party and the Area Manager for action.

ROAD MEETS MINIMUM REQUIRES FOR LIMITED SERVICE:	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
IF NOT: (Please specify upgrades required to meet requirements)	
Needs to be wider, 5 CM of Gravel added Brushed to 4 M width and all Overhead Branches Removed	

Manager/Foreman Signature	Date:
	June 6, 2014

Bit Cockburn

Exhibit C to Appendix A

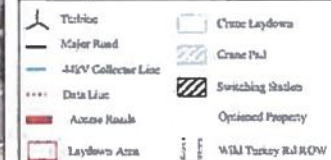
This is Exhibit "C" referred to in the Reply Affidavit of Ian MacRae affirmed March 23, 2015.

A handwritten signature in blue ink, appearing to read 'JL', is positioned above a horizontal line.

Commissioner for Taking Affidavits (or as may be)
Jesse Long (LSUC # 58647L)



LEGEND



PROJECT LOCATION



Wind Turbine Model:
SENATION MM92 (formerly REpower)

Hub Height: 104.0 m
Rotor Diameter: 92.5 m

Coordinate System: UTM NAD83 - Zone 17N

[illegible]

Project Title:
Sumac Ridge Wind Farm
Drawing Title:
Aerial with Infrastructure

	Date	Name	Dis. and Number of Yrs.
Received By	07-20-2011	A. T. Pitt	
Verified By			
Issued By			Supervisor's In.

2225 Argente Road, Suite 102
Minneapolis, MN 55406
13M 237
(p) 905-213-8400
(toll free) 1-800-713-2622
© 1995-96 13-Pol
<http://www.13-pol.com>



<p>Spalte:</p> <p>Spalten:</p>	<p>Spalte:</p> <p>Spalten:</p>
--------------------------------	--------------------------------

WPD SUMAC RIDGE WIND INCORPORATED
Applicant

-and- CORPORATION OF THE CITY OF KAWARTHA LAKES
Respondent

Court File No. 37/15

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF APPLICATION FOR JUDICIAL REVIEW

POLLEY FAITH LLP
The Victory Building
80 Richmond Street West
Suite 1300
Toronto, ON
M5H 2A4

Andrew Faith (47795H)
afaith@polleyfaith.com

Andrew Max (65624J)
amax@polleyfaith.com

Tel: 416.365.1600
Fax: 416.365.1601

Lawyers for the applicant

Appendix B

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

B E T W E E N:

WPD SUMAC RIDGE WIND INCORPORATED

Applicant

and

CORPORATION OF THE CITY OF KAWARTHA LAKES

Respondent

REPLY AFFIDAVIT OF IAN MACRAE

I, IAN MACRAE, of the City of Mississauga, in the Province of Ontario, AFFIRM:

1. I am President of wpd Sumac Ridge Wind Incorporated (“wpd”), and, as such, have knowledge of the matters contained in this affidavit.

Wild Turkey Road

2. I have driven the length of Wild Turkey Road, from Ballyduff Road to Gray Road. The road was passable by car. The road surface is gravel.

3. I am advised by Murray Porter, the owner of a property bordering Wild Turkey Road, that cars drive along Wild Turkey Road, and that locals use this as a shortcut to get to either highway 35 or highway 7A. I attach a road map of the area showing the intersection of these roads as

Exhibit “A”.

4. I am further advised by Murray Porter that the residents with land abutting Wild Turkey Road and others have contracted services to level and re-gravel the road in the past.

5. I am further advised by Murray Porter that he has obtained permission City of Kawartha Lake staff to engage in similar type works in relation to Wild Turkey Road. I attach a copy of the document outlining the terms of the permission as **Exhibit "B"**.

6. The following table contains our estimate regarding operational vehicle use in relation to the Sumac Ridge Wind Project (the "Project") following the completion of construction:

Task	Frequency	Time of Day	Number of vehicles
Post Construction Bird and Bat Surveys	May 1-Oct 31, twice a week for three years.*	Daylight hours	1 (Two staff expected on site)
Post Construction Raptor Surveys	Weekly for the Month of November for three years.*	Daylight Hours	1 (two staff)
Post Construction Immission Sound Audit Testing	A total of four one day visits, two in the spring and two in fall.	Daylight hours	1 (two staff)
Post Construction emission Sound Audit Testing	One test likely to take place over 3-4 days. Likely conducted in Spring or in Fall.	Daylight hours	1 (two staff)
Routine turbine Maintenance	Every six months, more frequent during the first year or two of operation.	Usually during daylight	1-2 depending on the task
Road Maintenance	Snow clearing to be completed as needed. Road maintenance/fixes as needed but most likely in spring.	Day or night	1


*should threshold be exceeded during this period additional years of surveys will be required but frequency will not increase.

Surrounding Property

7. wpd has used an aerial photograph of the area surrounding the Sumac Ridge Wind Farm and overlaid it with project infrastructure. A copy of this map is attached as **Exhibit "C"**.

8. I have reviewed the affidavit of Diane McFarlane dated March 9, 2015. I agree that there are five properties bordering Wild Turkey Road in the area between Ballyduff Road and Gray Road, bearing the PINs (parcel identifier numbers) 0158, 0160, 0164, 0159, and 0161.
9. wpd has agreements for the participation in the Project with the owners of PINs 0158, 0160, 0164, and 0159. The owners of those parcels have informed me that they are willing to do what is necessary to allow for the use and upgrade of Wild Turkey Road.
10. I affirm this affidavit in support of wpd Sumac Ridge Wind Incorporated's application for judicial review and for no other purpose.

AFFIRMED BEFORE ME at the City of Mississauga, in the Province of Ontario on March 23, 2015



Commissioner for Taking Affidavits
(or as may be)
Jesse Long (LSUC 58647L)



IAN MACRAE

Appendix C

Court File No. 37/15

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

WPD SUMAC RIDGE WIND INCORPORATED

Applicant

- and -

CORPORATION OF THE CITY OF KAWARTHA LAKES

Respondent

CROSS-EXAMINATION OF RON TAYLOR

on his Affidavit sworn March 9, 2015,
held at the offices of ASAP Reporting Services Inc.,
333 Bay Street, Suite 900, Toronto, Ontario
on Tuesday, March 31, 2015, at 9:34 a.m.

APPEARANCES:

Andrew Faith on behalf of the Applicant
Andrew Max

Clifford I. Cole on behalf of the Respondent
Konstantine J. Stavrakos

Also Present:

Jesse Long

A.S.A.P. Reporting Services Inc.© 2015
1105 - 200 Elgin Street 900-333 Bay Street
Ottawa, Ontario K2P 1L5 Toronto, Ontario M5H 2T4
(613) 564-2727 (416) 861-8720

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PAGE

SWORN: RON TAYLOR

4

CROSS-EXAMINATION BY MR. FAITH:

4

RE-EXAMINATION BY MR. COLE:

149

LIST OF REFUSALS & UNDER ADVISEMENTS

Refusals (REF) found at pages:

53, 56, 65 & 130

Under Advisement (U/A) found at page:

129

LIST OF EXHIBITS

NO.

DESCRIPTION

PAGE

1

Notice of draft site plan

23

Toronto, Ontario

--- Upon commencing on Tuesday, March 31, 2015, at
9:34 a.m.

SWORN: Ron Taylor.

CROSS-EXAMINATION BY MR. FAITH:

1 Q. So good morning,
Mr. Taylor, you have been sworn.

A. Good morning.

2 Q. You began your work for
the City of Kawartha Lakes in 2010; correct?

A. Correct.

3 Q. And you started in what
is now your current position with the city; is
that right?

A. Correct.

4 Q. And I take it you have
been closely involved in dealing with the city's
response to WPD's Sumac Ridge project application?

A. Correct.

5 Q. I want to first just take
you to paragraph 48 of your affidavit, if you can
turn that up, it is on page 14.

So 48 says WPD commenced the
REA approval process, that's the renewable energy
approval process, in September 2010 with a notice

1 of proposal and notice of a public meeting.

2 You see that there?

3 A. Yes.

4 6 Q. And then the next
5 paragraph, you say:

6 "A year and a half later,
7 on January 17, 2012, WPD
8 contacted the city to
9 schedule a meeting with
10 city staff to discuss the
11 project."[as read]

12 Do you see that?

13 A. I do.

14 7 Q. And is it your evidence
15 that between those two dates, that nothing
16 substantial happened in respect of WPD's attempt
17 to consult with the city about the project?

18 A. That's correct.

19 8 Q. That the city didn't
20 really reach out to the -- sorry, WPD didn't
21 really reach out to the city to attempt to, for
22 example, consult about municipal approvals for the
23 project?

24 A. I agree.

25 9 Q. I want to take you to our

1 records, so that's the WPD application record,
2 Volume 2, page -- I am just going to give you a
3 page reference, 536. It's Tab M, but I am going
4 to try to stick to the page references.

5 A. I may not have that. I
6 only have my own.

7 10 Q. You don't have it, okay.
8 Do you have a copy?

9 MR. COLE: We are looking at
10 an e-mail chain, are we, the top e-mail, March 24,
11 2011?

12 MR. FAITH: Yes, that's right.
13 So the last e-mail in this chain is March 24th,
14 2011, at 3 p.m.. I want to take you to 5:36,
15 which is the first e-mail in that chain.

16 MR. COLE: We are working off
17 the original, which doesn't appear to have page
18 numbers. For the record, let's just both be clear
19 what document we are looking at as opposed to page
20 numbers.

21 MR. FAITH: For sure.

22 MR. COLE: Because otherwise,
23 it may get difficult.

24 MR. FAITH: Okay. I will give
25 you tabs, and then I will take you to the page

1 number within the tab.

2 So this is page 3 of the
3 printed e-mail chain within Tab M of our Volume 2.

4 BY MR. FAITH:

5 11 Q. I want to focus you first
6 on this e-mail from Kevin Surrett to you, dated
7 March 8th, 2011, with the subject "Meeting
8 Request".

9 And I want to point out the
10 second sentence after the words "Mr. Taylor":

11 "I am looking to set up an
12 introductory meeting with
13 the planner for the City
14 of Kawartha Lakes. I am
15 not sure if you are the
16 appropriate individual.
17 If not, would you mind
18 forwarding my e-mail to
19 the correct person."[as
20 read]

21 And then in the next
22 paragraph, Mr. Surrett says to you:

23 "The purpose of the
24 meeting is to provide
25 information regarding our

1 Sumac Ridge project and
2 determine with whom we
3 should begin to work to
4 obtain the required
5 municipal approvals."[as
6 read]

7 Do you recall this e-mail?

8 A. Yes.

9 12 Q. So do you agree that WPD
10 actually first reached out to the city regarding
11 its municipal approvals on March 8th, 2011?

12 A. Yes, the e-mail would
13 indicate that.

14 13 Q. And then on the same page
15 above, I want to show you an e-mail from you to
16 Mr. Surrett dated March 9th, 2011, at 8:20 a.m.

17 And in this e-mail, you forward
18 Mr. Surrett's request to Linda Russell, who is a
19 planner with the city; you see that?

20 A. That's correct, yes.

21 14 Q. And you say:

22 "She will be contacting
23 you soon to set up a
24 meeting respecting your
25 project and advising of

1 our consultation process
2 for renewable energy
3 projects."[as read]

4 You see that?

5 A. I do.

6 15 Q. And then just flip back a
7 page. Now, this is page 2 of that e-mail chain.

8 And this is the March 16, 2011,
9 e-mail. And here is Linda Russell responding to
10 your request in an e-mail to Mr. Surrett, and she
11 says:

12 "I have attached our
13 preconsultation
14 application, which will
15 allow us to review your
16 proposal and provide you
17 with formal comments
18 regarding the project. In
19 addition, we require that
20 you provide us with a
21 completed Renewable Energy
22 Approval Consultation Form
23 - Part A prior to the
24 preconsultation
25 meeting."[as read]

1 Do you see that?

2 A. I do.

3 16 Q. And you would agree that
4 this e-mail sets out the process required by the
5 city for it to consider municipal approvals, as
6 was initially requested by WPD; correct?

7 A. Correct, this is the
8 process that's set out for all developments to
9 preconsult and provide sort of preliminary comment
10 on any application that would progress through the
11 process.

12 17 Q. Right.

13 And I guess I just want to make
14 sure that we are clear, because the initial
15 request by Mr. Surrett was to determine with whom
16 we should begin to work to obtain the required
17 municipal approvals, and the direction that
18 Ms. Russell gave to Mr. Surrett was that this
19 would be handled within the consultation process
20 for renewable energy approval; correct.

21 A. Through the
22 preconsultation process that the city has
23 established, yes.

24 18 Q. Right. And, that's
25 right, preconsultation process that the city has

1 established and the, through the renewable energy
2 approval process, because you asked for Part A of
3 the consultation form; correct? Or Ms. Russell
4 asked for it?

5 A. Correct, yeah, the
6 planning department in the city is the coordinator
7 for all renewable energy applications.

8 19 Q. Okay.

9 A. So this stage would have
10 been when WPD was pursuing their REA approval and
11 there is prescribed consultation with the city.
12 Ultimately, it leads to the completion of what's
13 known as the Part B consultation form, and that's
14 what we sort of use as a template for our basis
15 for comments on the applications.

16 20 Q. Yes. And, again, just to
17 be clear, the response of the city to the request
18 to determine with whom we should begin to work to
19 obtain the required municipal approvals was to be
20 directed to these preconsultation and consultation
21 processes; correct?

22 A. Correct.

23 21 Q. Now, the Consultation
24 Form - Part A, that is known as the municipal
25 consultation form, which is part of the

1 regulations in the Environmental Protection Act;
2 are you aware of that?

3 A. I am. I believe it
4 should be Part B is the form that we complete,
5 though, and fill out.

6 22 Q. Right, okay. So let me
7 take you --

8 A. So I am not 100 per cent
9 what Part A sort of form is in the provincial
10 process.

11 23 Q. Let me take you to what I
12 think is the form, it's in Tab R of that same
13 volume. And it's at the end so -- I know you
14 don't have numbers, so it's at the end of this
15 tab. I am going to make sure you turn it up.
16 Just go right to the end there.

17 Can we go off the record for a
18 moment?

19 --- Off-the-record discussion.

20 BY MR. FAITH:

21 24 Q. It looks like we have
22 turned up what is, in our affidavit at page 592,
23 Volume 2. And you can see here this is Part A,
24 which is to be completed by the applicant before
25 submitting to the municipality, so that is WPD's

1 part; correct?

2 A. Yes, this is a provincial
3 form that WPD fills out for the province.

4 25 Q. Okay. And that's, we can
5 see that it's a consultation form that is pursuant
6 to Ontario Regulation 359/09. It says it in the
7 top right-hand corner?

8 A. Correct. Yes.

9 26 Q. And then if you flip over
10 three pages, you see Part B; right?

11 A. I do, yes.

12 27 Q. So let me take you back
13 to Tab M of the same brief. And I am going to
14 take you to the last -- sorry, the first page of
15 that e-mail chain, which is the second to last
16 e-mail, Thursday, March 24th, 2011, at 12:40 p.m.,
17 from Richard Holy to a number of people, including
18 Khlaire Parré who is at WPD?

19 A. Um-hmm, I see that.

20 28 Q. And you can see that
21 there was a meeting that was set up to discuss
22 these issues on, it was set up initially for
23 May 5th; do you see that?

24 A. I do.

25 29 Q. And, in fact, the meeting

1 was held on June the 2nd, 2011; do you remember
2 that meeting?

3 A. I don't believe I
4 attended the meeting. These are pre-scheduled
5 monthly meetings, so all development applications
6 are just scheduled accordingly, and they are meant
7 to be, again, preconsultation for any development
8 proposals or concepts. And the idea is we bring
9 together other interests, if you will, so other
10 departments, external agencies where possible.

11 30 Q. All right.

12 A. So I don't typically
13 attend the monthly meetings personally, but they
14 are coordinated through our planning department
15 for the purpose of sort of preconsultation.

16 31 Q. So there is no dispute
17 that WPD did attend a meeting on June 2nd, 2011,
18 with the city?

19 A. I am assuming that's the
20 case. I mean, I don't have it in my affidavit,
21 but I am assuming they did attend the June 2nd,
22 preconsultation meeting.

23 32 Q. Okay, I don't need to
24 take you to evidence of that.

25 Now, I take it that this

1 meeting, you would agree, was struck in order to
2 deal with the issues that had been addressed by
3 Mr. Surrett on March 8th, 2011; is that fair to
4 say?

5 A. I just want to
6 double-check... Yeah, the intent of it is to be a
7 preconsultation sort of at the front end of any
8 development concept; so the idea is to have
9 departments, agencies available for proponents to
10 sort of screen, answer preliminary questions. And
11 then typically, that is where a proponent would
12 then proceed with any detailed work, submissions,
13 and so on. So it is really sort of a sorting
14 front-end requirement.

15 33 Q. Okay. But was the city's
16 response to Mr. Surrett's request that there be a
17 meeting to begin the work to obtain the required
18 municipal approvals?

19 MR. COLE: I think he just
20 answered your question.

21 BY MR. FAITH:

22 34 Q. Is that fair?

23 MR. COLE: Do you vary from
24 the last answer you gave as to the intent of the
25 meeting?

1 THE WITNESS: Again, I would
2 say it's fair that the intent of the
3 preconsultation meetings are to go through the
4 issues on a preliminary basis with any proponents.
5 It's a prescribed step in the Planning Act. So
6 for Planning Act-related applications, that's the
7 reason that this venue was structured originally
8 for renewable energy projects. It's not a
9 prescribed step in the process per se, but it's a
10 venue that's already established at the city, so
11 we utilize that same venue to screen development
12 applications.

13 BY MR. FAITH:

14 35 Q. Okay, thank you.

15 A. Okay.

16 36 Q. Tab L of the same
17 Volume 2 of our record, this is Tab L of
18 Mr. MacRae's affidavit.

19 There is an e-mail on
20 March 24th, 2011, if you go just to the second
21 page there.

22 And you can see that
23 Mr. Surrett writes to Ric McGee --

24 A. Sorry, you said
25 March 14th?

1 37 Q. I'm sorry, it's March --
2 what did I say?

3 MR. COLE: You said 24.

4 MR. FAITH: Oh, I am sorry,
5 hang on, let me just make sure I have the right
6 one.

7 BY MR. FAITH:

8 38 Q. Yes, it's March 14th,
9 2011, at 3:41 p.m. You have that same e-mail.

10 So I am not going to read this
11 entire e-mail out to you, but you can see that
12 Mr. Surrett reaches out by e-mail to Mayor McGee
13 about this project; correct?

14 A. Yup.

15 39 Q. And you can see that the
16 purpose of that in the second paragraph is, in the
17 second line:

18 "This consultation seeks
19 the municipality's input
20 on project activities
21 which would affect
22 municipal services and
23 require municipal
24 approval."[as read]

25 You can see him saying that to

1 the mayor; right?

2 A. Yes, I see that.

3 40 Q. And then I am going to

4 take you to Tab K of Mr. MacRae's affidavit.

5 And, again, here you see on
6 March 14th, 2011, 3:43 p.m., Mr. Surrett reaches
7 out to Heather Stauble, who's the councillor for
8 the area in which the project was proposed;
9 correct?

10 A. Correct.

11 41 Q. And in the second
12 paragraph, Mr. Surrett says to Councillor Stauble:

13 "Consultation with the
14 municipality is also part
15 of the REA process, and we
16 look forward to engaging
17 with the municipality.
18 This consultation seeks
19 the municipality's input
20 on project activities
21 which would affect
22 municipal services and
23 would require municipal
24 approval."[as read]

25 You can see that?

1 A. Yes, I see that.

2 42 Q. So you agree that WPD
3 reached out to Councillor Stauble on March 14th,
4 2011?

5 A. I agree, they outreach,
6 yes, for consultation.

7 43 Q. In respect, in
8 particular, for activities that would require
9 municipal approval?

10 A. Yup, I would agree,
11 that's what it says.

12 44 Q. I am going to take you to
13 Tab O of Ian MacRae's affidavit. And before I get
14 into this, is it fairly clear that early in this
15 process, the city was aware of the access routes
16 that would be required to service this proposed
17 project?

18 A. At the time of the 2011
19 consultation e-mails? Like, I am not sure we
20 would have reviewed the package in detail at that
21 point. Again, the preconsultation is meant to be
22 sort of a preliminary screening, walk them through
23 what are potentially the processes, approvals and
24 so on.

25 45 Q. Okay, but you did take a

1 look at the notice of draft site plan; did you
2 not? Do you remember there was a notice of draft
3 site plan that was issued?

4 A. Yes, our planning
5 staff would have -- the package would have come
6 in, I am assuming, at that June meeting, very
7 generally. So that would have triggered the
8 process to start to look at that package.

9 46 Q. Okay, and the plan as of
10 that date was that Wild Turkey Road would be part
11 of the access route to service some of the
12 turbines in the project? Was that clear in June
13 of 2011?

14 A. I am sure it is in there.
15 I am not confirming that it jumped out in 2011 to
16 me, but certainly I am sure it was part of the
17 scope of the submission from WPD.

18 47 Q. I just want to give you a
19 copy of the notice of draft site plan because I am
20 not sure it is in the materials. It may be,
21 but... And you can see that there is a map that
22 is provided as part of the draft site plan, and
23 there are -- you see that there?

24 A. I do.

25 48 Q. And do you remember

1 looking at this document?

2 A. I have seen this
3 document, yes.

4 49 Q. And is it fair to say
5 that this document was available to the city at
6 least as of June 21st, 2011?

7 A. That's fair, yes, that is
8 when the notice came out.

9 50 Q. And that if you look in
10 the map, I mean, it's not a complicated project,
11 there are five turbines?

12 A. Um-hmm.

13 51 Q. And four -- Turbines 4
14 and 5, it would be fair to say, would rely on some
15 kind of access to Wild Turkey Road based on this
16 map?

17 A. Well, again, I want to go
18 back to sort of we got the general submissions
19 that came in. I am not sure it was explicitly
20 said that access would be gained over any of the
21 roads, quite frankly. I mean, this is a map that
22 shows, in their mind, the public road network or
23 the road network --

24 52 Q. Yes.

25 A. -- it doesn't indicate

1 Wild Turkey as having a different status.

2 53 Q. I am just saying that,
3 for example, looking at this map, to get to
4 Turbine 5, you'd need to use Wild Turkey Road; is
5 that fair to say?

6 A. Again, I don't know if I
7 would make that assumption because they could
8 access -- again, it's on that private property on
9 the east side.

10 54 Q. I am saying if you were
11 driving.

12 A. But that property already
13 gets access from Ballyduff Road.

14 55 Q. Right.

15 A. No different than if you
16 look at Turbine 1 and 3, I wouldn't suggest they
17 were proposing driving down Gray Road. But, I
18 mean, again, this is a key map just showing the
19 location of five turbine, so I wouldn't rely on it
20 to suggest that it is indicating where the access
21 is to any of the facilities.

22 56 Q. Okay, you wouldn't look
23 at the line that runs from Wild Turkey Road to
24 Turbine 4 and make an assumption at that time that
25 Wild Turkey Road would be part of the access plan

1 for Turbine 4?

2 A. I am just trying to match
3 what the key map sort of shows those lines as
4 indicating. I guess there is sort of two --
5 again, because you have a key map here, the other
6 problem is there is a section of Wild Turkey Road
7 that's open to the north of these turbines.
8 Again, I just don't think there is accuracy in
9 this map to definitively suggest that we would say
10 that is the unopened portion of Wild Turkey Road
11 and they are proposing access to it just based on
12 this key map.

13 MR. FAITH: Okay. I am going
14 to just mark that as Exhibit 1, if I could.

15 MR. COLE: Sure.

16 EXHIBIT NO. 1: Notice of
17 draft site plan.

18 BY MR. FAITH:

19 57 Q. So you should still have
20 that e-mail open, I hope, and just to make sure
21 you are on the same page, the last page in Tab O
22 of the MacRae affidavit -- second last page, there
23 is an e-mail from Khlaire Parré to Richard Holy
24 dated January 17, 2012, at 6:50 p.m.

25 MR. COLE: I am sorry, say

1 that again, please. We are at Tab M?

2 MR. FAITH: Tab O.

3 MR. COLE: Right, we are at
4 Tab O, the second to last page -- we only have two
5 pages. What is the date of the e-mail?

6 MR. FAITH: The date of the
7 e-mail is January 17, 2012.

8 MR. COLE: Let's go off the
9 record.

10 --- Off-the-record discussion.

11 BY MR. FAITH:

12 58 Q. So take a look at the
13 e-mail from Khlaire Parré. You can actually just
14 look at that highlighted part, but feel free to
15 read the whole e-mail.

16 MR. COLE: Okay, do you want
17 your material back?

18 MR. FAITH: Yes, thank you.

19 BY MR. FAITH:

20 59 Q. Okay. So you can see
21 here that it's clear that what Ms. Parré is doing
22 is following up on a meeting that had been held
23 back in May 11th and then was attempting to meet
24 again with the city; correct?

25 A. I would agree. That's

1 what it appears, that is what she is requesting.

2 60 Q. And just look at the
3 e-mail dated January 23rd, 2012, at 11:07 a.m.
4 Again, that's in Tab O of the MacRae affidavit.
5 Do you have that one?

6 A. I think so, yes, I was
7 just looking at it here.

8 61 Q. So I just want to point
9 out in particular that in that e-mail, Ms. Russell
10 says:

11 "Staff is in the process
12 of reviewing the reports
13 that were received on
14 October 26th, 2011."[as
15 read]

16 And then she says:

17 "Staff requests additional
18 hard copies of each report
19 which were received on
20 November 25th, 2011."[as
21 read]

22 And you can see that there was
23 some preliminary reports that were given. Do you
24 remember what those reports were?

25 A. I don't, I am just

1 looking at the completion of the e-mail, because I
2 am assuming those bullet points sort of summarize
3 what were the outstanding studies that the city
4 was asking for?

5 62 Q. That's right.

6 A. I just don't have the
7 next page to that e-mail.

8 MR. COLE: Here is the next
9 page.

10 Just as an aide-memoire to me,
11 this is all contained at Tab M of Mr. Taylor's
12 affidavit.

13 THE WITNESS: So, sorry, can
14 you just repeat the question?

15 BY MR. FAITH:

16 63 Q. I was asking whether you
17 knew which reports -- do you remember the reports
18 that were received October 26th, 2011, and
19 November 25th, 2011?

20 A. I wouldn't be able to
21 tell you the exact reports that came in. I mean,
22 the typical would be the package that is required
23 by the province, and I would suggest that beyond
24 that list of requisite reports, these would be the
25 other ones that we have flagged up front as sort

1 of wanting further review or study on, the bullet
2 points.

3 64 Q. Okay. Is it fair to say
4 that at least by this time, there was some clarity
5 on what the access routes were proposed to be for
6 the turbines?

7 A. I am not -- I don't know
8 if I would jump to that conclusion. I mean,
9 again, following the preconsultation process, we
10 package up and circulate to interested parties,
11 agencies, internal and external, all of that
12 information with the goal of soliciting comments
13 that would then form part of staff recommendations
14 that would go forward to council as part of that
15 Part B consultation form completion.

16 So at that time, again, the
17 studies that they would have submitted, we would
18 have circulated. And, then, I know we were
19 specifically sort of interested beyond that,
20 issues related to noise and noise studies,
21 archeological as well as a hydrogeological study,
22 to assess as part of the city's review and
23 comments.

24 65 Q. It would have been clear,
25 though, to the city at that time that municipal

1 roads would be involved in the construction and
2 operation of these turbines to some extent; is
3 that fair?

4 A. I'd have to see the
5 package of the materials that were circulated to
6 see what was suggested in there in terms of access
7 requests.

8 66 Q. I don't want to be --

9 A. I don't think there was
10 explicit access or entrance requests that came in
11 as part of any of the studies or package to start.

12 67 Q. I was speaking more
13 generally, though.

14 The access to the turbines
15 would have to involve municipal roads to some
16 extent; that was known to the city at the time?

17 A. Definitely, you are
18 required to have access from a public road, yes.

19 68 Q. I want to take you to Tab
20 Q, and specifically to the second to last -- the
21 third to last page first.

22 It's an e-mail from Ron Taylor
23 to Jonathan Clifford, so it's you to Jonathan
24 Clifford, who is at WPD, dated February 27th,
25 2012; do you see that?

1 A. Yes, I do.

2 69 Q. I am showing you this
3 because there is some attachments that are
4 referenced in this e-mail, and then I want to take
5 you to the attachments; okay.

6 So you can see here that there
7 was -- in the first line, it says:

8 "In response to your
9 request to meet with city
10 staff, request copied
11 below, I can confirm that
12 city has received two of
13 the three studies you have
14 committed to sharing with
15 us."[as read]

16 So there was clearly a request
17 for a meeting, and this is your response to that
18 request?

19 A. I am assuming that the
20 attachment below is there; is that part of it?

21 70 Q. I am just going to take
22 you backwards to those attachments now. I just
23 want to show you that this e-mail contains
24 attachments before I take you to the attachments.
25 Okay?

1 A. Sure.

2 71 Q. Okay, so let's go back to
3 the attachments. So this is the last page in that
4 tab. And there is this e-mail, it's not dated.
5 Have you seen this e-mail before?

6 A. I have not. Just, not in
7 the materials, so that is why I am surprised it
8 doesn't have any dates or anything on it.

9 72 Q. My assumption is that
10 this is one of the attached e-mails, or at least
11 it's an e-mail that precedes the e-mail I just
12 read to you.

13 But if you can verify the date
14 of this e-mail, Counsel, I would appreciate it. I
15 think this is the only copy we have.

16 MR. COLE: Let's try to do
17 that now.

18 MR. FAITH: Sure.

19 MR. COLE: Do you remember the
20 e-mail?

21 THE WITNESS: I don't, but
22 again, I'm looking at the stuff that are on here.

23 MR. COLE: Let's do this, I am
24 not going to challenge counsel's integrity, your
25 client has the e-mail chain, and you are telling

1 me that this last page was attached to the e-mail
2 chain, so that if one were to look at the
3 electronic version of what is Exhibit Q, that we
4 would see the last page; that is what you are
5 saying?

6 MR. FAITH: I am going to
7 answer your question. Can we just go off the
8 record for a minute?

9 --- Off-the-record discussion.

10 MR. FAITH: We just had a
11 discussion about whether this e-mail from Linda
12 Russell to Ron Taylor, Christina Sisson,
13 S-i-s-s-o-n, and others was in fact an attachment
14 to the February 27th, 2012, 3:09 e-mail. We are
15 going to attempt to verify that, but we are going
16 to proceed on the basis that it is an attachment
17 to that e-mail until -- or unless and until we
18 have determined otherwise.

19 BY MR. FAITH:

20 73 Q. The content of the e-mail
21 is what I am concerned about.

22 So Linda Russell says to you
23 and others, including a member -- members of WPD,
24 that:

25 "The proponent would like

1 a meeting to discuss a
2 number of topics,
3 including entrance
4 permits, building permits,
5 road upgrades, location of
6 power lines within the
7 municipal road allowance
8 and any concerns
9 identified from the review
10 of the draft REA
11 reports."[as read]

12 Do you see that e-mail?

13 A. I do.

14 74 Q. And I am going to suggest
15 to you that this is a response to, again, WPD's
16 request to talk to the city about permits and
17 approvals; is that fair?

18 A. Yeah, I would agree.

19 75 Q. We sought a meeting to
20 talk about issues, including road upgrades; right?

21 A. Yes, it's listed in the
22 e-mail, I agree.

23 76 Q. Now, I want to take you
24 back to the e-mail, February 27th, 2012, and you
25 can see that the e-mail refers to that request of

1 a meeting regarding road upgrades within the REA
2 process; this is a response to that request;
3 correct?

4 A. This is the e-mail you're
5 suggesting, to Jonathan Clifford from me?

6 77 Q. Yes.

7 A. So it's outlining...

8 78 Q. Do you want me to break
9 that down for you just so it's clear?

10 I am asking you, this e-mail is
11 clearly in response to the request for a meeting
12 with city staff; do you agree with that?

13 A. Yes, I agree.

14 79 Q. And the request for a
15 meeting with city staff included a request to meet
16 about road upgrades; is that fair?

17 A. That's fair, based on the
18 attachment, yup.

19 80 Q. Okay, and that was
20 February 27th, 2012?

21 A. Correct.

22 81 Q. And you advise in the
23 e-mail that you are not clear on the purpose of
24 the requested meeting given it is not prescribed
25 in the REA process and not required prior to you

1 scheduling your public open house; do you see that
2 in the second paragraph?

3 A. I see the passage, yes,
4 so...

5 82 Q. I just want you to look
6 at it so I can ask you questions about it.

7 A. Okay, sure.

8 83 Q. And then the second
9 paragraph says:

10 "It's our understanding
11 through discussions with
12 the province that
13 municipalities are
14 encouraged to provide
15 additional comments that
16 are not prescribed in the
17 Part B form if there are
18 any additional concerns or
19 questions. Therefore, our
20 preference is to review
21 all of the submitted
22 committed reports
23 concurrently and then
24 finalize our comments."[as
25 read]

1 Correct; do you see that
2 there?

3 A. I do, I see that.

4 84 Q. So is it fair to say that
5 the city's position was that requests for things
6 like road upgrades would be considered as part of
7 the REA consultation process; is that what you
8 were saying there?

9 A. This -- what I am saying
10 here is that there is prescribed reports for the
11 REA process in consultation with the province.
12 They directed us or advised that we could review
13 beyond the scope of our local interests or, again
14 the reason for the requests for other studies like
15 the hydrogeological report, for example.

16 So that was the context sort of
17 of this particular paragraph, was to say we wanted
18 to get, I think the line above suggests we were
19 still missing one of the studies. So basically,
20 we were saying we want a complete package of
21 submission so that all of the various agencies,
22 departments in the city can review them together
23 and comment on them.

24 85 Q. But were you not saying
25 that things like building permits and road

1 upgrades requests would be considered as part of
2 the consultation process?

3 A. If the proponent is
4 asking for input respecting sort of what are the
5 required approvals, it would form part of that
6 process.

7 So I guess I will take one step
8 back. So what we don't do in these
9 preconsultations for any development is prescribe
10 at the -- in the level of detail what their, for
11 example, all of their building permit requirements
12 are going to be.

13 I think it's important that --
14 you have to look at the preconsultation in the
15 context. We can only comment and review what's in
16 front of us, and then we respond accordingly and
17 provide advice or guidance to proponents.

18 86 Q. But it wouldn't have
19 been -- it would have been known to the city at
20 this time, at least, that at least access permits
21 would be required of some kind?

22 A. Absolutely.

23 87 Q. To get to the project;
24 right?

25 A. Yes. So we would have

1 commented to the proponent to say that, you will
2 need access permits.

3 88 Q. Okay, and the proponent
4 would say --

5 A. Entrance permits are
6 required and so on.

7 89 Q. And the proponent was
8 saying, at least in February of 2012, we would
9 like to come and talk to you about building
10 permits and road upgrades?

11 A. Um-hmm.

12 90 Q. And you didn't, you
13 didn't say, well, sure, why don't you put in an
14 application; you said, let's deal with it in the
15 consultation process; didn't you?

16 A. No, I don't agree that we
17 would have explicitly said that. This is the
18 stage of review where we are reviewing the
19 submissions that the proponent provides.

20 91 Q. Well, let me put it this
21 way: Did you ever say to WPD in response to the
22 request for a meeting about building permits and
23 road upgrades, you need to put in a formal request
24 for those at this stage? Did you ever say that?

25 A. I would not have said

1 that, no.

2 92 Q. Because --

3 A. We would have said, there
4 are permits that are required, and we are happy to
5 talk to you about those permits specifically.

6 93 Q. Did you say that?

7 A. Not in this e-mail.

8 94 Q. Did you say that at some
9 other time in February of 2012?

10 A. I didn't on
11 February 2012. But we worked with the proponent
12 on these issues independently sort of throughout
13 the process.

14 So, for example, they did ask
15 our chief building official about building permits
16 and what's required, and we responded accordingly.

17 95 Q. What did you say --

18 A. Again, because these are
19 sort of now detailed implementation permits.

20 96 Q. But I just want to make
21 sure we are clear on this point because I think
22 it's important.

23 You can see here now at least
24 that WPD had asked you in 2011 for a meeting to
25 sit down and talk about municipal approvals. And

1 then they ask in February of 2012 that they would
2 like to have a meeting, and they specify about
3 road upgrades and building permits. And up until
4 that point, had you ever said to WPD, 'Actually
5 you need to submit a formal application if you
6 want us to consider your request at this time'?

7 A. I don't see that
8 explicitly said in the e-mail.

9 97 Q. Had you ever said it
10 prior to the e-mail?

11 A. I couldn't confirm that.
12 But our normal practice would be, if we were asked
13 the question, for example, do we need a building
14 permit? we would say, yes or no, and here is
15 generally the requirements for a building permit.

16 If they were asking for -- like
17 in the e-mail, do we need access or entrance
18 permits? then we would say, yes, and there is a
19 prescribed process to get those permits. But we
20 wouldn't review in detail at that point the
21 specifics related or link it to their general
22 submissions under the REA approval.

23 98 Q. Is that because it would
24 be premature at that stage?

25 A. Honestly, I think it

1 would be because we would be answering the
2 question at the time, like we do for all
3 proponents.

4 So unless WPD asked us
5 specifically, what do we need to do to upgrade
6 Wild Turkey Road, for example, we would say, here
7 is the prescribed process to apply for that and
8 get the necessary approvals.

9 99 Q. And in February 2012, at
10 least prior to WPD's REA application being
11 submitted to the Ministry of the Environment,
12 would the city have accepted WPD's application to
13 upgrade Wild Turkey Road and process it?

14 MR. COLE: Do you understand
15 the question?

16 THE WITNESS: I do.

17 I would suggest that we would
18 not have approved that or, for example, a building
19 permit or an entrance permit because WPD at the
20 time didn't have general approval for the project
21 in the first place. So we wouldn't issue -- we
22 wouldn't issue upgrades to a road without sort of
23 any context whatsoever or, again, the process
24 needed to rationalize that upgrade.

25 BY MR. FAITH:

1 100 Q. You'd agree that what the
2 city's position was, was that until approval was
3 granted, you are not going to engage in a process
4 which would expend municipal resources to
5 determine whether or not an upgrade would be
6 approved; is that fair?

7 A. I think we made that
8 statement generally. We said, until the project
9 gets approval from the province, again, all we
10 would do is review it based on the context of the
11 prescribed process. So the province asks
12 municipalities to consult, we set up a process to
13 complete the consultation phase of that program.

14 101 Q. And then, in fact, after
15 the approval, there was an appeal, and so it was
16 the city's position, you know what, until the
17 appeal is complete and there is a determination on
18 the appeal, we still won't process any
19 applications to upgrade roads; is that fair?

20 A. But when the REA was
21 approved, the city's position had already been
22 established that we didn't want to open up that
23 particular road. So our response would have been,
24 you can't get an entrance permit on a road that's
25 not open.

1 102 Q. I want to take you to
2 Jonathan Clifford's e-mail to you of March 14,
3 2012.

4 A. Same tab, I am assuming?

5 103 Q. Same tab, sorry, yes,
6 that's Tab Q of our application records, Ian
7 MacRae's affidavit.

8 A. Sorry, March 14th e-mail,
9 you said?

10 104 Q. Yes, 10:31 a.m.

11 A. Yes.

12 105 Q. And Mr. Clifford says to
13 you in the second paragraph, second sentence:

14 "I have confirmed with our
15 staff that there are some
16 project design questions
17 that might require the
18 city's input in order to
19 facilitate the design
20 process. These include
21 questions concerning the
22 power lines and the
23 general permitting
24 questions."[as read]

25 Do you see that?

1 A. I see that, yes.

2 106 Q. Is it fair to say that
3 that e-mail was known to the city to be an attempt
4 to engage in the general permitting process
5 required for this project to go ahead?

6 A. I would agree that this
7 is focusing on the transmission infrastructure and
8 asking for any sort of city interests or
9 permitting sort of related to that.

10 107 Q. Well, it goes beyond
11 that; doesn't it? These include questions
12 concerning the power lines and the general
13 permitting process; isn't that fair to say?

14 A. Well, again, my
15 recollection of this sort of context of e-mails
16 was related to the transmission line installation,
17 particularly on Gray Road, and I think that's why
18 they were asking questions concerning our
19 interests related to that transmission line or
20 power line installation and the permitting for
21 that, if there is a process related to it. I
22 don't think it goes beyond, like, for other
23 permits associated with the project.

24 108 Q. I think we can resolve
25 this by just going to the next e-mail, which is

1 just, again, back a page, it is April 9th, 2012,
2 9:02 a.m.

3 A. Um-hmm.

4 109 Q. And, in fact, this
5 probably explains, you know, there was a bit of
6 confusion about that other e-mail, that's fair
7 enough.

8 A. Um-hmm.

9 110 Q. And you say to
10 Mr. Clifford, in the first sentence:

11 "Please forward to me a
12 listing of those
13 issues/matters you wish to
14 discuss and/or have
15 questions."[as read]

16 A. Right.

17 111 Q. Because you are saying, I
18 want to actually know what these issues are;
19 that's fair?

20 A. I would agree.

21 112 Q. So, then, let's go to the
22 response, and that, for that, you are going to
23 have to look at the first e-mail after the cover
24 page to the exhibit, Exhibit Q, and -- yes, and to
25 see the date of that, you have to go back one

1 page.

2 A. Okay.

3 113 Q. Because it's on a

4 different page. Yes.

5 So you see from Jonathan
6 Clifford, April 16, 2012, 4:33 p.m., to you, and
7 this is where Mr. Clifford sets out the list of
8 topics that WPD would like to discuss with the
9 municipality, and he says:

10 "Most are related to
11 permitting and
12 planning."[as read]

13 And now it becomes clear it is
14 about partly civil engineering and partly
15 electrical engineering; is that fair to say
16 looking at those lists?

17 A. Yeah, I would agree.

18 114 Q. So really it wasn't just
19 about the transmission lines that he was talking
20 about, he also wanted to talk about the civil
21 engineering issues with the city?

22 A. Yes, the entrance,
23 building permits and road upgrades, yes.

24 115 Q. And so you can see there
25 that he is specifically referring to road upgrades

1 and he wants -- and, particularly, he wants a
2 meeting regarding roads that would need to be
3 upgraded based on our project layout; is that
4 correct?

5 A. Yes, I agree it says
6 that.

7 116 Q. And you read this e-mail,
8 I take it?

9 A. I did.

10 117 Q. And I take it at the
11 time, you took this to mean that what Mr. Clifford
12 wanted to discuss in a meeting with you on
13 April 16, 2012, was what was required to upgrade
14 the roads as part of this project. Is that fair?

15 A. Agree, he is asking that.

16 118 Q. And the response that --
17 actually, the next e-mail in this chain, and you
18 can tell me if there was a response, this was an
19 April 16th e-mail. And then there is no response,
20 as far as we know, and then Mr. Clifford follows
21 up with you on May 23rd, 2012, 4:22 p.m.

22 He says:

23 "I want to follow up on my
24 e-mail below and inquire
25 whether the city planning

1 staff have had a chance to
2 review our discussion list
3 and whether they have the
4 time to meet with us or
5 participate in a
6 conference call."[as read]

7 Do you see that?

8 A. I see it.

9 119 Q. And, also, in the second
10 paragraph, he says:

11 "We would also like to
12 inquire as to the status
13 of the municipal
14 consultation form and
15 whether council has
16 reviewed it. We plan on
17 submitting our REA
18 application soon after the
19 final open house and would
20 like to ensure this is
21 included in our
22 submission."[as read]

23 Do you see that?

24 A. I do.

25 120 Q. And was it fair that you

1 took from this that the issues in part relating to
2 road upgrades were on WPD's mind in early 2012?

3 A. Yeah, I would agree they
4 are asking us that.

5 121 Q. And that they wanted to
6 reach out to the city and have a meeting so that
7 the issues could be addressed before the final
8 public meeting; is that true?

9 A. Correct, yes, that is
10 what it says.

11 122 Q. And it's fair that in
12 this process, the REA process, that the final
13 public meeting is final because it's the last
14 meeting before the application is actually
15 submitted to the Ministry of the Environment?

16 A. That's my understanding,
17 yes.

18 123 Q. So this is kind of the
19 final opportunity to deal with issues that might
20 arise from various stakeholders before a final
21 application is submitted?

22 A. Yeah, I would agree, they
23 are intending to wrap things up sort of on a
24 preliminary basis with the municipality.

25 124 Q. And that it's possible

1 that prior to submitting the final application,
2 that that's an opportunity to make whatever
3 amendments might be necessary in order to
4 accommodate issues that arise through the public
5 consultation process; is that fair?

6 A. That would be one step in
7 the process, yes, to make amendments.

8 125 Q. And I just want to take
9 you to -- I think I missed it.

10 So if you can go back to the
11 April 16, 2012, 4:33 e-mail. And you look at --
12 so go over a page, so it's the last page in that
13 e-mail, just above Mr. Clifford's signature line.

14 And you can see there is a
15 paragraph that says:

16 "We plan on submitting our
17 reports for REA approval
18 soon after the final
19 public meeting and, as
20 such, meeting before the
21 June 19th is important.
22 It will also assist us in
23 making any necessary
24 changes and amendment to
25 the reports before we meet

1 with the public to ensure
2 accuracy."[as read]

3 Do you remember seeing that
4 paragraph when this e-mail was sent to you?

5 A. Yes, I see it.

6 126 Q. I mean, I take it you
7 read this then as well?

8 A. I would presume so, yeah.

9 127 Q. And so is it not clear
10 from this e-mail that what WPD is saying is that
11 prior to the final meeting where we have to submit
12 our application, we want to get your input in case
13 any amendments are required to reports that we
14 submit?

15 A. Yeah, I would agree that
16 that is what they are asking.

17 128 Q. Okay.

18 A. Again, I would just go
19 back and say, from a practical standpoint, I think
20 if WPD didn't explicitly ask for a city position,
21 let's say, with respect to the road and upgrading
22 it specifically, that level of detail would never
23 be in this stage of the process. I mean, other
24 than they are asking; and I believe up to this
25 point, and rightfully so, they are asking if there

1 is any municipal approvals that are required, be
2 it building permits, entrance permits, access and
3 so on.

4 129 Q. Is that what you took
5 from all of these attempts, all of these attempts
6 to reach out to the city were about just figuring
7 out what permits were required rather than to
8 discuss those permits?

9 A. No. In fact, I would say
10 this sort of exchange is really based on the
11 broader project application itself with about a
12 dozen studies that are related to it, the site
13 plan, the implementation generally of the project.

14 So it -- I am not aware -- it's
15 actually quite uncommon at this stage, and I am
16 sort of speaking just from general REA approvals,
17 that we would be getting into fine detail,
18 engineering design, that type of thing, or details
19 in implementation permits.

20 130 Q. You wait until after the
21 approval to do all that?

22 A. Correct. So this context
23 is to get a municipal position generally as part
24 of the consultation that's prescribed by the
25 province.

1 131 Q. I take it you now agree
2 that before WPD submitted its REA application,
3 that it did consult with the city regarding its
4 plan for upgrading roads, or at least it attempted
5 to consult with the city regarding its plan for
6 upgrading roads?

7 A. I would say they
8 consulted with the city, and part of it was
9 questions related to what they would need to do to
10 upgrade roads. Again, without explicitly saying
11 they want to upgrade unopen roads, I mean, we have
12 got to look at it in that context because we were
13 dealing with two roads in particular that they are
14 utilizing that don't have -- they are not publicly
15 travelled, they are not open roads.

16 So, again, I just want to be
17 clear that at this stage, typically our response
18 is here is the process to implement, not the
19 detail.

20 132 Q. Yes, but, okay, I just
21 want to -- is it fair, though, to say that at
22 least WPD tried to consult with the city about its
23 plan to upgrade roads? Is that fair to say?

24 A. Well, I don't want to
25 be -- I just want to be clear, I don't think it

1 was clear that they were proposing to open and
2 upgrade Wild Turkey Road, for example.

3 133 Q. Do you think they tried
4 to discuss that with you?

5 A. I think, again, in the
6 terms of this discussion, it's what are the
7 necessary approvals from the city to upgrade
8 roads, and when I say that, even our open roads.
9 I mean, you are dealing with construction traffic
10 that -- and turbine blades, for example, that have
11 very unique impacts on the road. That is really,
12 quite frankly, the context that this would have
13 been received by the city at that point.

14 134 Q. Yeah, that's from your
15 point of view, and I understand that, and you have
16 given us your point of view, what you thought of
17 these requests.

18 But isn't it fair to say that,
19 at least from WPD's point of view, that you would
20 have assumed WPD was at least trying to reach out
21 to you to --

22 REF MR. COLE: How is he supposed
23 to say what WPD was thinking?

24 MR. FAITH: I am asking what
25 he perceived. Did the city --

1 MR. COLE: No, I think what he
2 has told you, two things, not just what he
3 perceived but what actually happened as far as he
4 understands it. He is not going to speculate as
5 to what WPD thought it was doing. He has been
6 very candid and clear as to his understanding of
7 both what he knew and his understanding and
8 recollection today as to what actually happened.
9 So I think that asking him to speculate about WPD
10 is inappropriate.

11 MR. FAITH: Let me rephrase
12 it, because I hear you on that.

13 MR. COLE: Sure.

14 BY MR. FAITH:

15 135 Q. Is it fair to say that
16 WPD at least attempted to reach out and have a
17 discussion with the city about the municipal
18 approvals that would be required in respect of
19 upgrading roads as part of this project?

20 A. I'd say, generally, in
21 terms of the request, yes, that they were asking
22 that in that one e-mail.

23 136 Q. Well, and --

24 A. I just don't know the
25 context of what they mean by upgrading a road. I

1 mean, other than I can only put it in the context
2 at that time and at that stage of the program.
3 There was never any indication that certain roads
4 were going to be requested to be opened and
5 upgraded.

6 137 Q. Right, did the city ever
7 ask for particularization as to which roads would
8 be upgraded as part of this project?

9 A. No, no.

10 138 Q. Why not?

11 A. Because, again, at this
12 stage, in this context, they are getting
13 consultation from the city on the broad program,
14 or the project, sorry, and as I mentioned before,
15 what we would be responding to are what would be
16 typical municipal processes or approvals that they
17 would require generically.

18 I don't know the exact timing,
19 but I know that there has been discussions with
20 WPD on either elements of, again, building
21 permits, on entrance permits, and so on.

22 So they are not explicitly
23 asking for approval to open up a road or to
24 redesign a road through this. But I would agree
25 that they are generally asking what is the

1 permitting and approval context at the city.

2 139 Q. It's fair to say that
3 even if they had specifically asked about Wild
4 Turkey Road prior to their approval, you would
5 have said this is not the time to do that, as part
6 of the city?

7 A. Well, we responded, we
8 responded to questions ongoing from the proponent
9 and others. If they posed the question to say,
10 will the municipality open up the road, I suspect
11 we would have provided them an answer.

12 140 Q. All right. So --

13 A. Again, it's not explicit
14 in any of these exchanges to be able to sort of
15 backdate and suggest that they are applying
16 specifically for a particular road to be upgraded,
17 based on my opinion.

18 141 Q. Do you fault WPD --

19 REF MR. COLE: Don't answer that
20 question. I don't know what the question is, but
21 we are not here to --

22 BY MR. FAITH:

23 142 Q. Let me take you to the
24 affidavit, so paragraph 64 of your affidavit. The
25 second sentence you say:

1 "As WPD had already
2 submitted an REA
3 application without
4 consulting the city
5 regarding its plan for
6 Wild Turkey Road, council
7 did not want staff to
8 expend resources until
9 such time it was clear the
10 project was
11 proceeding."[as read]

12 It's the first part of that
13 sentence that is important in terms of this next
14 question.

15 Isn't it fair that that
16 sentence is not entirely true, at least the first
17 part of that sentence? WPD did consult or at
18 least attempted to consult regarding its plan for
19 Wild Turkey Road; did it not?

20 A. Again, I think consistent
21 sort of with my last response, I wouldn't suggest
22 or imply that their e-mail in 2012 asking for,
23 generally, what are the city approvals and
24 applicable processes, that they explicitly
25 submitted anything that would suggest that they

1 are going to open up and utilize Wild Turkey Road.

2 I mean, I think that was my point before, is that

3 this really -- this whole process really starts

4 from a high level and sort of works its way

5 through. Again, we are a commenting agency, and

6 unless the proponent explicitly provides in their

7 submission that they are going to utilize that

8 road for that purpose, all we are going to be

9 commenting on at the time of the REA review is,

10 generally, here is what permits are required, here

11 is our typical road standards if you do apply to

12 upgrade any road, or even if it's open, and here

13 is our building permit requirements, for example.

14 143 Q. Can I take you to

15 paragraph 46 of your affidavit.

16 A. Sure.

17 144 Q. You say:

18 "As will be detailed in

19 the following section, WPD

20 submitted its application

21 for a REA permit after

22 these studies were

23 completed and made

24 public."[as read]

25 And you are referring to your

1 roads, transportation studies.

2 And you say:

3 "WPD ignored the city's
4 transportation network
5 planning decision as set
6 out in the transportation
7 master plan -- "[as read]

8 And it's this last part that I
9 am going to refer you to:

10 " -- and also ignored the
11 need for city approval to
12 locate its access road on
13 a municipal road allowance
14 as it was then believed to
15 be by both parties."[as
16 read]

17 Now, I take it from this
18 sentence, you are not suggesting that WPD ignored
19 the need for city approval prior to submitting its
20 application for a renewable energy approval; are
21 you?

22 A. No, we walked through, I
23 mean, obviously, they were asking generally what
24 are the approval processes or requirements of the
25 municipality.

1 145 Q. So WPD was aware of the
2 need for city approval to locate its access road
3 on a municipal road allowance; is that fair to
4 say?

5 A. Again, this is under
6 the -- this is in response to sort of the context
7 to open Wild Turkey Road or not, specifically.
8 Right. So the section -- so the statement that I
9 am making is in that context of a request to open
10 and utilize for access Wild Turkey Road.

11 146 Q. On what basis do you say
12 that WPD ignored the need for city approval to
13 locate its access road on a municipal road
14 allowance prior to submitting its application for
15 a renewable energy approval?

16 A. There is no document.
17 They never asked, up until it was sort of assumed,
18 they never asked for specific approval and access
19 to Wild Turkey Road to access those two turbines.

20 147 Q. That is your response --

21 A. Yes.

22 148 Q. -- is there anything
23 more? Okay.

24 Now, the city finally met with
25 WPD on June 7th, 2012; do you recall that meeting?

1 A. Yes. Yes. Sorry, I am
2 just -- are we working from a...

3 149 Q. Not yet.

4 You remember because of that
5 last e-mail chain, WPD had been asking to set up a
6 meeting from earlier in the year at least as early
7 as April of 2012?

8 A. Um-hmm.

9 150 Q. And then finally, the
10 city agreed to a meeting June 7th, 2012; is that
11 right?

12 A. Correct.

13 151 Q. And there was no meeting
14 that the city had with WPD prior to June 7, 2012,
15 and after the request?

16 A. Not that I am aware of,
17 no.

18 152 Q. And the meeting was
19 twelve days prior to WPD's final public meeting,
20 which was on June 19, 2012; is that right?

21 A. Correct.

22 153 Q. And at paragraph 50 of
23 your affidavit, it's clear at least in this
24 meeting that city staff advised WPD
25 representatives that any proposed alteration of

1 Wild Turkey Road would require city approval;
2 right?

3 A. That's stated, yes.

4 154 Q. So you are acknowledging
5 by that statement that WPD did bring the issue of
6 Wild Turkey Road to the city's attention on
7 June 7, 2012?

8 A. At that meeting, yes.

9 155 Q. At that meeting. That
10 meeting was prior to the submission of WPD's
11 application for a renewable energy approval;
12 correct?

13 A. Yes.

14 156 Q. So I ask you again, is it
15 still fair to say that WPD ignored the requirement
16 for approval for its access routes prior to the
17 submission of its application?

18 A. As of June, there was the
19 conversation that we had about that intent or that
20 request. I would agree.

21 157 Q. So it didn't ignore the
22 need for approval; is that fair, prior to the
23 submission of its application?

24 A. I would agree.

25 158 Q. All right. Now, your

1 affidavit doesn't suggest that there were any
2 other issues that were raised about Wild Turkey
3 Road at the meeting, so I take it that the main
4 response at the meeting from the city was 'you are
5 going to need approval if you want to alter Wild
6 Turkey Road'; is that fair?

7 A. Yeah, that would reflect
8 what I had stated in Section 51.

9 159 Q. All right.

10 A. Yes.

11 160 Q. And it's not, you know,
12 there is -- at this stage, the consideration of
13 whether to approve Wild Turkey Road would not have
14 obviously taken place, we have discussed that;
15 right?

16 A. Sorry, can you say that
17 again?

18 161 Q. Considering whether or
19 not the city would approve Wild Turkey Road was
20 not a live issue at this meeting because it was
21 before the approval was granted; right?

22 A. Yeah, there wouldn't have
23 been detailed discussion about how to get that
24 approval.

25 162 Q. Or whether the city would

1 approve?

2 A. Correct.

3 163 Q. Right --

4 A. There was no

5 determination.

6 164 Q. So the city didn't advise

7 WPD at that meeting that it would refuse to allow

8 access to or use of Wild Turkey Road?

9 A. I would agree there was

10 no discussion on the detail.

11 165 Q. And the city did not

12 advise WPD at the June 2012 meeting that it would

13 refuse to allow upgrades of Wild Turkey Road;

14 correct?

15 A. Not at that meeting, no.

16 166 Q. And the city did not

17 advise WPD at the June 2012 meeting that it would

18 refuse to allow -- that Wild Turkey Road was a

19 nature trail; right?

20 A. I am not sure if that

21 issue came up at that meeting, but...

22 167 Q. Right, nobody at that

23 meeting said, wait a minute, that portion of Wild

24 Turkey Road that you plan to modify and upgrade

25 runs along a trail that's used by our community as

1 a nature trail; correct?

2 A. Correct, because we were
3 never in that detailed discussion with the
4 proponent in the first place.

5 168 Q. Well --

6 A. I mean, they asked what
7 would be required to upgrade Wild Turkey to
8 utilize it at that time.

9 169 Q. Right, but I take it that
10 if they wanted to upgrade a city park and use that
11 as an access route to a turbine, you might at that
12 point say, whoa, wait a minute --

13 REF MR. COLE: If I may, just
14 stick with the facts of this case as opposing to
15 ask about city parks that may be subject to all
16 sorts of different criteria or concerns.

17 MR. FAITH: I will leave that
18 alone.

19 BY MR. FAITH:

20 170 Q. It's clear that at this
21 meeting on June 7th, 2012, the city did not
22 suggest that WPD should seek an alternative route
23 to Wild Turkey Road; is that fair?

24 A. We didn't discuss any
25 alternatives; correct.

1 171 Q. Now, WPD had told you, as
2 we have discussed earlier, that it would submit
3 its application to the Ministry of the Environment
4 after the final public meeting on June 19th, 2012?

5 A. Correct.

6 172 Q. And the city knew that
7 the application would be submitted as proposed in
8 the week or weeks following your June 7, 2012,
9 meeting?

10 A. That's my understanding,
11 yes.

12 173 Q. And is it fair to say
13 that the city knew that if WPD were to amend its
14 application as submitted to the Ministry of the
15 Environment, that any issues that would give rise
16 to an amendment would have to be raised prior to
17 that June 19, 2012, public meeting, or on that
18 meeting date?

19 A. No, I don't think that's
20 the case.

21 174 Q. Its application to the
22 Ministry of the Environment --

23 A. Understood.

24 175 Q. -- which was going to be
25 submitted just in the weeks after the public

1 meeting of June 19, 2012, I am referring to.

2 A. So the question you are
3 asking me is?

4 176 Q. The June 7 meeting, on
5 June 7, 2012, at that meeting --

6 A. Yes.

7 177 Q. -- that was, is it fair
8 to say, the city's last chance in a private
9 meeting with WPD to raise any issues that might
10 lead to WPD amending its application before
11 submission to the Ministry of the Environment?

12 A. That process is solely a
13 provincial process, so again, we are a commenting
14 agency sort of through it. The Part B form, quite
15 frankly, is very rudimentary. So, I mean, I think
16 you are trying to suggest that the city would
17 provide sort of a comprehensive all-detailed
18 response to these applications at this stage in
19 the program, and, quite frankly, that is just not
20 the case for this application or any others.

21 178 Q. Okay. Can I take you
22 to -- let me ask you this first: At any time
23 prior to your submissions to the MOE of March 11,
24 2013, did you advise WPD or anyone else that the
25 city would refuse to permit WPD to use Wild Turkey

1 Road?

2 A. I would suggest, no. It
3 never came up as an issue.

4 179 Q. So can I take you to
5 page 561 -- sorry, Volume 2, our record, Volume 2,
6 Ian MacRae's affidavit, Tab R.

7 So these, so that I understand
8 what this is, these are the submissions provided
9 by the city to the Minister of the Environment and
10 the director of the Ministry of the Environment?

11 A. Yes, I believe this would
12 be the cover letter that would include the Part B
13 municipal form that gets returned to the Ministry.

14 180 Q. And then also a report
15 that was submitted as part of the city's
16 submissions?

17 A. Correct.

18 181 Q. Okay. And by this time,
19 certainly, the city had all of the related and
20 supporting documents attached to the renewable
21 energy application and the application itself?

22 A. We would have had
23 whatever studies, yeah, were submitted at that
24 time.

25 182 Q. And it's fair to say that

1 the application set out WPD's proposal to upgrade
2 and use a portion of Wild Turkey Road to service
3 two of five turbines?

4 A. Sorry, say that --

5 183 Q. You knew that it was in
6 this application that you had a chance to look at
7 prior to this letter that it was WPD's proposal to
8 upgrade and use a portion of Wild Turkey Road to
9 service two of the five turbines in the project?

10 A. I am not sure that that
11 detail was in that package. Again, this would
12 have been the response to the REA approval.

13 I am not sure -- there was
14 never a request leading up to the REA explicitly
15 for permission to open that road and upgrade it.

16 184 Q. Okay, so you didn't
17 know -- your view is that when this application,
18 when these submissions were made, that, for
19 example, the widening of Wild Turkey Road wasn't
20 on the table, as known to the city?

21 MR. COLE: What does that
22 mean, "not on the table"?

23 BY MR. FAITH:

24 185 Q. That it wasn't proposed.

25 A. I am saying, in the

1 context of our response back on the Part B
2 consultation form, I am not aware of that
3 explicitly forming part of the study submissions
4 that we would have then submitted to the Minister.

5 186 Q. Okay, can I just take you
6 to the report, the council report, that is within
7 that tab.

8 A. Right.

9 187 Q. And under -- it's page 8
10 of that report.

11 A. Sorry, these are the
12 minutes first.

13 188 Q. Okay, you can see under
14 "engineering division", the heading "Engineering
15 Division":

16 "The city acknowledges in
17 its report that the
18 project requires upgrades
19 to municipal roads and
20 construction of private
21 access roads to the
22 turbine sites."[as read]

23 You see that?

24 A. I do.

25 189 Q. So is it fair to say that

1 the city was aware that as part of the project,
2 there were going to have to be upgrades to
3 municipal roads?

4 A. Yes, I would agree that
5 we flagged requirements for municipal road
6 upgrades, yes.

7 190 Q. I take it that the city
8 knew that, having looked at the plan, that the
9 upgrades that would have to be required included
10 Wild Turkey Road?

11 A. That they were proposing?

12 191 Q. Yes, that they were
13 proposing.

14 A. I would suggest yes,
15 because we highlighted in the same report the
16 status as we knew it at the time. And part of the
17 discussion at that time was generally the use of
18 Gray Road and Wild Turkey Road from an assumption
19 standpoint or opening it up to the public.

20 192 Q. I don't think we need to
21 go too far into this, but under "Land Management"
22 for example, on that same page, the report
23 specifically addresses Wild Turkey Road, which it
24 says is a public road allowance in the former
25 Township of Manvers. And singling out Wild Turkey

1 Road would make it clear that the city was fully
2 aware that Wild Turkey Road had been proposed to
3 be used as part of this project?

4 MR. COLE: Just so the record
5 is clear, the minutes that you are looking at in
6 the letter is March 13, 2013, so this is after the
7 REA application has been submitted?

8 MR. FAITH: Yes. Oh, yes.

9 MR. COLE: Okay. So I
10 interrupted you. What is your --

11 MR. FAITH: I agree with that.

12 THE WITNESS: And this report
13 is dated February 5th --

14 BY MR. FAITH:

15 193 Q. February 5th, 2013, yes.

16 So all I am saying is that it
17 is clear at least in the time that you are making
18 your submissions to the director that Wild Turkey
19 Road is proposed to be upgraded; is that fair?

20 A. Correct, it is included
21 in the --

22 194 Q. That was my initial
23 question, okay.

24 A. Yes, at this stage. I
25 mean, again, I am not in those discussions sort of

1 leading up to it sort of in that context of 2012,
2 I guess is what I was referring to.

3 195 Q. Right. But now you were
4 twigged to the issue?

5 A. So 2013, yes, when we
6 responded back.

7 196 Q. All right. And, now, I
8 want to take you to that municipal consultation
9 form which is attached to the March 11, 2013,
10 letter to the director. And just so that it's
11 clear as to how this process works -- I will let
12 you turn it up.

13 A. It was an attachment to
14 that report, I am assuming?

15 197 Q. Yes, it's at the back.

16 A. Part B form in particular
17 or A?

18 198 Q. Part B, yes, we can look
19 at Part B.

20 A. Okay.

21 199 Q. And just so that we are
22 clear about the process, the WPD provided a blank
23 Part B form for the municipality to fill out; is
24 that correct?

25 A. Yes.

1 200 Q. And this is Part B of the
2 form that Linda Russell told WPD to submit as part
3 of its application for road upgrade approvals in
4 her e-mail of March 16, 2011; do you remember
5 that?

6 A. That would have been Part
7 A, right, that is what we talked about, so we were
8 asking for Part A, which was the project
9 description, in order to then rely upon to then
10 respond to.

11 201 Q. And this is Part B of
12 that form is all I am saying.

13 A. Part B is our portion of
14 that commenting.

15 202 Q. Okay.

16 A. Part A is the proponent's
17 context of the project.

18 203 Q. All right, did you help
19 prepare this particular form for submission?

20 A. No, not directly. So
21 Linda Russell would have coordinated it based on
22 the comments that came in. And then it was
23 provided in draft to council as part of their
24 consideration at that council meeting.

25 204 Q. All right, sorry, so the

1 form was created in response to input that came in
2 from whom?

3 A. This is the, again, this
4 is the provincial form, not our form.

5 205 Q. Yes.

6 A. So these are the
7 categories that the province is soliciting comment
8 back from the host municipality.

9 206 Q. Okay, so in other
10 words --

11 A. So we are answering sort
12 of that within that sort of scope of consultation.
13 And I think I mentioned earlier, it's a very
14 generic form. It really doesn't get into -- it
15 really just gets more into sort of city interests
16 and approval sort of further on in the program, so
17 implementation.

18 So it talks about -- I mean, it
19 talks about the location, it talks about traffic
20 management, it talks about, you know, just very
21 general infrastructure sort of requirements.

22 207 Q. There had been public
23 consultations, and you had received input from the
24 public prior to your filling -- the city filling
25 this form out; is that fair?

1 A. No, no.

2 208 Q. There weren't?

3 A. The city -- the
4 municipality is not responsible for the public
5 consultation component of that program.

6 209 Q. Okay.

7 A. So the Part B form is
8 specifically soliciting, from the city, feedback.

9 The proponent does the public
10 consultation program, and I believe they have to
11 submit a separate public consultation report that
12 the Minister receives, so the city is not part of
13 that process.

14 210 Q. My question was whether
15 the city had done public consultations of its own
16 prior to the submission of this Part B?

17 A. No, not any formal, other
18 than the preconsultation program, is my
19 recollection.

20 211 Q. Okay, well, maybe that's
21 what is referred to in the report.

22 But let me take you back to the
23 report Plan 2013-003, which is a report that was
24 created on February 5th, 2013, for council's
25 approval.

1 A. Okay. I have it.

2 212 Q. If I can just take you to
3 page 9 of that report.

4 You see here that you have
5 listed over 1500 -- well, you collected, I guess
6 the city collected 1500 objections regarding this
7 project, and they have been listed in this report.

8 What was the process that
9 underlay that section of this report?

10 A. This is not like a
11 public -- sorry, a prescribed public consultation
12 process, so this was unsolicited feedback to the
13 city sort of in tandem with the public
14 consultation that WPD was performing.

15 And my understanding is that, I
16 mean, these same, I will say objections generally,
17 would be posted sort of on that requisite site and
18 passed on by the proponent through their
19 consultation report.

20 213 Q. I see.

21 A. So this was basically
22 summarizing for council's purposes whatever
23 interaction the public had, I will say indirectly
24 with the city staff.

25 214 Q. I see, okay. So this --

1 A. But this is not our
2 program.

3 215 Q. These public comments are
4 not the city's position, then, that's one thing
5 that is clear. It is just a summary of the issues
6 that have been raised with the city from the
7 public?

8 A. Correct, I would agree.

9 216 Q. All right, so if we can
10 just go back to Part B again, Part B of that form.

11 You mentioned, on the second
12 page, you mentioned that there are a number of
13 boxes that could be completed by the city in
14 respect of this project, and under 5.2, you see
15 "Project Roads".

16 A. Um-hmm.

17 217 Q. One of the comments that
18 are being solicited from the city are comments on
19 the proposed project's plans regarding, respecting
20 proposed road access; right, that's one of the
21 comments that the form asks for?

22 A. Um-hmm.

23 218 Q. And the other is
24 "identify any issues and provide recommendations
25 with respect to road access"; do you see that?

1 A. I do.

2 219 Q. And the city's response
3 was "development agreement required" in both
4 cases?

5 A. Right, agreed. Yes.

6 220 Q. Okay. And then, just so
7 that we know what you meant by that, I think, I am
8 going to ask you anyway what you meant by that.

9 But let me take you to page 8
10 of the city report of February 5th, 2013.

11 And on page -- so, again,
12 page 8, so under "Consultations", the city report
13 says:

14 "Should this project be
15 approved by the province,
16 staff will require that
17 the proponent enter into a
18 development agreement to
19 address various city
20 interests related to
21 construction activity
22 related to this project.
23 These interests include,
24 but are not limited to --
25 "[as read]

1 And then there were a bunch of
2 interests that I guess were set out according to
3 each department of the city; is that right?

4 A. Correct.

5 221 Q. So when we talk about a
6 development agreement, the words "development
7 agreement required" refer to the same thing you
8 are talking about in this paragraph; do they not?

9 A. Correct. That they
10 would -- they refer to what's known as that
11 template agreement in terms of a submission.

12 So, again, we experienced
13 uncoordinated sort of development implementation
14 with other types of projects, so this was a way to
15 create a single agreement that could clearly
16 implement projects meeting the city's interest but
17 sort of outlining the expectations of the
18 proponent.

19 So that is why our generic
20 response in the Part B form is simply, enter into
21 that development agreement, enter into that
22 development agreement.

23 222 Q. All right. And it's fair
24 that this Plan 2013-003, it was received by
25 council as part of resolution --

1 A. Sorry, which plan?

2 223 Q. This report we are
3 talking about.

4 A. Oh, yes, yes, council
5 considered it.

6 224 Q. Let me just put the
7 question more clearly.

8 The council report, Plan
9 2013-003, of February 5th, 2013, was received by
10 city council?

11 A. Correct.

12 225 Q. And by receiving it, it
13 was generally in agreement with the report's
14 findings?

15 A. It would be the
16 corresponding resolution that would determine sort
17 of what council's position was on it. So they
18 received our report, they recommended that the
19 project as outlined in the appendices be refused,
20 and they recommended -- or they resolved that the
21 council recommendations, together with all of that
22 package, go to the Ministry.

23 226 Q. Okay, but as far as you
24 can tell, there were no issues on council with the
25 contents of this report?

1 A. I am not sure, I mean,
2 they didn't challenge, that I recall, sort of
3 anything related to information put forward to
4 them.

5 227 Q. What does receiving the
6 report mean, in the city's view?

7 A. Again, that's sort of
8 very standard for basically any item that council
9 will deal with so that there is, as part of the
10 resolution, at least acknowledgement of receiving
11 whatever information was in front of council in
12 order to make their subsequent determinations in
13 that resolution.

14 I do want to just clarify, but
15 receiving it doesn't mean agree with it. It is
16 receiving the package. I think it is important
17 that it's clear that council is just receiving a
18 body of work to make a determination.

19 228 Q. That's fair.

20 A. Yes.

21 229 Q. Now, I take it that there
22 is nothing in this report that suggests that it
23 was unacceptable to the city to allow access to
24 Wild Turkey Road as part of this project?

25 MR. COLE: That's not fair.

1 BY MR. FAITH:

2 230 Q. At least from the city's
3 position. Why don't I reword it.

4 Can you point me to what
5 sections of this report take issue with access to
6 Wild Turkey Road as part of the project?

7 MR. COLE: Well, you would
8 have to read it in its context, but if you look at
9 10 of 11, road widening, there is no public
10 support for the widening of the realignment of
11 either Wild Turkey Road or Ballyduff Road.

12 Also, in fairness to the
13 witness, the city already has its 2011 and 2012
14 transportation and network reports that they are
15 obviously mindful of, and you chose not to examine
16 on that. That is your prerogative, but in terms
17 of the specific document, it clearly indicates no
18 public support.

19 BY MR. FAITH:

20 231 Q. But you agreed earlier
21 that this portion of the report does not reflect
22 the city's position; you did tell us that earlier;
23 right? This is just a summary of public comments?

24 MR. COLE: I think what he
25 said was he provided this information to council.

1 MR. FAITH: Well, we will let
2 the answer speak for itself.

3 BY MR. FAITH:

4 232 Q. But is there anything
5 apart from the public comments section that would
6 indicate that council, or city staff, rather,
7 would recommend that Wild Turkey Road not be
8 permitted as an access route for this project?

9 A. I would say that there is
10 nothing explicit to say to either support or deny
11 it. Again, this is at the stage where we are
12 flagging the issues. I think the city, though, or
13 staff at this time were clear that one of our
14 positions were we weren't going to assume any
15 roads; and so when you put it in that context,
16 that would imply by assumption that a road is
17 upgraded first and then assumed by the
18 municipality and opened by by-law.

19 So we are saying at this point
20 that we will not assume any of these roads.

21 MR. COLE: You have to point
22 out that when he is speaking, the witness is
23 pointing to page 8 of 11 under "Engineering
24 Division", and then towards the bottom, there is
25 reference to land management.

1 BY MR. FAITH:

2 233

Q. And you say:

3 "Road assumption requires
4 a petition that must
5 contain signatures from
6 100 per cent of the
7 property owners fronting
8 the road in question."[as
9 read]

10 Do you see that?

11 A. That is what the -- yes,
12 that would have been a summary of the engineering
13 department's understanding of what would be
14 required for that process, but it's preceded by:

15 "The city will not assume
16 any roads as part of this
17 project."[as read]

18 234

Q. Right, and then it sets

19 out the requirements for road assumption, which is
20 that it requires a petition and must contain
21 signatures from 100 per cent of property owners
22 fronting the road in question.

23 Taken into context, was it the
24 city's position that it wouldn't assume any roads
25 without this petition process being followed; is

1 that the city's position, then?

2 A. Well, that is a typical
3 process for somebody to make a request to the
4 city.

5 235 Q. Right.

6 A. It doesn't imply that you
7 get approval, but it is part of the process to
8 determine that.

9 236 Q. Do you have any idea why
10 it was necessary to put that last sentence?

11 A. Again, only because we
12 are characterizing or summarizing comments that
13 came in either -- well, from the public in the
14 latter part and, in this case, by departments and
15 agencies.

16 237 Q. Okay. Now, we have
17 already said that these -- you have already told
18 us that you agree that what was set out here under
19 "Consultations" in the bold heading on page 8
20 were, you know, interests that had to be addressed
21 prior to construction activity. And would you
22 agree with me that nowhere in these interests is
23 any mention that Wild Turkey Road is a nature
24 trail?

25 A. I would agree that the

1 report doesn't characterize the status of Wild
2 Turkey Road specifically.

3 238 Q. Well, it does
4 characterize the status of Wild Turkey Road under
5 "Land Management".

6 Is it true that the city's
7 position at the time of this report was that Wild
8 Turkey Road is a public road allowance in the
9 former Township of Manvers?

10 A. That could be a generic
11 response, again from that respective department.
12 So a public road allowance, that doesn't imply
13 that it's open or unopen or anything like that,
14 but it basically says Wild Turkey is a road
15 allowance. And it doesn't go beyond that to say
16 that it's anything different.

17 239 Q. The land management
18 department at the time would have been aware if
19 what is essentially a public road allowance was
20 actually, in fact, being used as a nature trail;
21 isn't that fair?

22 A. I wouldn't characterize
23 it specifically like that. We have hundreds of
24 unopened road allowances that, that only talks to
25 the specific status, if you will, of that piece of

1 land. It doesn't characterize that the use on top
2 of it by the public, you know, is specifically for
3 vehicular traffic or anything else. And we have
4 hundreds of examples where there are road
5 allowances that are boat launches, road allowances
6 that are simply trails, road allowances that are
7 completely grown over, in fact, and there is no
8 access period, obviously, right up to an open road
9 allowance. So we wouldn't normally characterize
10 the detail of a particular road allowance at this
11 stage.

12 240 Q. Can I ask you whether in
13 over 1500 objections that the city received, that
14 the city ever, in response to any of those
15 objections during this consultation --

16 MR. COLE: Sorry, sorry, just
17 so I am clear, I thought he said the 1500
18 objections were voiced in the public consultation
19 process that your client received as distinct from
20 solicited directly by the city.

21 THE WITNESS: Correct.

22 MR. FAITH: I'm sorry. Let me
23 rephrase that, you are right.

24 BY MR. FAITH:

25 241 Q. In the over 1500

1 objections that were at least known to the city,
2 was there any concern raised by the public that
3 you are aware of at the time of this report about
4 Wild Turkey Road being used as a nature trail?

5 A. I couldn't confirm that
6 for you.

7 242 Q. You have no evidence that
8 any were raised at the time of this report at this
9 time; is that correct?

10 A. Again, the 1500
11 objections were basically a petition that was
12 passed on to the province via the city. All of
13 that public consultation, I am assuming your
14 client has on the record, and I wouldn't know the
15 details of it to determine or to make that
16 correlation to our review. We did not review in
17 detail the public consultation package.

18 243 Q. Well, okay --

19 A. We simply just noted to
20 council, here is the objections that were
21 received, here is what -- if there were some
22 submissions, we either characterized those or sent
23 those letters on through the process.

24 244 Q. Someone from the city
25 looked at at least some of those objections so

1 that they could be summarized in this city report;
2 right?

3 A. Yes, majority, again, was
4 petition-based, so it was easy to theme the
5 objections, if you will.

6 245 Q. And the city received
7 some unsolicited objections; you have told us that
8 before?

9 A. Correct.

10 246 Q. All I am saying is,
11 sitting here today, can you tell me whether the
12 city ever received an objection -- or reviewed an
13 objection from the public at the time of this
14 February 5, 2013, report that Wild Turkey Road was
15 a nature trail?

16 MR. COLE: Can we go off the
17 record for a second?
18 --- Off-the-record discussion.

19 BY MR. FAITH:

20 247 Q. At the time of the
21 March 11, 2013, submission to the director, are
22 you aware whether the city had either received or
23 reviewed public comments regarding concerns that
24 Wild Turkey Road was a nature trail?

25 A. I am aware of that theme

1 as a comment, but I cannot confirm and would
2 suggest that it likely was after this report. I
3 don't -- I didn't review personally all of the
4 1500 submissions, so I couldn't make a
5 determination as to whether or not one of those
6 comments mentioned something about the trail.

7 248 Q. Let me ask you the
8 question again. At the time of the March 11,
9 2013, submission to the director, were you aware
10 whether the city had reviewed or received any
11 public objection related to the fact that Wild
12 Turkey Road was a nature trail?

13 A. Again, in the context of
14 the comments that we summarized here, I didn't
15 review them all, so I am not aware.

16 249 Q. So the answer is no.

17 MR. COLE: I think he said
18 "no" with an explanation. That is pretty simple.

19 MR. FAITH: All right, if it's
20 "no" with an explanation, I am happy with that.

21 --- Upon recess at 11:22 a.m.

22 --- Upon resuming at 11:38 a.m.

23 BY MR. FAITH:

24 250 Q. So I wanted to address
25 the, maybe that undated e-mail that we had under

1 Tab Q, Volume 2, of your record. We have looked
2 into this e-mail, and we will confirm formally if
3 you want us to, but this e-mail actually should
4 have been at the end of this thread instead of --
5 sorry, at the front of this thread instead of the
6 end because it's dated May 25th, 2012, and it is
7 kind of the e-mail that sets up the meeting.

8 So you remember there was a
9 meeting on June 7, 2012, and this is the e-mail
10 that's kind of --

11 MR. COLE: How do you have a
12 date on it? You say it's dated.

13 MR. FAITH: We had somebody
14 look at the electronic version of it.

15 MR. COLE: Okay, so let's not
16 waste any more time on this. Just send me a
17 revised Exhibit Q to MacRae's affidavit, and that
18 should cover that; right?

19 MR. FAITH: That's fine.

20 MR. COLE: Okay.

21 BY MR. FAITH:

22 251 Q. I just want to ask one
23 question related to that to clarify this.

24 So it's clear that Ms. Russell
25 here is kind of setting up what the issues that

1 WPD would like to discuss at the June 7 meeting
2 would be; is that right?

3 MR. COLE: It says what it
4 says. I am not sure what you can draw from that,
5 but...

6 BY MR. FAITH:

7 252 Q. All right, let me take
8 you -- let me ask you this: You did -- we talked
9 about the fact that it said in the report that the
10 city would not assume any roads as part of this
11 project. And I just want to ask you whether, was
12 there anything in your, to your knowledge, that
13 suggested that at that point as of February 5th,
14 2013, WPD had asked for the city to assume Wild
15 Turkey Road?

16 A. I am not aware of the
17 specific ask from WPD, so, again, those comments
18 would have been made in the context of whatever
19 department was reporting through the circulation
20 process. And so it's a generic comment with our
21 understanding that there were two roads that
22 aren't assumed, so...

23 253 Q. Okay, thank you.

24 When did you first determine
25 that Wild Turkey Road's primary use was a nature

1 trail?

2 A. We characterized it sort
3 of as a recreational trail, so I want to be
4 explicit on that because I am not sure I ever
5 called it a nature trail. But certainly whether
6 it's nature and/or recreational trail --

7 254 Q. Can we clarify that
8 before you go on?

9 A. Sure.

10 255 Q. I am sorry to interrupt
11 you, but paragraph 9 of your affidavit, just so
12 you know where I am coming from.

13 A. Okay.

14 256 Q. The second sentence, you
15 say:

16 "Its primary use is as of
17 a nature trial by members
18 of the public."[as read]

19 Do you see that?

20 A. Yes, I do.

21 257 Q. So is it fair to say that
22 it's not a nature trail but a recreational trail;
23 that would be a more specific description of what
24 your understanding is now?

25 A. My understanding is it,

1 again, it's a nature trail for the purpose of a
2 linkage to the conservation area. And it is also
3 used as a recreational trail, we are aware of
4 snowmobiles and ATVs, that type of thing, on a
5 seasonal basis.

6 258 Q. Okay. So when did you
7 come to determine that this was a nature trail, as
8 a city?

9 A. Well, from the city's
10 perspective, sort of through the ERT program would
11 have been when -- or the ERT appeal, I should say,
12 there was a number of site visits and review of
13 that specific use of that road allowance at that
14 time.

15 259 Q. Okay, and so --

16 A. That would be my
17 understanding.

18 260 Q. So during the appeal
19 process of WPD's renewable energy approval, that's
20 when the public comments that this was a nature
21 trail first came forward; is that fair? To the
22 knowledge of the city?

23 A. To my knowledge, okay,
24 for sure.

25 261 Q. Can I take you to --

1 actually, you may remember this, but on May 31st,
2 2013, WPD requests permission to upgrade Wild
3 Turkey Road; do you remember that?

4 A. Maybe not the specific
5 date, so that is why I am just wondering if there
6 is a reference to it.

7 262 Q. Here, I will take you
8 to --

9 MR. COLE: It is your
10 Affidavit R, the letter from legal counsel.

11 BY MR. FAITH:

12 263 Q. Why don't we go to the
13 letter. It's at 959, yes, Tab R, 959, it's what
14 your counsel was saying.

15 A. Okay.

16 264 Q. So this, this is a
17 request by Calvin Lantz to Diane MacFarlane of
18 May 31st, 2013.

19 And this letter, just to put it
20 into context, is written after the consultation
21 process had ended insofar as the city's part was
22 concerned?

23 A. I believe it -- yeah, I
24 think it's in the context of when the REA
25 submission went in, it was clarified, as we just

1 discussed, of the specific want or use of that
2 road allowance by WPD, and then subsequently, this
3 would have been the program to review that
4 request.

5 265 Q. Okay.

6 A. And so that is when we --
7 through our legal counsel, started a dialogue, if
8 you will, with them.

9 266 Q. And then on page 971 of
10 your affidavit in that same Volume 2 -- let me
11 take you to the beginning of that, which is at
12 967.

13 This is the minutes from the
14 regular council meeting dated July 9, 2013?

15 A. Okay.

16 267 Q. Do you see that?

17 A. I do.

18 268 Q. And if I can take you to
19 971. There was a resolution here by council that
20 passed, and the second item under Item 4.4, which
21 carried as CR 2013-644, was that the council
22 confirmed the applications from WPD Canada for
23 permits relating to Gray Road and Wild Turkey Road
24 are premature, and directs that the city's legal
25 counsel to advise the applicant accordingly.

1 A. I see that.

2 269 Q. Is it fair to say that
3 that council resolution is a response to the
4 May 31st, 2013, letter from WPD's counsel?

5 A. It was -- the resolution
6 came from a memorandum that I provided to council.
7 And I assume that the memorandum -- I need to see
8 the memorandum, but it's very likely that that
9 memorandum was based on that dialogue with WPD's
10 legal counsel and that sort of exchange.

11 270 Q. And I take it, as you
12 told us before, the response was premature in the
13 view of the city because WPD hadn't gotten its
14 approval yet?

15 A. Correct. They did not
16 get their REA approval until December. So other
17 than commenting, we stayed steadfast that the
18 applications or any specific applications for
19 permits were premature pending some status of
20 approval from the province, yup.

21 271 Q. Okay. And then if I can
22 take you to page -- sorry, to WPD records, Ian
23 MacRae affidavit, which is in Volume 2, Tab Z.

24 And this is a letter that
25 responds to an inquiry by Patrick Duffy, who was

1 acting on behalf of WPD, and it's dated

2 February 4th, 2014; right?

3 A. I see it, yes.

4 272 Q. And it's written by

5 Mr. Cole's partner, Harry Dahme, at Gowlings, and

6 it advises in the second paragraph that:

7 "The city is of the
8 opinion that consideration
9 of road improvements to
10 Wild Turkey Road at this
11 point in time are
12 premature. The renewable
13 energy approval for the
14 project has been appealed
15 to the Environmental
16 Review Tribunal. Until
17 such time as the ERT
18 renders a decision on the
19 appeal, the city is
20 reluctant to engage in a
21 process which results in
22 the use of the city's
23 resources perhaps for no
24 purpose."[as read]

25 Do you see that?

1 A. I see it.

2 273 Q. And that was the city's
3 position?

4 A. I would agree.

5 274 Q. Do you agree that the
6 city itself suggested that WPD undertake studies
7 consistent with a municipal class environmental
8 assessment process?

9 A. My recollection was,
10 yeah, we were asked how to proceed with that
11 approval, and in order for council to make a
12 determination, as well as staff to make a
13 recommendation, a private proponent would need to
14 submit similar submissions as an MCEA.

15 275 Q. I see.

16 A. And I think that's
17 outlined in my affidavit explicitly.

18 276 Q. Okay, and the idea is
19 that these studies would be undertaken because
20 they would be necessary for the point in time at
21 which the city would be prepared to consider
22 potential upgrades to Wild Turkey Road?

23 A. The municipality, if we
24 were opening up a road and changing its status,
25 would be required to go through an MCEA. That was

1 the position at the time and the advice. Because
2 we were not party to that or weren't pursuing that
3 public -- or, sorry, that process that's
4 applicable to the public sector, that is why the
5 comment was made that, as a private sector
6 proponent, they would need to at least provide
7 similar analysis and review in order for the city
8 to then make a determination as to whether it
9 would be appropriate or not.

10 277 Q. And was it the city's
11 position that it would take into account the
12 results of that MCEA-type process in its
13 consideration as to whether to allow WPD to
14 upgrade Wild Turkey Road?

15 A. It was, the response at
16 the time was that that would be the process that
17 the municipality would have to go through to
18 consider opening the road.

19 At the time of this, at the
20 time of this occurring, so in February of 2014,
21 the municipality was also participating in the
22 concurrent appeal to the ERT, and so we needed to
23 get direction from council with respect to
24 elements of this project as it would relate to
25 that tribunal process.

1 278 Q. All right, I just want to
2 take you to the second last paragraph on the first
3 page of the February 4, 2014, letter to Mr. Duffy.

4 Where it says that:

5 "The city does not object
6 to WPD conducting an
7 environmental assessment
8 study following the MCEA
9 approach. The results of
10 any such study will be
11 taken into consideration
12 by the city in making its
13 decision, along with any
14 other factors or sources
15 of input considered
16 relevant by the city, such
17 as city planning
18 objectives and public
19 input."[as read]

20 Was it the city's position
21 that the results of the MCEA study will be taken
22 into consideration by the city in making its
23 decision?

24 A. That's what our solicitor
25 is saying, that they would need to do an

1 environmental study that would follow that, what
2 would be the outline or guidelines of the typical
3 MCEA process.

4 279 Q. And that it would be
5 taken into consideration by the city in making its
6 decision respecting Wild Turkey Road; correct?

7 A. Correct.

8 280 Q. That was the city's
9 position on February 4th, 2014; is that right?

10 A. Correct.

11 281 Q. And did you -- do you
12 agree that the city did not consider WPD's MCEA
13 studies before passing its resolution of
14 March 25th, 2014; is that a true statement?

15 A. No, I would suggest,
16 again, because we needed to get direction from
17 council with respect to this road for the purpose
18 of the tribunal hearing, that was why we
19 accelerated a recommendation to council, but the,
20 part of the recommendations were based on the
21 preliminary options, if you will, that were posted
22 by WPD.

23 So council was aware, and I
24 believe that at that reporting, even the options
25 were generally described to council.

1 282 Q. That's right.

2 A. But they had not
3 completed, I guess, what would be their study.

4 283 Q. In fact, the options you
5 are referring to were eight options that were
6 going to be put to the experts to consider as part
7 of the MCEA-type studies; is that your
8 recollection?

9 A. I believe that the scope
10 of the options was sort of typical for a Phase 1
11 in an MCEA process. So it's to outline sort of
12 the broad range or identify the broad range of
13 options, and then those options get reviewed.

14 284 Q. So at the time of the
15 March 25th, 2014, resolution by council, what you
16 had from WPD were the eight options that were
17 going to be put to the test as part of the MCEA
18 process; correct?

19 A. Yes, I believe they did
20 not publish sort of the analysis of those options,
21 just the options themselves at the time.

22 285 Q. I want to take you to the
23 template development agreement issue for a moment.

24 So first thing is to look at
25 the affidavit -- your affidavit at paragraph 118.

1 At paragraph 118, you say
2 that -- you describe the idea of this template
3 agreement and what it's for, and then you quote
4 the sections from the template agreement that we
5 take issue with. And then in 119, you give an
6 explanation that:

7 "'Works' here, refer to
8 installations on city
9 lands, generally beneath
10 road allowances that are
11 to be set out in a
12 schedule to the template.
13 These are standard clauses
14 in road use or road
15 occupancy agreements.
16 These clauses are present
17 to protect city property
18 when permitting works
19 within it."[as read]

20 Do I understand the position
21 you are taking here is that "works", when the
22 agreement refers to "works", it's referring to
23 works that are actually on municipally-owned
24 property?

25 A. Yeah, we wouldn't -- the

1 scope of the agreement wouldn't go beyond sort of
2 to the private lands. So the city, in being party
3 to this agreement, the template agreement is meant
4 to protect or control sort of works sort of within
5 our city road allowances or property.

6 286 Q. Okay. So that "works"
7 does not include, for example, a wind energy
8 project on those lands owned by the proponent?

9 A. Correct. So the "works"
10 in this particular case would refer to the
11 transmission lines, I think is what we are
12 describing, within the road allowance itself.

13 287 Q. Okay.

14 A. So that still would be
15 subject to that agreement.

16 288 Q. Okay, can I take you to
17 Tab MM of your affidavit of Volume 2.

18 A. Sure.

19 289 Q. Now, ordinarily, I don't
20 ask questions related to what might be considered
21 a legal definition, but since it's in your
22 affidavit, I am going to put it to you.

23 MR. COLE: Well --

24 MR. FAITH: Unless you would
25 like to withdraw that part.

1 MR. COLE: Well, before you
2 answer the question, let's hear the question
3 first. So why don't you put your question, I
4 don't know what you are talking about.

5 BY MR. FAITH:

6 290 Q. Okay, so I am interested
7 in the definition in this template development
8 agreement, and let me ask you -- let me back up.

9 This MM is the template
10 development agreement that we are talking about;
11 is that right?

12 A. Correct.

13 291 Q. And that's referred to at
14 paragraphs 118 and 119 of your affidavit?

15 A. That's correct.

16 292 Q. So the term the "work" is
17 defined in this paragraph; do you see that at the
18 end of the paragraph?

19 A. Sorry, the paragraph
20 within the affidavit, not the agreement?

21 293 Q. No, no, 1325 of your
22 affidavit, I am sorry.

23 MR. COLE: Page 1325, yes.

24 BY MR. FAITH:

25 294 Q. Yes, so it's the second

1 page of the template development agreement.

2 The top paragraph, it says, at
3 the end of that paragraph, you can see there is a
4 definition, the "work"?

5 A. Um-hmm.

6 295 Q. And that is defining what
7 comes before it, and what comes before it is:

8 "Proponent is in the
9 process of constructing
10 and operating a
11 large-scale renewable
12 energy facility project on
13 those lands owned by it
14 and legally described
15 as."[as read]

16 And then there would be a
17 description, and it would be defined as:

18 "The municipal lands set
19 out in a diagram included
20 in Schedule A."[as read]

21 And then I would suggest to
22 you that that entire paragraph is defined as the
23 "work".

24 And maybe your counsel can
25 answer that or...

1 MR. COLE: Well, it's really
2 not a question. The document says "(the 'work')"
3 after referencing Schedule A, which follows in the
4 context of the definition of "proponent". So the
5 document says what it says.

6 I am not sure I understand what
7 your question is.

8 BY MR. FAITH:

9 296 Q. Are you suggesting that
10 the "work" is defining the diagram included in
11 Schedule A?

12 MR. COLE: Well, this is a
13 template agreement, so it's a master document to
14 apply to projects of this kind.

15 I have got to be candid with
16 you, I am not quite sure what your question is.
17 Or perhaps it's more fair to say, I don't know
18 where this is leading because it seems to be a
19 very awkward and unclear question to me.

20 BY MR. FAITH:

21 297 Q. Well, why don't I ask for
22 this: Can I have an undertaking that if after
23 having had a chance to review this paragraph and
24 the definition of Schedule A which also appears in
25 this agreement under paragraph 1, which is the

1 city lands, whether your position as to the
2 definition of "work" includes work that is done on
3 lands owned by the proponent?

4 That is for your lawyer.

5 MR. COLE: Do you understand?

6 THE WITNESS: I think I
7 understand that the "work" definition from the
8 standard template to this, to the affidavit, is
9 slightly different. The work that's being noted
10 here in the affidavit is specific to works
11 contained in the agreement that are in the
12 municipal lands.

13 So there may be a wording
14 weakness in the template in that the work
15 described there is capturing sort of the entire
16 scope of the program.

17 Now, having said that, we still
18 do have, you know, access, entrances, things like
19 that, we may have grading and drainage plans that
20 are on the private lands that form part of sort of
21 the overall development implementation.

22 So I hope that sort of
23 clarifies it.

24 But for the purpose of the
25 description in the affidavit, the "work" would be

1 the work within the public realm.

2 BY MR. FAITH:

3 298 Q. All right, so the
4 affidavit, in the affidavit, you are clarifying
5 the city's interpretation of what the "work"
6 means?

7 A. Right.

8 299 Q. Okay.

9 A. I think the reason I am
10 making that statement is because I think leading
11 into this, the concerns by the proponent, it was
12 never the city's intent to impose its jurisdiction
13 on the development on the private portion of the
14 lands for the project. So that is where that
15 context, in my mind at least, came from. We
16 wanted to be specific and acknowledge that.

17 300 Q. And I take it that the --
18 you're now understanding that the definition of
19 the "work" is broader as it's sort of written here
20 in the template development agreement, that that
21 came about in the context of this application,
22 that you recognized that in the context of this
23 application?

24 A. I think it was brought to
25 our attention by the proponent that there was

1 concern with entering into an agreement where the
2 city may have the ability, I think myself
3 included, to stop a project based on "the works"
4 not being completed. And I think that is where my
5 context is coming from. I want to make sure that
6 it's clear that "the works" would be clearly
7 defined within the agreement in the first place.
8 And it's not, it's not the intent of this
9 agreement in entering into it that I would be
10 given delegated authority, let's say, to stop work
11 that's being done on the private lands. This is
12 within the scope of works in the public realm.

13 301 Q. Okay. And then you make
14 the point that council passed a by-law that
15 authorized the mayor and others to enter into the
16 template development agreement?

17 A. Yes, they provided
18 authorization of the mayor and clerk to sign off
19 on these. Generally in keeping with the template.

20 The objective of that was,
21 because it was a generic template, the idea being
22 that every application or REA development
23 agreement didn't have to come back to council. So
24 as long as it met the, you know, the general
25 parameters and the expectations in the agreement,

1 that the mayor and clerk were authorized
2 automatically to execute those documents.

3 302 Q. Okay, thank you.

4 Can I just take you now to
5 page 1322, and this is part of the report from
6 September 9, 2014, that I think is the
7 authorization you were talking about, that
8 recommended the authorization you were talking
9 about; is that right?

10 A. Sorry, you said page?

11 303 Q. Go to the front of
12 that -- 1319 in your big numbers at the bottom.

13 A. Yes. So the intent of
14 this report was to get council endorsement of the
15 general parameters of the template as a document
16 to work through these approvals, yes.

17 304 Q. I think that is what you
18 were talking about.

19 A. Yes.

20 305 Q. And this was, this
21 report, and its recommendations in particular,
22 were eventually authorized by council by
23 resolution?

24 A. Correct. The template
25 was endorsed by resolution, and then there was a

1 by-law that confirms that endorsement as well
2 as -- sorry, approval of that document for use,
3 and it also automatically empowers the mayor and
4 clerk to execute any of those agreements.

5 306 Q. Okay. Can I take you to
6 1322 in the big numbers, and this is page 4 of 5
7 of the Plan 2014-054 report. That first full
8 paragraph, the report says:

9 "The development agreement
10 will apply to all
11 large-scale projects that
12 receive provincial
13 renewable energy approval
14 and require local controls
15 and approvals for
16 construction and ongoing
17 operation."[as read]

18 And I take it it's your
19 position that what's being referred to here as
20 "local controls and approvals for construction and
21 ongoing operation" are operations and
22 constructions done on municipally-owned land.

23 A. Correct.

24 307 Q. Okay, not the
25 construction and operation generally of the

1 project?

2 A. Not the construction and
3 operation, only the requisite construction
4 management plan, for example, adherence to that.
5 So we would normally then cite that in the
6 schedule. That is a provincial requirement and
7 approval anyways, and it just commits that it will
8 be done sort of to the parameters of that study
9 and that approval from the province.

10 Similarly, would be, because I
11 don't want to mislead, so for the private lands, a
12 good example would be a storm-water management
13 plan, which is something that we would have regard
14 to in the context of issuance of a building permit
15 because it's applicable law from a drainage
16 perspective. So the intent would be, in order to
17 streamline any of these developments, we would
18 just include and cite that plan as part of the
19 agreement template, and the proponents would then
20 adhere -- or agree to adhere to that study as
21 approved by the province. But it gives us the
22 comfort level that at least that study is done and
23 will be implemented in the context of any permits
24 that we would issue.

25 So there is some private land

1 implication, but it is specific to the studies and
2 approvals that would need to be adhered to
3 otherwise.

4 308 Q. Okay, can I take you to
5 paragraph 123 of your affidavit.

6 You say there that:

7 "There is some confusion
8 on whether the city
9 intends to hold back
10 permits if the template is
11 not executed by a
12 proponent. Council has
13 not authorized staff to
14 withhold any permits."[as
15 read]

16 Will you agree that at least
17 prior to this affidavit, it was the city staff's
18 position that WPD would have to execute this
19 template prior to receiving any permits?

20 A. Yeah, the intent of the
21 template was to coordinate all of those individual
22 approvals. So part of the scope was, you know,
23 for example, WPD will be required to get entrance
24 permits. They would need a road occupancy permit.
25 And they would need a building permit. So the

1 position of the city was, based on the template
2 sort of scope, that coordinates all of the issues
3 that ultimately would be needed or required prior
4 to a building permit being issued.

5 So the assumption was made, if
6 they entered into a template agreement, they would
7 have satisfied all of the city's requirements.

8 309 Q. But do you not agree that
9 it was a staff requirement that the proponent sign
10 the template agreement prior to being able to get
11 those permits, they had to sign it first?

12 A. Agreed. But, again, it
13 was in that context of because the template
14 agreement would address all of those local
15 approvals that they would otherwise get
16 individually.

17 310 Q. Okay, if we can go back
18 to 1322 of the second volume of your affidavit.

19 So in the middle of the first
20 full paragraph on that page, this is page 4 of 5
21 of Plan 2014-054.

22 A. Yes.

23 311 Q. This is the report that
24 was received by council when it made its
25 resolution.

1 I am going to read you the
2 middle of the paragraph. It says:

3 "Proponents will be
4 required to enter into
5 this agreement after
6 renewable energy approval
7 and prior to the issuance
8 of any municipal
9 permits."[as read]

10 Was it not the position of
11 staff and then council by receiving this report,
12 that the template agreement would be required to
13 sign this agreement prior to the issuance of any
14 municipal permits?

15 A. Yes. And it was based
16 on, again, the context that the template agreement
17 would address those requisite requirements anyways
18 in order to get a permit. So it was meant to,
19 quite frankly, sort of streamline and have a
20 single approval, if you will, through the
21 execution of the agreement that would capture all
22 of the municipal interests in one document.

23 312 Q. All right, you now say
24 that the city permits will be processed in the
25 ordinary course even if WPD elects not to execute

1 this template development agreement?

2 A. Yeah, it was a concern
3 raised by your client, and, again, in that context
4 I just described about what the intent of it is,
5 as long as WPD met individually all of the various
6 permits, we would issue them accordingly. But,
7 again, we would recommend that the best course of
8 action would be to enter into this agreement so
9 that it's simplified and streamlined, quite
10 frankly, for your client.

11 313 Q. Can I take you to
12 paragraph 15 of your affidavit.

13 A. I was optimistic. You
14 were in the 1300s, but now you are going back to
15 15.

16 MR. COLE: It's an old
17 lawyer's trick.

18 MR. FAITH: Check this out,
19 you can see there is two pages left. And if I am
20 not on script, I am not speaking, so...

21 BY MR. FAITH:

22 314 Q. Okay. So paragraph 15.

23 So you say at paragraph 15:

24 "WPD has other viable
25 on-site alternatives to

1 Wild Turkey Road but has
2 made no attempt to pursue
3 these alternatives."[as
4 read]

5 And, first of all, I take it,
6 now that I have had a chance to get your evidence,
7 that the allegation that we have made no attempt
8 to pursue other alternatives, you are referring to
9 us having made no attempt to pursue those
10 alternatives after March 25th, 2014?

11 MR. COLE: Well, just hold on
12 a second. If you are going to editorialize. What
13 paragraph 15 says, I think, is based on the record
14 in front of us and what the city knew and now
15 knows, there has been no effort to pursue the
16 alternatives. They have identified alternatives,
17 but I think what the witness is saying and
18 certainly what his affidavit is saying is there is
19 no evidence that they have been pursued.

20 BY MR. FAITH:

21 315 Q. When should WPD have
22 started to pursue alternatives to Wild Turkey
23 Road, in your view?

24 A. I would say a key
25 milestone would have been when council suggested

1 that they were not going to open the road and
2 allow it as an option for use to serve the
3 project.

4 So from at least that time
5 forward, there should have been the ability for
6 WPD to pursue alternatives. And if that meant
7 amendments to the Ministry, then they should have
8 pursued those.

9 316 Q. And what alternatives do
10 you say the city had or has -- sorry, that WPD had
11 or has to Wild Turkey Road?

12 A. Well, my understanding of
13 the lands -- sorry, I want to back up.

14 So there is two turbines that I
15 am understanding would be accessed by Wild Turkey
16 Road if it was opened and updated. So both are
17 private lands, both have existing access right now
18 to a public open and maintained road. So they
19 should have the ability, at least, without sort of
20 any further analysis, they have an option to
21 access from Ballyduff in this case.

22 317 Q. So Turbine 5, for
23 example, might be accessed from Ballyduff Road?

24 A. Correct. Because there
25 is already a driveway at the end of Ballyduff that

1 the private landowner who is leasing the lands
2 accesses on to that same property from.

3 318 Q. And this would be sort of
4 Option 5 in the MCEA process that WPD conducted?

5 MR. COLE: Do you know the
6 options well enough?

7 THE WITNESS: I am saying
8 perhaps, because I would have to look at the
9 options table. But I do know that WPD in their
10 options looked at a number of private land
11 opportunities to access those facilities.

12 BY MR. FAITH:

13 319 Q. And in your view, there
14 was one option in among the options that were
15 presented that would have meant that no use of
16 Wild Turkey Road would have been necessary; is
17 that right? That that was open to WPD?

18 MR. COLE: Are you talking
19 about Option B? We should be clear.

20 THE WITNESS: My recollection
21 was there was an option, I don't know the
22 numbering system for it off the top of mind, but
23 there was one option for Wild Turkey Road. The
24 remaining were variations sort of on private lands
25 generally in terms of options for access to the

1 facilities.

2 BY MR. FAITH:

3 320 Q. So among the viable
4 on-site alternatives to Wild Turkey Road, are you
5 counting that WPD had an option to build roads
6 that didn't touch the unopened portion of Wild
7 Turkey Road?

8 MR. COLE: Let's be fair,
9 because the options are your client's options and
10 they are presented in your material.

11 MR. FAITH: All right, we can
12 go to them.

13 MR. COLE: So if you want to
14 be specific, even the Option 1B, I think, crosses
15 Wild Turkey Road at some northern point, so it's
16 important to be specific.

17 MR. FAITH: That's fine, I
18 just want to know what you are talking about when
19 you say "on-site options available to WPD".

20 Can we just go off the record
21 for a second.

22 --- Off-the-record discussion.

23 BY MR. FAITH:

24 321 Q. You have said in your
25 affidavit that WPD has viable alternatives to Wild

1 Turkey Road. I take it that the study has done no
2 studies -- the city has done no studies of its own
3 exploring alternatives to WPD's use of Wild Turkey
4 Road?

5 A. No, that was not our
6 obligation.

7 322 Q. Right. So the options
8 that you say are viable, do they come from WPD's
9 MCEA report?

10 MR. COLE: These are the
11 options that WPD says are alternatives.

12 BY MR. FAITH:

13 323 Q. But your client says in
14 his affidavit that there are other viable
15 alternatives.

16 MR. COLE: I think, as I just
17 said to you, he is referring to the alternatives
18 that your client has put forward.

19 BY MR. FAITH:

20 324 Q. He says they are viable
21 in his affidavit.

22 MR. COLE: Yeah, well, your
23 client says their alternative is -- I am not sure,
24 what are we arguing over, if anything?

25 MR. FAITH: Whether there is a

1 viable alternative to our use of Wild Turkey Road.

2 MR. COLE: As opposed to not
3 viable alternative?

4 MR. FAITH: Correct, from an
5 environment perspective.

6 MR. COLE: Well, I think what
7 the affidavit says is that your client has put
8 forward alternatives.

9 MR. FAITH: I don't think that
10 is what the affidavit says. Let's go back to it.
11 Paragraph 15.

12 And maybe we can amend your
13 comments here right now if necessary, but it says
14 here:

15 "WPD has other viable
16 on-site alternatives to
17 Wild Turkey Road but has
18 made no attempt to pursue
19 these alternatives."[as
20 read]

21 MR. COLE: I think what is
22 referred to there is a reference to one or more of
23 the options referenced in the MCEA.

24 BY MR. FAITH:

25 325 Q. And I want to know which

1 of those options the city considers to be viable.

2 MR. COLE: Well, okay, can we
3 run through that now, can we do that now?

4 THE WITNESS: I think, if I
5 could, my first comment would be there is access
6 on a publicly open and maintained road to both
7 properties that are supporting those turbines.
8 So, in my mind, there is already an alternative.

9 What we didn't do is
10 scrutinize -- I think what you were asking is,
11 from an environmental standpoint, which is the
12 most viable or preferred by the city? And if --
13 then if that's not the case, that is certainly not
14 what we did to scrutinize it.

15 The comment is, quite frankly,
16 very generic to say there is access available to
17 both the properties that support those turbines.
18 WPD hasn't pursued any of those alternatives.
19 They have stayed consistent from day 1 wanting
20 Wild Turkey Road to be opened and upgraded.

21 BY MR. FAITH:

22 326 Q. But you have said in your
23 affidavit that WPD has other viable on-site
24 alternatives. They wouldn't be alternatives if
25 they weren't viable; would you agree with that?

1 A. I would argue that
2 anything is viable. If they have got access to a
3 public road, then that is the only requirement,
4 from the city's perspective, in order to
5 accommodate access to the property.

6 327 Q. Is an alternative viable
7 if it won't be approved by the Ministry of the
8 Environment, in your opinion?

9 A. We are not part of that
10 approval process in terms of a revision to the
11 project, so...

12 328 Q. Can I just ask you this:
13 Is it fair to say that despite paragraph 15 of
14 your affidavit, the city is in no position to
15 determine what alternatives to Wild Turkey Road
16 are viable from an environmental perspective?

17 A. If you are asking me from
18 an environmental perspective, we didn't conduct an
19 environmental study on the properties. We know
20 that there are viable, or there is viable access
21 to these properties already.

22 329 Q. You are not aware of any
23 viable on-site alternatives to Wild Turkey Road
24 from an environmental perspective?

25 A. We are aware of other

1 options and the scope of those options generally
2 based on your client's report.

3 330 Q. The city is not aware of
4 any other viable on-site alternatives to Wild
5 Turkey Road from an environmental perspective; is
6 that statement correct?

7 MR. COLE: Have you considered
8 that question?

9 THE WITNESS: We haven't
10 done -- the city has not conducted a detailed
11 environmental review, but we could -- we can look
12 at the at least published study generally by your
13 client, and they are showing options -- I would
14 hope that they are viable. Certainly when you
15 look -- some, at least, are viable -- to access
16 some or both of the turbines that we are talking
17 about.

18 BY MR. FAITH:

19 331 Q. Which ones are viable?

20 A. They are putting them
21 forward.

22 332 Q. You say some of them are
23 viable, so which ones are viable, in your opinion?
24 You have put this in your affidavit.

25 A. Yes.

1 333 Q. So I am asking you, I
2 have the right to ask you this, WPD has other
3 viable on-site alternatives to Wild Turkey Road;
4 what, in your opinion, are the viable alternatives
5 to Wild Turkey Road from an environmental point of
6 view, for example?

7 U/A MR. COLE: I am going to take
8 that under advisement. You have absolutely no
9 expert evidence in this case, period. Even the
10 MCEA report is hearsay; it is not expert evidence,
11 et cetera. You have said in your own material
12 through the MCEA report that there are
13 alternatives and they are viable. Some you like
14 and some you don't. The issue as to the
15 environmentally soundness or viability of an
16 option isn't in issue in this application. You
17 certainly haven't made it an issue.

18 So it's not an appropriate
19 question, and for the moment, I am going to --

20 MR. FAITH: It is in his
21 affidavit.

22 MR. COLE: It says "on-site
23 viable options".

24 MR. FAITH: Alternatives to
25 Wild Turkey Road.

1 REF MR. COLE: And that is
2 referring to, as he has indicated, the options put
3 forward by your client as well as his own evidence
4 as to the access to these two turbines.

5 But the issue and the
6 opinion -- expert evidence relating to the
7 environmental soundness or viability that one
8 sliver of the overall assessment isn't raised by
9 you in this case and hasn't been responded to by
10 us in our case. So let's not argue. I am not
11 going to allow him to answer that question.

12 MR. FAITH: All right, thank
13 you.

14 BY MR. FAITH:

15 334 Q. You have put in some
16 evidence from Anneliese Grieve in this matter?

17 MR. COLE: Yes.

18 BY MR. FAITH:

19 335 Q. By way of affidavit?

20 MR. COLE: Yes.

21 BY MR. FAITH:

22 336 Q. Anneliese Grieve, I take
23 it, Mr. Taylor, you have read Anneliese Grieve's
24 affidavit?

25 A. I have.

337 Q. She appears to assert
that an alternative option for access to Turbines
4 and 5 of the project would be Option 1B in WPD's
MCEA report.

A. I believe that is the case. I would have to look at the affidavit specifically, but it sounds accurate.

338 Q. So is it at least the
city's point of view that that is an alternative
for the use of Wild Turkey Road, that is a viable
alternative, Option 1B?

MR. COLE: Let's just be very clear here. Let's see her affidavit. What paragraph? And I am not necessarily disagreeing with you. I just want to be fair to the witness as to the paragraph to which you refer.

MR. FAITH: Do you want to read it or do you want me to point you to it?

MR. COLE: Just point me to what part of the report.

MR. FAITH: So there is, under
page 3 of your affidavit, so under 3.0,
"commentary and alternative approaches". It says:

"There are two alternative approaches WPD could have

1 pursued when it became
2 obvious that it may not
3 reach agreement with the
4 City of Kawartha Lakes on
5 the use of Wild Turkey
6 Road."[as read]

7 And then if you look down
8 toward the end of 3.0, so this is page 7,
9 Ms. Grieve suggests that, this is on the second
10 paragraph:

11 "WPD could likely have
12 been able to identify an
13 alternative access road,
14 submit these changes for
15 approval in accordance
16 with the modifications
17 provisions detailed in the
18 technical guide. For
19 example, if the access
20 route chosen is similar to
21 Route 1B presented in a
22 Municipal Class EA, it
23 could be routed to avoid
24 removal of significant
25 amounts of vegetation and

1 so on."[as read]
2 And in the next paragraph, it
3 says:
4 "This route would have
5 similar or less
6 environmental effects than
7 opening Wild Turkey Road
8 and, as a result, would be
9 relatively easy to approve
10 using the process outlined
11 in Chapter 10 of the
12 technical guide."[as read]

13 Is it the city's position at
14 least that Route 1B is a viable alternative?

15 MR. COLE: Well, as she says
16 here:

17 "For example, if the
18 access route chosen was
19 similar to Route 1B
20 presented... "[as read]

21 I think it's correct to say
22 that the city's position is that an access route
23 that is similar to 1B is a viable option.

24 BY MR. FAITH:

25 339 Q. And similar being what?

1 MR. COLE: I can't tell you
2 sitting here right now whether it's exactly the 1B
3 or whether there is some minor variation to it.

4 But the 1B option, and let's
5 just cut to the chase, basically puts a private
6 road on private land as opposed to a private road
7 on public land.

8 The distinction between 1A and
9 1B is that the access route is on private land,
10 with the exception of the northern tip that I
11 think crosses over the road allowance, if it is a
12 road allowance.

13 THE WITNESS: I believe that
14 is my recollection, yes.

15 MR. COLE: So that is the real
16 difference between 1A and 1B. And I think it is
17 fair to say, and if this is what you are driving
18 at then we agree, that the general diagrammatic
19 description of the 1B option is viable in that
20 context by the city and is certainly preferred
21 over 1A.

22 BY MR. FAITH:

23 340 Q. Well, preferred but
24 viable; right?

25 MR. COLE: Viable.

1 BY MR. FAITH:

2 341 Q. And including the fact
3 that Option 1B crosses Wild Turkey Road?

4 MR. COLE: Well, if we haven't
5 told you before, we will tell you now, but we
6 have, that is not the concern, I think that the
7 crossing over is not an issue.

8 BY MR. FAITH:

9 342 Q. When did that stop being
10 a concern? Maybe your client can answer this.

11 When did the crossing over Wild
12 Turkey Road stop being a concern?

13 MR. COLE: Well, what I am
14 telling you now is that we have said that the
15 option of 1B or something similar, as per this
16 report, is viable. The rest may be sort of along
17 the lines of settlement, I am not really quite
18 sure. But, if it's to be argued, the city's
19 position is that the 1B option and, in particular,
20 the northern tip that appears to cross -- and
21 please correct me if I am wrong.

22 THE WITNESS: Um-hmm. I am
23 just looking at the picture.

24 MR. COLE: -- that that is
25 something that the city would expect to be able to

1 resolve in the normal course with the proponent.

2 BY MR. FAITH:

3 343 Q. Would you agree that
4 prior to this application for judicial review, the
5 city's position was that even Option 1B would not
6 be available to WPD?

7 MR. COLE: The issue of 1B has
8 never surfaced. Your client has been absolutely
9 inflexible, rigid, and 110 per cent committed to
10 1A. The issue has never been raised. In your
11 application material, you seek no relief relative
12 to 1B. It's entirely predicated, as is the REA,
13 on 1A.

14 Alternative routes have never
15 been proposed, and that is clear in the record.

16 BY MR. FAITH:

17 344 Q. Did the city ever, prior
18 to this application for judicial review, take the
19 position that it would allow a route to cross Wild
20 Turkey Road?

21 MR. COLE: The city was never
22 asked to consider anything other than the project
23 as described in the project description contained
24 as an appendix to the REA, i.e., 1A.

25 BY MR. FAITH:

1 345 Q. Did the city ever make
2 WPD aware of its position now, that it would allow
3 an option that crossed Wild Turkey Road?

4 MR. COLE: I believe the city
5 did indicate --

6 MR. FAITH: When was that --

7 MR. COLE: Let me finish.

8 The city has indicated, and if
9 you give me a minute, I can find the
10 communication, that it would consider -- I have to
11 find -- we can take a five-minute break because I
12 don't want to misstate the record.

13 But the first response to your
14 question is that the issue of 1B was never raised,
15 or was any other option raised, but let's just
16 stand down for a minute and let me just find I am
17 looking for.

18 MR. FAITH: Sure.

19 --- Upon recess at 12:33 p.m.

20 MR. COLE: I am looking for
21 something that I can't find at the moment. I will
22 take more time later and put it to you before the
23 end of this examination.

24 BY MR. FAITH:

25 346 Q. Can I ask you at least

1 this: At least at the time of the ERT appeal of
2 this matter, it was the city's position that it
3 would not allow a route that required vehicular
4 crossing across Wild Turkey Road?

5 MR. COLE: I don't think that
6 issue was ever raised by your client. What was
7 raised by your client was 1A, period. But
8 differently, what was raised by your client, what
9 has always been sought by your client is the
10 entire package described in the REA. Period.

11 BY MR. FAITH:

12 347 Q. Can I take you to Diane
13 McFarlane's affidavit, please, if you have it.
14 And it's Tab A, February 19, 2015, Environmental
15 Review Tribunal decision in Cham Shan Temple --
16 C-h-a-m S-h-a-n Temple -- v. Director, Ministry of
17 the Environment. I take you to page 67 of that
18 decision, and paragraph 229.

19 I am going to read it aloud:

20 "Mr. Taylor testified that
21 the city recently became
22 aware that the approval
23 holder was exploring
24 access to a portion of the
25 site from Ballyduff Road

1 through a private
2 property. He stated that
3 such a route would still
4 require vehicular crossing
5 across Wild Turkey Road
6 for access to Turbine 5,
7 and the city will not
8 consent to open even part
9 of that road. According
10 to Mr. Taylor, it remains
11 unclear to the city
12 whether there are proposed
13 changes to the project
14 plan for access."[as read]

15 So having read that, was that
16 your testimony as it has been characterized in
17 this decision of the ERT, Mr. Taylor?

18 A. That's correct. It's
19 based on council's direction that any portions of
20 Wild Turkey Road would not be opened for access.

21 348 Q. And is it true that you
22 had become aware that the approval holder was
23 exploring access to a portion of the site that
24 would cross Wild Turkey Road?

25 A. I am not aware.

1 349 Q. Well, is it true what
2 you --

3 A. Oh, I am sorry. Sorry,
4 in terms of -- maybe rephrase that. I thought you
5 meant recently, if there was some discussion.

6 350 Q. I am saying, at the time
7 you testified at the ERT hearing, had you become
8 aware that WPD was exploring access to a portion
9 of the site that would require vehicular crossing
10 across Wild Turkey Road?

11 A. I wasn't aware
12 specifically. This context was to outline, again,
13 based on through the ERT process, possible
14 options. They were known at that time and through
15 that process. So this was for clarity to the
16 tribunal to say, you need to -- you need to
17 understand that there isn't currently access
18 that's approved by the city to Turbine 5. And it
19 basically is then saying, whether that's
20 traversing the entire unopen road allowance or
21 crossing it from Turbine 4 to 5.

22 351 Q. When the tribunal says
23 that you testified that the city will not consent
24 to open even a part of that road, was that a true
25 characterization of the city's position at the

1 time you gave that testimony?

2 A. It was, yes.

3 352 Q. I have one more page
4 left.

5 So as the director of
6 development, you are in a position to provide the
7 city's position regarding its jurisdiction or
8 ownership of municipal property?

9 MR. COLE: Say that again. My
10 mind wandered. I didn't hear the question.

11 MR. FAITH: It was a wordy
12 question.

13 BY MR. FAITH:

14 353 Q. As the director of
15 development, you are in a position to provide the
16 city's position regarding its jurisdiction or
17 ownership of municipal property?

18 A. Our land management staff
19 would typically be charged with confirming through
20 the normal registry process sort of what ownership
21 there is of the lands.

22 354 Q. Okay, and to the extent
23 that there is dispute over a road status, you are
24 at least in a position to identify the city's
25 position regarding the status of the road?

1 A. Yes, based on that
2 sought-after advice from staff, yes.

3 355 Q. I am just going to take
4 you to your affidavit, paragraph 11 and 12, and
5 you say that:

6 "During the course of an
7 Environmental Review
8 Tribunal hearing in
9 connection with the
10 project, evidence was led
11 that has rendered
12 uncertain the ownership
13 status and legal location
14 of Wild Turkey Road."[as
15 read]

16 Do you see that?

17 A. I do. So it is Item 11,
18 yes.

19 356 Q. And then you say that:
20 "WPD and the city were
21 present at the ERT
22 hearing. WPD is therefore
23 aware that these are
24 uncertainties -- that
25 there are uncertainties

1 with the ownership status
2 and legal location of Wild
3 Turkey Road."[as read]

4 And you say:

5 "The MacRae affidavit
6 fails to describe the
7 uncertainty respecting
8 Wild Turkey Road."[as
9 read]

10 Right?

11 A. Correct, that is what it
12 says, yes.

13 357 Q. So is it your position
14 that the MacRae affidavit should have brought the
15 uncertainty to the attention of the Court in this
16 proceeding and failed to do so?

17 MR. COLE: Well, that's a
18 legal question in the sense that it pertains to
19 the position during the course of argument.

20 Our position is that it is a
21 threshold issue and that it is relevant and, in
22 fact, imperative to be determined in order for the
23 relief to be granted and that it ought to have
24 been raised by the applicant. It wasn't, and,
25 therefore, the city is raising it so that the

1 Court understands that as of today, it is unclear
2 whether the Wild Turkey Road is on public or
3 private lands or subject to some other description
4 that has an impact on the city's ability to grant
5 the relief claimed.

6 BY MR. FAITH:

7 358 Q. Do you anticipate making
8 the argument at the hearing of this application
9 that somehow WPD was not being fully forthcoming
10 in respect of the status of this Wild Turkey Road?

11 MR. COLE: Well, I think the
12 way the argument will be framed will be set out in
13 the factum. I am not troubled in any way by
14 saying that, in my view, the issue ought to have
15 been raised in the applicant's material.

16 BY MR. FAITH:

17 359 Q. All right, and you say in
18 your affidavit, there is a gentleman by the name
19 of Herman Wimellbacher, this is at paragraph 101,
20 gentleman by the name of Herman Wimellbacher who
21 rendered Wild Turkey Road's legal status to be
22 uncertain?

23 A. Correct.

24 360 Q. And also rendered
25 uncertain the legal location of Wild Turkey Road?

1 A. Correct.

2 361 Q. And I take it it was

3 Mr. Wimellbacher's evidence at that hearing that

4 created this uncertainty?

5 A. Correct, he is a

6 surveyor.

7 362 Q. Yes.

8 A. So he put evidence

9 forward to suggest that some of the road or all of

10 the road may be what's known as a forest road, so

11 that is where it came through in terms of evidence

12 at the ERT hearing.

13 363 Q. And, okay, was there

14 anything else you can recall that you haven't

15 mentioned in your affidavit that came out, say,

16 from another witness that rendered the legal

17 status and location of Wild Turkey Road uncertain?

18 A. I think, again, I sort of

19 highlight Ms. MacFarlane's sort of evidence and

20 affidavit. Really, she was in discussions with

21 the surveyor as well at the time to try and

22 determine how that determination was made about

23 the status of the road.

24 So the surveyor's results

25 differed from the city's records search, and our

1 records search, my understanding, is went back
2 significantly further just in terms of history of
3 that road to be able to try to determine its
4 status. That is as much as I am aware of any
5 activity related to what the actual road status
6 is.

7 364 Q. Yes, well, MacFarlane,
8 her affidavit, she does describe making some
9 inquiries and doing some work, but I am talking
10 about the ERT hearing. By that time, the
11 uncertainty that you describe was raised by
12 Mr. Wimellbacher alone; is that fair?

13 A. It was through his
14 evidence was the single submission in the ERT.

15 365 Q. Okay.

16 A. So the city's position
17 was clear that it was assumed to be an unopened
18 and unassumed road. And that was our evidence,
19 and there is no other evidence.

20 366 Q. Wimellbacher was the one
21 who raised these uncertainties at the ERT hearing.
22 There was no one else that raised the
23 uncertainties?

24 MR. COLE: Do you know?

25 BY MR. FAITH:

1 367 Q. Yes, as far as you
2 remember.

3 A. He was a witness for
4 the -- for your client and provided evidence.
5 Wimellbacher was not a witness of the city.

6 368 Q. He wasn't a witness of
7 our -- of WPD's. He was just, I think he was
8 testifying as part of the ERT process on behalf of
9 the applicants who were trying to appeal the
10 regulatory energy approval; isn't that right?

11 A. My recollection was that
12 he was a witness of your client, but, again, I
13 could be wrong. I was asked sort of as part to
14 respond to it, but...

15 369 Q. It is a question for
16 research, not debate.

17 A. Okay.

18 MR. COLE: I don't think
19 anything turns on this, so look, unless I tell you
20 it matters, let's just treat it as it doesn't
21 matter. The point is, the issue came up in the
22 hearing and it is what it is.

23 BY MR. FAITH:

24 370 Q. You are not taking the
25 view that Mr. Wimellbacher was our witness at this

1 hearing as of now?

2 MR. COLE: I think what
3 Mr. Taylor is doing is speculating, and he might
4 very well be wrong. But it really doesn't matter,
5 from our point of view.

6 BY MR. FAITH:

7 371 Q. Okay, all right, I want
8 to take you to the ERT decision at paragraph 233
9 in Diane MacFarlane's --

10 Let's go off the record.

11 --- Off-the-record discussion.

12 MR. COLE: Mr. Taylor is
13 correcting himself. Mr. Wimellbacher,
14 W-i-m-e-l-l-b-a-c-h-e-r, was called on behalf of
15 the appellants at the ERT hearing and not WPD.
16 Okay.

17 BY MR. FAITH:

18 372 Q. Paragraph 233 of the ERT
19 tribunal decision states that:

20 "Mr. Taylor stated that he
21 disagreed with
22 Mr. Wimellbacher's
23 interpretation of the
24 status of Wild Turkey Road
25 as a quarter sessions road

1 and confirmed his
2 understanding that it is
3 an unopened road allowance
4 under the city's
5 jurisdiction."[as read]

6 That was your understanding as
7 of the ERT hearing; was it not?

8 A. Correct.

9 373 Q. So the confusion you say
10 arose from that hearing was certainly not in
11 relation to the city's position in respect of this
12 road; isn't that fair?

13 A. Sorry, can you --

14 374 Q. The city's position was
15 that this was an unopened road allowance under the
16 city's jurisdiction as of the ERT hearing; was it
17 not?

18 A. Correct.

19 MR. FAITH: I think now is a
20 good time for a break because I think I am pretty
21 much done.

22 --- Upon recess at 12:49 p.m.

23 --- Upon resuming at 1:05 p.m.

24 RE-EXAMINATION BY MR. COLE:

25 375 Q. A couple of quick

1 questions in reply on re-examination. Hopefully,
2 we can do this without taking you to too many
3 documents.

4 You recall counsel asked you
5 questions about the various options in the WPD
6 MCEA.

7 A. Correct.

8 376 Q. And you will recall that
9 that document has Options 1A, 1B, et cetera, et
10 cetera, et cetera, et cetera, set out?

11 A. Yes.

12 377 Q. Now, you are familiar
13 with the REA?

14 A. Process?

15 378 Q. Right.

16 A. Yes.

17 379 Q. And you are familiar with
18 the actual approval secured by WPD?

19 A. Yes.

20 380 Q. And I take it there is no
21 issue between the parties that it's the Option 1A
22 that is in the REA approval?

23 A. That's my understanding,
24 yes.

25 381 Q. Now, at any time did WPD

1 ever approach the city to seek any kind of
2 approval for anything connected with the 1B
3 option?

4 A. Not to my recollection.

5 382 Q. At any time did WPD ever
6 approach the city and ask for a permit or an
7 approval simply for a crossing of Wild Turkey Road
8 as distinct from opening and upgrading Wild Turkey
9 Road?

10 A. The city was considering
11 the transmission crossing of Wild Turkey Road and
12 acknowledged that as part of the OEB process; but
13 for vehicular, for anything beyond transmission
14 lines, our position was that any access over or
15 through Wild Turkey Road where it was unopened
16 would remain that way, that was council's
17 position.

18 383 Q. Just to be clear, was
19 there ever a request for a crossing, a limited
20 permit for crossing purposes only for vehicular
21 traffic?

22 A. No, we haven't had those
23 discussions.

24 MR. COLE: All right, thank
25 you very much. Those are all of my questions.

1 MR. FAITH: We are done.

2 Thank you very much.

3 --- Whereupon examination adjourned at 1:07 p.m.

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3 I HEREBY CERTIFY THAT I have, to the best
4 of my skill and ability accurately
5 transcribed the foregoing proceeding.
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9 Lisa Lamberti, Court Reporter
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Appendix D

Court File No. 37/15

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

WPD SUMAC RIDGE WIND INCORPORATED

Applicant

- and -

CORPORATION OF THE CITY OF KAWARTHA LAKES

Respondent

CROSS-EXAMINATION OF DIANE McFARLANE
on her Affidavit sworn March 9, 2015,
held at the offices of ASAP Reporting Services Inc.,
333 Bay Street, Suite 900, Toronto, Ontario
on Wednesday, April 1, 2015, at 1:15 p.m.

APPEARANCES:

Andrew Faith on behalf of the Applicant
Andrew Max

Clifford I. Cole on behalf of the Respondent
Konstantine J. Stavrakos

Also Present:

Jesse Long

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LIST OF REFUSALS

Refusals (REF) found at pages:
38, 39 and 55

Toronto, Ontario

--- Upon commencing on Wednesday, April 1, 2015 at

1:15 p.m.

AFFIRMED: DIANE McFARLANE

CROSS-EXAMINATION BY MR. MAX:

1 Q. Hi, Ms. McFarlane.

So I understand you work on
matters relating to municipal property and road
allowances?

A. Correct.

2 Q. And you have a senior
right of way agent designation?

A. Yes, I do.

3 Q. And you have specialized
training and experience in matters relating to
rights of way and property rights?

A. Correct.

4 Q. And you, in fact, set up
the city's land management department?

A. I did.

5 Q. And you have been leading
that department since 2007?

A. Right.

6 Q. And you are also the
city's land management coordinator?

1 A. Correct.

2 7 Q. And the land management
3 department addresses certain issues relating to
4 City of Kawartha Lakes property?

5 A. Correct.

6 8 Q. And that can include
7 property that used to belong to the Township of
8 Manvers?

9 A. Correct.

10 9 Q. And you are also the
11 chair of the land management committee?

12 A. Correct.

13 10 Q. So as part of your
14 employment, you are responsible for addressing the
15 issues you discuss in your affidavit about the
16 status of roads?

17 A. Correct.

18 11 Q. But you are not put
19 forward today as an expert, as I understand?

20 A. Yes.

21 12 Q. So you are here to give
22 facts about the status of Wild Turkey Road --

23 MR. COLE: To be fair to her,
24 the affidavit is not put forward as an outside
25 third-party expert opinion. It's an opinion by

1 somebody who works in this area and my client's
2 operation.

3 So whether she is an expert or
4 not, well we can argue that later, but it's being
5 put forward as representative of the city's
6 position.

7 MR. MAX: Okay, that's fair.

8 BY MR. MAX:

9 13 Q. So just to start, do you
10 have your affidavit in front of you?

11 MR. COLE: She does.

12 BY MR. MAX:

13 14 Q. I would like to go to
14 paragraph 6 of your affidavit.

15 If we can just read the first
16 sentence together:

17 "Up until recently the city
18 believed that Wild Turkey Road
19 was an opened road."[as read]

20 Is that a typo?

21 A. That should be
22 "unopened", yes.

23 15 Q. Okay, I just wanted to
24 get that resolved first, "unopened road
25 allowance", thank you.

1 MR. COLE: No, thank you,
2 otherwise it's time to go.

3 MR. FAITH: Got you, got you,
4 we thought we had you.

5 MR. COLE: Otherwise that's
6 the end of the case, send me the bill and the city
7 will gladly pay it.

8 THE WITNESS: Oh, well I have
9 no authority there.

10 (Laughter)

11 BY MR. MAX:

12 16 Q. I want to understand,
13 make sure I fully understand the city's position
14 for the possibilities for the status of Wild
15 Turkey Road.

16 As I understand it, there are
17 five possibilities, so I am going to list all the
18 ones that I found and go through them one by one
19 with you and you can tell me if I have missed any
20 of the possibilities.

21 Okay, so if I can take you to
22 paragraph 6 of your affidavit, which is still in
23 front of you. The first possibility is that Wild
24 Turkey Road is an unopened road allowance?

25 A. Yes.

1 17 Q. Okay. And then the
2 second possibility -- if I can take you to heading
3 B.1 on the same page -- is that it is a forced or
4 a trespassed road. I am going to call that
5 Possibility 2; is that fair?

6 A. Yes, it's a possibility.

7 18 Q. And just for
8 terminology's sake, I am going to use "forced" and
9 "trespassed" interchangeably. But if it ever
10 becomes an issue that they mean different things,
11 you just let me know. Okay?

12 A. Sure.

13 19 Q. And then if I can take
14 you to paragraph 16 of your affidavit.

15 You point out that there is a
16 by-law registered on title of a certain parcel in
17 1882.

18 And then if I can take you to
19 paragraph 33 of your affidavit, you say that we
20 don't know whether that by-law establishes or
21 closes Wild Turkey Road; is that fair?

22 A. Correct, correct.

23 20 Q. Okay. So that's the
24 third possibility.

25 Now the fourth possibility, if

1 we can go back to page 6 of your affidavit, under
2 heading B.2, we have the possibility that Wild
3 Turkey Road is a quarter sessions road; is that
4 correct?

5 It is page 6. There is a
6 heading, it is under paragraph 18, it says
7 "evidence of Wild Turkey Road" --

8 A. Oh, I am sorry.

9 21 Q. " -- as a quarter
10 sessions road"?

11 A. Yes.

12 22 Q. So I am going to call
13 that the fourth possibility.

14 A. Okay.

15 23 Q. And then the fifth
16 possibility, if we can go to paragraph 24 of your
17 affidavit, you say that there is a by-law from
18 1850.

19 And then in the following
20 paragraph you say "this may be Wild Turkey Road".

21 So the fifth possibility is
22 that there is a road opened by -- that Wild Turkey
23 Road is a road opened by a by-law from 1850?

24 A. It is a possibility.

25 24 Q. And that may have been

1 subsequently closed?

2 A. We don't have -- it's
3 inconclusive.

4 25 Q. Right. So you agree with
5 me that it might have been?

6 A. It might have been, but
7 we don't have evidence of that.

8 26 Q. And it might not have
9 been as well.

10 Okay, so those are the five
11 possibilities that I took from your affidavit.
12 Have I missed any?

13 A. I don't believe so.

14 27 Q. So these are the five
15 possibilities that the city says might be
16 applicable to Wild Turkey Road.

17 Good.

18 If we can go to the first
19 possibility.

20 MR. FAITH: Sorry, I didn't
21 hear an answer.

22 THE WITNESS: Yes.

23 BY MR. MAX:

24 28 Q. All right, you have to
25 say "yes" or "no" because the nods won't be in the

1 transcript. Thanks.

2 So if we can go to the first
3 possibility, which is that it's an unopened road
4 allowance.

5 So I take it that if this is
6 true, the city does have jurisdiction over Wild
7 Turkey Road?

8 A. If it is true, yes. They
9 would have jurisdiction over an unopened road
10 allowance.

11 29 Q. And if that was the case,
12 the city could authorize Wild Turkey Road to be
13 cleared, upgraded or widened within the bounds of
14 the road allowance?

15 A. Yes.

16 30 Q. And it could do that
17 without assuming or opening the road?

18 A. Yes.

19 31 Q. And I take it that if
20 that was the case, WPD would need the city's
21 permission to upgrade or widen the road?

22 A. Under the Municipal Act,
23 they have to have express permission from the
24 municipality to alter any municipally road or
25 allowances, regardless of their status.

1 32 Q. Great, okay.

2 So but it's possible if WPD
3 wanted to widen the road that WPD or the city
4 might need permission of landowners in bordering
5 properties?

6 A. Could you ask that
7 question again? I am sorry, I am not really sure.

8 33 Q. I am happy to.

9 Sure, so WPD or the city might
10 also need the permission of landowners of
11 properties bordering Wild Turkey Road if they were
12 to widen the road?

13 A. I don't know why they
14 would need permission from abutting landowners to
15 alter municipal roads.

16 34 Q. Okay, so what if it was
17 being widened beyond the road allowance?

18 A. We don't have
19 jurisdiction over property that's not ours, so --

20 35 Q. Right. So in that case,
21 WPD would need permission of abutting landowners
22 maybe, but --

23 A. And that would be
24 separate and distinct from anything that -- we
25 would only deal with the jurisdiction of the road.

1 36 Q. Perfect. And there is
2 nobody else that the city would need permission
3 from, it would just be the city because it's a
4 road allowance that's in the city's jurisdiction?

5 A. If it's an established
6 road allowance within our jurisdiction, no.

7 37 Q. So I take it, then, that
8 if the city -- under this possibility of an
9 unopened road allowance --if the city cooperated
10 and if abutting landowners cooperated in any way
11 necessary, WPD would be able to upgrade, use and
12 widen Wild Turkey Road?

13 A. If the city agreed and it
14 was established that it is in the city ownership,
15 then they could do it.

16 38 Q. If the city agreed and if
17 it was -- let me just be clear here.

18 A. Sure.

19 39 Q. If it was an unopened
20 road allowance, and the city cooperated --

21 A. Yes.

22 40 Q. -- then WPD could
23 upgrade, use and widen the road?

24 A. Yes.

25 MR. COLE: I don't want to

1 interrupt you because I don't have a problem with
2 your questions, but you are really merging two
3 issues which is jurisdiction and location.

4 I think it's clear from her
5 evidence that in addition to the jurisdiction
6 issue, the actual location of this road isn't
7 clear. And so when she says "yes, if the city
8 agrees it can be upgraded", I am not going to
9 contradict her, that is her evidence and I don't
10 have an issue with it. But I want the evidence to
11 be clear at this point that you are not asking
12 about location, because you would still have to be
13 within the proper boundaries of the road.

14 BY MR. MAX:

15 41 Q. Sorry, and this is why I
16 asked you if there was a road allowance and WPD
17 wanted to do something outside the bounds of the
18 road allowance you said that would not be a
19 concern of the city, that would be between WPD and
20 the abutting landowners; correct?

21 A. Correct.

22 42 Q. So that is why I said if
23 the city cooperated and if abutting landowners
24 cooperated then WPD could upgrade, use and widen
25 Wild Turkey Road; you would agree with that?

1 MR. COLE: My point wasn't so
2 much abutting landowners per se, but rather where
3 is the road over which there is jurisdiction.
4 That is the point I am raising.

5 The city has jurisdiction over
6 what it has. The question of where that is, where
7 that road is, is one of the two areas of comment
8 by this witness in her affidavit.

9 BY MR. MAX:

10 43 Q. Right, so if there was a
11 road allowance, and if Wild Turkey Road as it is
12 on the ground was within that road allowance, then
13 the city could authorize WPD to upgrade and use
14 the road?

15 MR. COLE: I think the point
16 is that the road allowance -- its location, quite
17 apart from jurisdiction, its location, I think she
18 is saying isn't clear. I just want your questions
19 to be clear on the record that that issue of
20 location is not the subject of what you are now
21 asking about.

22 BY MR. MAX:

23 44 Q. Well you would agree with
24 me that we know the location of what is Wild
25 Turkey Road on the ground, someone can point to

1 that?

2 A. Actually we don't know
3 the exact location of Wild Turkey Road and that is
4 why I can't answer the question definitively that
5 you are asking me. Because we really -- it's
6 inconclusive as to where that road is exactly
7 located.

8 45 Q. So on the ground right
9 now, there is -- you would agree with me that on a
10 piece of land somewhere there is something on the
11 ground? I think in your affidavit --

12 A. Yes.

13 46 Q. -- you call it "Wild
14 Turkey Road as it appears on the ground"?

15 A. Yes.

16 47 Q. So if Wild Turkey Road as
17 it appears on the ground is within the road
18 allowance, and you say you don't know where the
19 road allowance is right now, but if it were within
20 the road allowance then the city would have
21 jurisdiction of Wild Turkey Road as it is on the
22 ground; is that correct?

23 A. I think the issue -- yes,
24 but a road allowance can be many different things,
25 can be many different sizes. And we just don't

1 know how big this road is and exactly where it's
2 located, it's inconclusive.

3 48 Q. So if Wild Turkey Road as
4 it appears on the ground was within the road
5 allowance, then the city would have jurisdiction?

6 A. Yes, if they owned it.

7 49 Q. If who owned it?

8 A. The city.

9 50 Q. Which it would if it was
10 within its jurisdiction?

11 A. Yes.

12 51 Q. And if Wild Turkey Road
13 as it appears on the ground was not in what they
14 are calling the road allowance, which we don't
15 know where it is possibly, then Wild Turkey Road
16 as it appears on the ground wouldn't, in fact, be
17 an unopened road allowance?

18 A. Correct.

19 52 Q. It would be one of the
20 other possibilities that you list?

21 A. Correct.

22 53 Q. So I want to go to your
23 second possibility now, which is that Wild Turkey
24 Road is a forced road across private lands?

25 A. What paragraph is that?

1 54 Q. I am going to take you to
2 that. So if you can turn up paragraph 27 of your
3 affidavit.

4 You say:

5 "The city does not have
6 authority over a forced road
7 unless it is dedicated to the
8 public as a highway,
9 expressedly or impliedly, and
10 was accepted by the
11 municipality. At this time
12 the city has no evidence on
13 whether dedication or
14 acceptance of this portion of
15 Wild Turkey Road occurred."[as
16 read]

17 A. Correct.

18 55 Q. So you would agree with
19 me that this statement in your affidavit raises
20 two distinct issues if Wild Turkey Road is a
21 forced road.

22 The first is that is an issue
23 where there has not been dedication or acceptance;
24 and the second issue is where there has been
25 dedication or acceptance.

1 So I am going to go through
2 both of those distinctly, but would you agree with
3 me that your affidavit raises those two
4 possibilities?

5 A. I disagree. I think I am
6 saying conclusively that it is inconclusive, the
7 current status of that road.

8 56 Q. Sure, but you have
9 raised -- so we have established that you have
10 five possibilities for what Wild Turkey Road can
11 be and one of those, which we are turning to now,
12 is that it is a forced road across private lands
13 and you agree that is possible?

14 A. Yes.

15 57 Q. Okay. So I am saying,
16 according to paragraph 27, if Wild Turkey Road was
17 a forced road, there could either have been
18 dedication or acceptance or there might not have
19 been those two things; is that fair?

20 A. I agree.

21 58 Q. Okay, good. So I want to
22 just look specifically at the first scenario where
23 there has been no dedication and acceptance. And
24 you'd agree with me if that is the case, City of
25 Kawartha Lakes wouldn't have jurisdiction over

1 Wild Turkey Road as it appears on the ground?

2 A. Correct.

3 59 Q. So in that case, the only
4 permission that WPD would need to upgrade, use or
5 widen the road would be the owners of the land on
6 which that road is passing?

7 A. If it's a forced road?

8 60 Q. Yes.

9 A. Correct.

10 61 Q. So now I want to look at
11 the second possibility where there has been
12 appropriate dedication and acceptance.

13 And if that's the case, the
14 city would have jurisdiction over Wild Turkey Road
15 but only on the historically travelled path of the
16 road; is that correct? I am going to take you to
17 paragraph 28 of your affidavit.

18 A. Okay.

19 62 Q. So, okay you agree with
20 me or? So let me read this to you, okay:

21 "Even if there has been
22 dedication and acceptance, the
23 road cannot be widened by a
24 municipality without acquiring
25 the lands for the widening as

1 a forced road is no wider than
2 the path of the road
3 historically travelled by the
4 public."[as read]

5 So in that case, the city only
6 has jurisdiction on the historically travelled
7 path of the road; is that correct?

8 A. Correct.

9 63 Q. And the city would not
10 have jurisdiction on the land on either side of
11 the road -- of the historically travelled part of
12 the road?

13 A. Correct.

14 64 Q. So in that case, the city
15 could authorize the use of Wild Turkey Road on the
16 historically travelled portion?

17 A. You are saying if there
18 has been acceptance and applied dedication?

19 65 Q. Yes.

20 A. Yes, correct.

21 66 Q. And the city could
22 authorize upgrades?

23 A. Yes.

24 67 Q. And if the abutting
25 landowners or the landowners on either side gave

1 all the necessary cooperation, then the city could
2 also widen the road?

3 MR. COLE: The city could
4 widen the road?

5 MR. MAX: Yes.

6 MR. COLE: Or WPD could widen
7 the road?

8 BY MR. MAX:

9 68 Q. Well the city could
10 authorize WPD to widen the road?

11 A. I am not sure that I
12 could -- umm... Are you assuming that they would
13 be required to -- I am not in the -- it would be a
14 council decision as to whether or not they would
15 want to acquire lands to widen that road. And so
16 for the purpose of this I couldn't answer that
17 question. I don't represent council in that way.
18 I don't have authorization --

19 69 Q. Sorry, I didn't mean to
20 interrupt you.

21 A. As a staff member, I have
22 no authorization, so I can't go down that path as
23 to whether council would or would not want to
24 acquire land as part of a forced road.

25 70 Q. Sorry, I understand that.

1 But I am asking you: If council did cooperate, if
2 council said yes and if the abutting landowners
3 said yes, then the city could authorize the road
4 to be widened; is that fair?

5 A. I guess where I am having
6 difficulty is these are hypotheticals and in land
7 it is either "yes" or "no". And, again, this
8 would have to be a council decision because there
9 is operational and maintenance costs that are
10 involved in that.

11 So, yes, they would have to
12 have a business case, and it would have to be
13 approved by council.

14 But for the purpose of this
15 road that is in front of us now, it's a
16 hypothetical, it's difficult for me to answer that
17 question definitively for you.

18 71 Q. I am just going to ask
19 the question again.

20 If Wild Turkey Road was a
21 forced road, and council --

22 MR. COLE: Can I make this
23 easy?

24 MR. MAX: Yes.

25 MR. COLE: If the city has

1 jurisdiction and if all of the requisite criteria
2 are satisfied, and we all know about the municipal
3 processes involved in that regard, and the
4 landowners agree, then the road would be upgraded
5 and widened. I think that is what you are driving
6 at.

7 MR. STAVRAKOS: Presumably the
8 form of agreement is appropriate, right.

9 MR. COLE: Yes, so that is the
10 city's position.

11 BY MR. MAX:

12 72 Q. Do you agree with that?

13 A. Yes, yes.

14 73 Q. Thank you.

15 So now I want to turn to the
16 third possibility that you raise, and if I can
17 take you to paragraph 33 of your affidavit.

18 So the third possibility is the
19 by-law from 1882?

20 A. Correct.

21 74 Q. And according to this
22 paragraph, the by-law, which we can't read, may
23 either open or close Wild Turkey Road; is that
24 fair?

25 A. Correct, yes.

1 75 Q. Whether the by-law opens
2 or closes Wild Turkey Road, you'd agree with me
3 that as long as WPD has the cooperation of the
4 city and of surrounding landowners, WPD could use,
5 upgrade and widen Wild Turkey Road?

6 A. Could you ask that
7 question again, please?

8 76 Q. Sure.
9 Whether the by-law opens or
10 closes Wild Turkey Road, the 1882 by-law, you say
11 --

12 A. Yeah.

13 77 Q. -- you say it may open a
14 public highway or close the highway.

15 So if the by-law either opened
16 or closed it, you'd agree with me that as long as
17 WPD had the cooperation of the city and of the
18 surrounding landowners, that WPD could use,
19 upgrade and widen Wild Turkey Road?

20 A. Yes.

21 MR. COLE: Again --

22 THE WITNESS: As long as it's
23 not been conveyed as part of the closure, then we
24 would still have jurisdiction over it.

25 BY MR. MAX:

1 78 Q. If it was not conveyed?

2 A. Still in the jurisdiction
3 of the city.

4 79 Q. And if it had been
5 conveyed, it would be conveyed to one of the
6 landowners whose property was abutting?

7 A. That is the normal course
8 of business, correct.

9 MR. COLE: I think this gets
10 back to the same issue I raised with you earlier.
11 The location of the road may be different than its
12 actual presence on the ground today. So I don't
13 want to keep repeating myself, but your questions
14 need to be clear.

15 So when you ask, you know, 'In
16 this event could the road be upgraded and
17 widened?' And she says yes or no, it's on the
18 assumption that what you are referring to is the
19 road as per the by-law or as per survey or
20 whatever as distinct from what is physically
21 present or observable on the ground because that
22 is important in the case.

23 BY MR. MAX:

24 80 Q. Sure, but if it's not one
25 of those -- if the by-law from 1882 isn't talking

1 about Wild Turkey Road as it is physically on the
2 ground, then it has to fall into one of the other
3 categories that we have discussed?

4 A. Correct, but it's
5 inconclusive.

6 81 Q. Sorry, what's
7 inconclusive?

8 A. The location of the road
9 and the status of the road.

10 82 Q. But I just want you to
11 agree that -- you have agreed that it is one of
12 the five?

13 A. It would be one of the
14 five.

15 83 Q. So if what was on the
16 ground didn't fall under the by-law from 1882, it
17 would have to be one of the other four things?

18 A. Yes.

19 84 Q. Okay. So under the
20 possibility of the by-law, you agree that as long
21 as WPD had the cooperation of the city, there is
22 nobody other than the adjoining landowners, there
23 is no one else the city would need permission from
24 to allow WPD to use, upgrade or widen the road?

25 A. I would say that's

1 inconclusive.

2 It would require research as to
3 if there is any underlying restrictions,
4 restricted covenants, easements, rights of way
5 that are registered on title or revealed as part
6 of research, due diligence.

7 85 Q. So if the -- I guess we
8 will have to go through all the possibilities,
9 then.

10 So if WPD, as it appears on the
11 ground -- not WPD. If Wild Turkey Road as it
12 appears on the ground was opened by a by-law from
13 1882, then the city would have jurisdiction over
14 that road; is that correct?

15 A. If that establishes it,
16 correct.

17 86 Q. And if it closed the
18 road, then the city wouldn't have jurisdiction
19 over the road?

20 A. The city can close a road
21 but retain ownership.

22 87 Q. And if it retained
23 ownership, it would have jurisdiction over the
24 road?

25 A. Correct.

1 88 Q. So in either case, if the
2 city agreed, WPD could widen, use and upgrade the
3 road?

4 A. Correct.

5 89 Q. So now I want to turn to
6 your fourth possibility, which is that Wild Turkey
7 Road is a road created by magistrates in quarter
8 sessions. And that is something you discuss at
9 paragraph 29 of your affidavit.

10 So you say -- so the city does
11 have jurisdictions over quarter sessions roads; is
12 that correct?

13 A. Correct.

14 90 Q. Now, if a survey
15 indicated that Wild Turkey Road, as it appeared on
16 the ground, matched the road created by the
17 magistrates in the quarter road sessions, then the
18 city would have authority over the road?

19 A. Correct.

20 91 Q. And in that case, the
21 city could authorize Wild Turkey Road be upgraded?

22 A. Correct.

23 92 Q. And it could be -- the
24 city could authorize Wild Turkey Road to be
25 widened to the extent that the widening didn't

1 exceed the bounds of the road as created by the
2 magistrates?

3 A. Correct.

4 93 Q. And if the widening
5 exceeded the bounds of the road as defined by the
6 magistrates, then WPD would need permission from
7 the landowners on either side or on the side that
8 they were trying to widen?

9 A. Correct.

10 94 Q. So in that case, WPD
11 would need the city's permission to upgrade and
12 widen the road and it would need the permission of
13 the bordering landowners?

14 A. Correct.

15 95 Q. And there is nobody else
16 that WPD would need permission from?

17 A. Again, unless there is --
18 under due diligence it's revealed that there is
19 rights of way, of restricted covenants on that
20 road.

21 96 Q. And you have no, you have
22 no evidence of that? You have come across nothing
23 to that effect?

24 A. The city has not -- it's
25 inconclusive. The city has not done extensive

1 research on this road.

2 97 Q. So I want to turn to
3 Possibility 5, which is the by-law from 1850.

4 And if I can take you to
5 paragraph 25 of your affidavit -- I guess I will
6 take you, sorry, go to paragraph 24.

7 And there you say that there is
8 a road by-law from 1850 that established and
9 confirmed a number of roads. And then if we turn
10 to the next paragraph, you say this may be Wild
11 Turkey Road.

12 So if it turns out that this
13 isn't Wild Turkey Road, then you'd agree that the
14 by-law is irrelevant because there is only four
15 other possibilities remaining?

16 A. I would say that it is a
17 possibility. But it's inconclusive.

18 98 Q. Right, but I am saying if
19 it turns out that this by-law is not referring to
20 Wild Turkey Road as it is on the ground, then --

21 MR. COLE: Sorry, talking
22 about not referring to Wild Turkey or not
23 referring to Wild Turkey as it is on the ground?

24 MR. MAX: As it is on the
25 ground.

1 MR. COLE: You mean it is
2 referring to Wild Turkey but with a different
3 location?

4 MR. MAX: No, that's not what
5 I mean. If it turns out that the by-law is not
6 talking about Wild Turkey Road as it is on the
7 ground.

8 MR. COLE: What does that
9 mean? Is the question if the by-law does not
10 refer to Wild Turkey period? Or is the question
11 if the by-law does not refer to Wild Turkey as per
12 its present location on the ground? What is your
13 question?

14 MR. MAX: Well we have agreed
15 that there is something on the ground.

16 MR. COLE: Everybody agrees
17 with that.

18 MR. MAX: And this by-law is
19 either talking about that or it is not talking
20 about that.

21 MR. COLE: Now but it could be
22 talking about Wild Turkey Road but in a different
23 location.

24 MR. MAX: Then it wouldn't be
25 talking about what is there. It would be talking

1 about another thing, Wild Turkey Road 2, say.

2 MR. COLE: Well it could be
3 moved, you know, an inch or 5 yards or 10 yards or
4 50 yards, it might meander, it might be perfectly
5 straight, I don't know.

6 I am just saying that -- it is
7 not what I am saying. I think what the witness is
8 saying is that whatever Wild Turkey is, it is
9 unclear whether it is physically what is on the
10 ground or whether it is something different, in a
11 different location.

12 MR. MAX: I am talking about
13 the thing that is physically on the ground right
14 now.

15 MR. COLE: Then I say just be
16 clear, I am not objecting.

17 MR. MAX: Okay, that's fine, I
18 understand.

19 MR. COLE: So what is the
20 question?

21 BY MR. MAX:

22 99 Q. If the by-law is not
23 referring to Wild Turkey Road as it is on the
24 ground, then what is on the ground must fall under
25 one of the four other possibilities that we have

1 discussed?

2 A. Yes.

3 100 Q. And if I can take you to
4 paragraph 30 of your affidavit.

5 MR. COLE: Just to be clear,
6 it could also be a combination of one or more of
7 these things. That is why I am trying just to
8 identify to you this overarching issue of
9 location.

10 MR. FAITH: To be fair, I
11 think the witness has given an answer. It is
12 clear to her obviously, she has answered.

13 MR. COLE: I am just telling
14 you what the city's position is as a matter of law
15 and argument, so I think we need to be fair to the
16 witness. She has identified already the
17 overarching concern of location, and every time
18 you put a question like this, which is unclear and
19 ambiguous and which I need to clarify, the issue
20 of location comes up and then it disappears and
21 then you think you get an answer and the
22 transcript is horrible.

23 MR. FAITH: I think you are
24 putting argument on the record. The question
25 wasn't unclear. You asked it to be rephrased and

1 it was rephrased in a way the witness gave a clear
2 response to.

3 MR. COLE: Well witnesses
4 often answer questions in respect of an issue --

5 MR. FAITH: It was reprhased
6 in the way you suggested.

7 MR. COLE: Well, I have got my
8 objection then and if we need to deal with it
9 later we will, but you have my concern.

10 BY MR. MAX:

11 101 Q. So I just want to take
12 you again to paragraph 30. You say that the
13 uncertainty in this possibility arises from the
14 need to determine the route and width of the road
15 and the need to determine whether there is a
16 by-law closing the road?

17 A. Correct.

18 102 Q. If the 1850s by-law is
19 referring to Wild Turkey Road as it is on the
20 ground, then whether the road remains open or
21 closed so long as WPD had permission from the city
22 and surrounding landowners it could use, upgrade
23 and widen Wild Turkey Road?

24 A. I think -- I would ask
25 you to clarify that question.

1 103 Q. Sure.

2 A. I am not sure I
3 understand exactly what you are asking me.

4 104 Q. Okay, well why don't we
5 go through it, through both of the possibilities
6 if the road remains open or if the road remains
7 closed.

8 So let's start with it being
9 open. If the 1850s by-law is referring to Wild
10 Turkey Road as it is on the ground --

11 A. Um-hmm.

12 105 Q. -- then if it was still
13 opened, if nothing else had closed the road, if
14 the city gave permission and if surrounding
15 landowners gave permission, WPD could use, upgrade
16 and widen the road?

17 A. Yes.

18 106 Q. Now if the road was
19 closed, so the 1850s by-law was referring to Wild
20 Turkey Road as it is on the ground but it was
21 subsequently closed, then, again, WPD would just
22 need the permission of the city or surrounding
23 landowners to use, upgrade or widen?

24 A. I find the question
25 difficult that I have already asked it that there

1 needs to be due diligence. I can't definitively
2 say that those are the only two people or the only
3 two consultations that would be required in order
4 to open that road regardless of whether it was
5 opened or closed by by-law.

6 MR. FAITH: Can we go off the
7 record for a second.

8 --- Off-the-record discussion.

9 MR. COLE: What has been put
10 in issue through the affidavit of the deponent
11 here today, Diane McFarlane, is whether the city
12 has jurisdiction to grant the opening or access or
13 upgrading to Wild Turkey Road as requested by WPD
14 prior to this application and as a result of
15 whatever order may be made. The affidavit
16 identifies concerns in that respect.

17 What we have discussed off the
18 record is this: That if the city has jurisdiction
19 100 per cent, then clearly it has jurisdiction.
20 If it turns out that landowners are the owners of
21 what we call Wild Turkey Road 100 per cent, then
22 they would. And if it's combination of the two,
23 then in the event that the city and landowners
24 consent, then in the context of this discussion
25 there would be no impediment to upgrading and

1 widening.

2 And just so that I am clear, we
3 are talking about the entitlement or the power to
4 consent. We are not saying that the city would
5 consent or wouldn't consent, we are simply talking
6 about jurisdictional issues.

7 I might go further and say that
8 I don't think we object to the characterization of
9 five options and their sub categories. And if it
10 expedites matters, you can take my general
11 comments as responsive to whatever additional
12 questions you have.

13 MR. MAX: I appreciate that.

14 MR. COLE: Okay.

15 BY MR. MAX:

16 107 Q. So there are exactly five
17 property parcels bordering Wild Turkey Road
18 between Ballyduff Road and Gray Road; is that
19 correct?

20 A. Correct.

21 108 Q. And if I can take you to
22 paragraph 12 of your affidavit.

23 And in paragraph 13 you list
24 these pins, and I am just going to refer to them
25 by the last three digits. There is 158, 159, 160,

1 161 and 164; is that correct?

2 A. Correct.

3 109 Q. So parcels 158, 160 and
4 164 are lands leased by WPD for the project?

5 A. Correct.

6 110 Q. And you are not concerned
7 about those landowners cooperating with WPD and
8 the city?

9 REF MR. COLE: Just a second, I
10 don't think she can speak to that issue. I am
11 happy to talk to you about that off line, but I
12 don't think she can speak to that issue.

13 BY MR. MAX:

14 111 Q. Okay, but you state that
15 pins 159 and 161 are not leased by WPD?

16 A. Correct.

17 112 Q. So based on our
18 discussion before, other than the cooperation of
19 the city, the only obstacles to the use, upgrading
20 and widening of Wild Turkey Road would come from
21 the owners of parcels 159 and 161?

22 MR. STAVRAKOS: So why 159 and
23 161?

24 MR. MAX: Because those are
25 the three that aren't leased by WPD.

1 REF MR. STAVRAKOS: No, but you are
2 now assuming that there is appropriate evidence of
3 consent. She can't answer to the other
4 leaseholds. We don't know what they have agreed
5 to. She can't answer any of those questions.

6 BY MR. MAX:

7 113 Q. Okay, so if I can take
8 you to Tab B of your affidavit, please. At
9 page 216. If you can just flip over to page 216,
10 please, the big numbers at the bottom, and you
11 have to flip it sideways.

12 This is a parcel register for
13 property 161; is that correct?

14 A. Correct.

15 114 Q. And on the left side,
16 under "owners names", it says "the Corporation of
17 the Township of Manvers"?

18 A. Correct.

19 115 Q. So you would agree with
20 me that this piece of land is owned by the City of
21 Kawartha Lakes?

22 A. It appears as part of the
23 pin page.

24 116 Q. Okay. And --

25 MR. FAITH: Sorry, is that a

1 "yes"?

2 THE WITNESS: Yes.

3 BY MR. MAX:

4 117 Q. Yes.

5 And you'd agree with me that

6 pin 159 is owned by Paul Preston?

7 A. Correct.

8 118 Q. Until recently, the
9 city's position was that Wild Turkey Road was an
10 unopened road allowance; correct?

11 A. Sorry, could you repeat
12 the question?

13 119 Q. Until recently, the
14 city's position was that Wild Turkey Road was an
15 unopened road allowance?

16 A. It is signed as an
17 unassumed road, which is different from an
18 unopened road allowance.

19 120 Q. Can you return to
20 paragraph 6 of your affidavit, please?

21 So you say:

22 "Up until recently, the city
23 believed that Wild Turkey Road
24 was an unopened road
25 allowance."[as read]

1 A. Right.

2 121 Q. So you would agree with
3 me?

4 A. Yes.

5 122 Q. The city has since
6 received new information about Wild Turkey Road?

7 A. Yes.

8 123 Q. And because of that
9 information, your position is that the status of
10 Wild Turkey Road is now unclear?

11 A. Correct.

12 124 Q. So one piece of new
13 information the city received is that by-law from
14 1850 that we discussed?

15 A. Correct.

16 125 Q. And that was recently
17 discovered by a staff member?

18 A. Correct.

19 126 Q. And when was that
20 discovered?

21 A. I can't -- it was within
22 the last few months, but I don't have the e-mail
23 from that.

24 127 Q. So February and March,
25 sometime in February, sometime in March?

1 A. I would say, yes.

2 128 Q. And another new piece of
3 information you discovered is an illegible by-law
4 from 1882?

5 A. Correct.

6 129 Q. And when was that
7 discovered?

8 A. Are you referring to the
9 quarter sessions application?

10 130 Q. No. So let's go to
11 paragraph 16 of your affidavit.

12 You say:

13 "The parcel register also
14 indicates a public highway
15 by-law passed by the Township
16 Manvers was registered in
17 1882."[as read]

18 When did you discover that?

19 A. That would have been
20 included with the clerk's department discovery of
21 the 1850 by-law.

22 131 Q. So at the same time as
23 the other one?

24 A. Yes.

25 132 Q. So you made those two

1 discoveries after Mr. Wimellbacher and the city's
2 representatives testified at the ERT hearing?

3 A. Correct.

4 133 Q. And you also knew them
5 after WPD commenced this application?

6 A. I am not -- oh. Yes,
7 correct. Sorry.

8 134 Q. So in addition to those
9 two discoveries of the by-laws, you have the
10 information that was given to you by
11 Mr. Wimellbacher?

12 A. Correct.

13 135 Q. And it's the city's
14 position that the information he provides makes
15 the status of Wild Turkey Road uncertain?

16 A. Correct.

17 136 Q. He told you in November
18 of 2014 that he had evidence that Wild Turkey Road
19 was a forced road. If I can take you to
20 paragraph 8 of your affidavit. Paragraph 8.

21 A. Okay.

22 137 Q. "Recently in
23 November 2014 -- "

24 A. Yes, that is correct.

25 138 Q. Yes, okay.

1 A. That is correct, yes.

2 Sorry.

3 139 Q. Okay. And he also told
4 you in November about evidence that Wild Turkey
5 Road was a quarter sessions road?

6 A. Correct.

7 140 Q. So the only sources of
8 uncertainty that you are aware of are the two
9 by-laws and the issues that Mr. Wimellbacher told
10 you about in November?

11 A. Can you rephrase that
12 question for me, please?

13 141 Q. Sure.

14 A. Thank you.

15 142 Q. The sources of
16 uncertainty that you were aware of are the two
17 potential by-laws and the issues that
18 Mr. Wimellbacher told you about in November?

19 A. Correct.

20 143 Q. You attached the ERT
21 decision concerning the Sumach Ridge project to
22 your affidavit?

23 A. Correct.

24 144 Q. And in your affidavit you
25 say that WPD was a party to that appeal?

1 A. Correct.

2 145 Q. And you did so twice,
3 once in paragraph 9 in the section concerning the
4 evidence of a forced road --

5 A. Correct.

6 146 Q. -- and another time in
7 the section about the evidence of a quarter
8 sessions road in paragraph 22?

9 A. Correct.

10 147 Q. And that's because it's
11 your view that WPD shouldn't be surprised by the
12 uncertainties with Wild Turkey Road --

13 MR. COLE: Sorry, say that
14 again.

15 BY MR. MAX:

16 148 Q. It's your view that WPD
17 shouldn't be surprised by the uncertainties
18 regarding Wild Turkey Road?

19 A. I have no communication.

20 MR. COLE: What are you
21 directing her to?

22 MR. MAX: Paragraph 22.

23 THE WITNESS: That I attached
24 the ERT decision.

25 MR. COLE: Well the decision

1 is attached. What is the question?

2 MR. MAX: I am asking whether
3 it's the witness' view that WPD shouldn't --
4 should be aware of the uncertainties regarding
5 Wild Turkey Road.

6 MR. COLE: Well can you answer
7 that?

8 THE WITNESS: How would I
9 know?

10 MR. COLE: She can speculate
11 based on the reasons and so on, but.

12 BY MR. MAX:

13 149 Q. You have put it twice in
14 your affidavit.

15 MR. COLE: Where?

16 MR. STAVRAKOS: She says that
17 he was aware of what he was aware of, the
18 Wimellbacher information.

19 THE WITNESS: Yes.

20 MR. COLE: The word "surprise"
21 "surprised" isn't in here. It just says that WPD
22 was a party and would have been aware of this
23 testimony.

24 BY MR. MAX:

25 150 Q. Would have been aware of

1 this testimony?

2 A. Right.

3 MR. STAVRAKOS: That is all it
4 says.

5 BY MR. MAX:

6 151 Q. I would like to go to Ron
7 Taylor's affidavit, Volume 2, Tab R, and page 959.

8 This is a letter addressed to
9 you. It says "Attention Diane McFarlane, land
10 management coordinator", and it is from Stikeman
11 Elliott, which is law firm.

12 A. Correct.

13 152 Q. And if I can just read a
14 portion of the first paragraph of the letter.

15 It says:

16 "We write to request and
17 initiate the application
18 process to allow WPD to make
19 certain road improvements to
20 Wild Turkey Road from the
21 point of intersection with
22 Ballyduff Road and continuing
23 840 meters northward."[as
24 read]

25 A. Yes.

1 153 Q. So you'd agree with me
2 that you knew at least by the date of this letter
3 May 31st, 2013, that WPD would be seeking to
4 upgrade and widen Wild Turkey Road?

5 A. Correct.

6 154 Q. And the first time the
7 city told WPD about any of the uncertainties that
8 we have discussed today were in your affidavit on
9 this application sworn March 9th, 2015?

10 MR. COLE: Sorry, the first
11 time that the city did?

12 MR. MAX: Yes, told WPD about
13 the uncertainties that we have discussed.

14 MR. COLE: I think that is a
15 fair statement.

16 BY MR. MAX:

17 155 Q. And now I would like to
18 take you to Tab Q of the same large Ron Taylor's
19 Volume 2. And if I can take you to page 919 at
20 the bottom. I see you are already there.

21 This is a council report and
22 it's dated February 5th, 2013, it is Report Number
23 Plan 2013-003?

24 A. Correct.

25 156 Q. And the subject line says

1 "proposal to develop a 10.25 MW on shore wind farm
2 in the geographic Township of Manvers"?

3 A. Correct.

4 157 Q. And its author was Linda
5 Russell?

6 A. Correct.

7 158 Q. And it is signed at the
8 bottom by her department head, which is Ron
9 Taylor?

10 A. Correct.

11 159 Q. And the report states
12 that -- it makes recommendations on the first
13 page. And the third recommendation is that the
14 council's recommendations together with this
15 specific report be forwarded to the province; is
16 that fair?

17 A. Correct.

18 160 Q. Can I take you to
19 page 926 of your affidavit?

20 MR. COLE: 926 of Mr. Taylor's
21 affidavit.

22 MR. MAX: Yes, sorry. Pardon
23 me, Mr. Taylor's affidavit.

24 BY MR. MAX:

25 161 Q. At the top there is a

1 heading, it says "consultations"?

2 A. Correct.

3 162 Q. And there is a subheading
4 "land management"?

5 A. Correct.

6 163 Q. And that is the
7 department which you head, land management?

8 A. Correct.

9 164 Q. So if I can just read you
10 the first sentence. It says:

11 "Wild Turkey Road is a public
12 road allowance in the former
13 Township of Manvers."[as read]

14 A. Correct.

15 165 Q. And those are comments
16 provided by your department?

17 A. Yes.

18 166 Q. And were you involved in
19 those consultations?

20 A. Yes.

21 167 Q. And you knew that these
22 comments would be used in the approval process for
23 the project?

24 A. Correct.

25 168 Q. So in 2014, you knew that

1 an ERT hearing was going to take place regarding
2 the project?

3 A. Correct.

4 169 Q. And when did you come to
5 know that?

6 A. I couldn't tell you, I am
7 sorry. I wasn't involved in it, and I wasn't
8 asked to comment on it. So I am unsure as to when
9 that would --

10 170 Q. But the latest, you would
11 agree with me, that the latest you could have
12 known was November 2014?

13 A. Correct.

14 171 Q. And Mr. Taylor testified
15 on behalf of the city at the ERT hearing?

16 A. Correct.

17 172 Q. On December 11th, 2014?

18 A. Correct.

19 173 Q. And I take it that you
20 would have discussed the hearing with him prior to
21 his testimony?

22 A. Mr. Taylor, I reported
23 to. He did not discuss it with me.

24 174 Q. So you report to
25 Mr. Taylor?

1 A. I no longer report to
2 Mr. Taylor, but at the time.

3 175 Q. At the time you did?

4 A. At the time of the ERT
5 hearing I did report to him, and he did not
6 discuss the ERT hearing with me.

7 176 Q. And if you reported to
8 him, I take it you would have told him about this
9 new evidence regarding Wild Turkey Road?

10 A. The new evidence from?

11 177 Q. From Mr. Wimellbacher?

12 A. Correct.

13 MR. COLE: Excuse me, she said
14 she only became aware of the evidence after the
15 hearing.

16 MR. MAX: She did not say
17 that.

18 MR. COLE: Sure, she did.

19 MR. FAITH: No, she didn't.

20 MR. COLE: When did you become
21 aware of this issue?

22 THE WITNESS: When
23 Mr. Wimellbacher brought it to me in
24 November 2014.

25 MR. COLE: Okay, was it

1 during, before or after the hearing; do you know?

2 THE WITNESS: I don't know the
3 hearing dates.

4 MR. COLE: All right, I stand
5 corrected.

6 THE WITNESS: I was not
7 involved in the ERT hearing, so I don't -- I am
8 sorry, I don't know the hearing dates for the ERT.

9 BY MR. MAX:

10 178 Q. But you agreed with me
11 that Ron Taylor testified on December 11th, 2014.

12 A. I don't know the dates
13 that Mr. Taylor testified, I am sorry. He
14 testified on -- I can confirm he testified on
15 behalf of the city to the ERT, what days of his
16 testimony or any of the other members that
17 testified for the city, I was not involved.

18 179 Q. Okay, but you have no
19 reason to believe that he didn't testify on the
20 11th of December?

21 MR. COLE: Do you know what
22 day he testified?

23 THE WITNESS: No, I honestly
24 don't know.

25 BY MR. MAX:

1 180 Q. You just told me on the
2 record that he did testify on December 11th. Do
3 you take that --

4 A. No, I did not know when
5 Mr. Taylor testified on behalf of the city.

6 MR. FAITH: Can we just go off
7 the record for a second.

8 --- Off-the-record discussion.

9 BY MR. MAX:

10 181 Q. Did you take the evidence
11 from Mr. Wimellbacher to Ron Taylor at any point
12 prior to his testimony at the ERT?

13 A. I took the evidence that
14 Mr. Wimellbacher gave to me, whether it was -- I
15 do not know the dates that Mr. Taylor testified,
16 whether it was before or after that -- it was when
17 Mr. Wimellbacher gave it to me that it was given
18 to Mr. Taylor.

19 182 Q. Can I take you to Tab A
20 of your affidavit, please, and I want to go to
21 page 69 of that record, paragraph 233.

22 "Mr. Taylor stated that he

23 disagreed with

24 Mr. Wimellbacher's

25 interpretation of the status

1 of Wild Turkey Road as a
2 quarter sessions road and
3 confirmed his understanding it
4 that it is an unopened road
5 allowance under the city's
6 jurisdiction."[as read]

7 A. I see that.

8 MR. COLE: Is there a question
9 there?

10 MR. MAX: Yes.

11 BY MR. MAX:

12 183 Q. In light of that
13 evidence, Mr. Taylor's response was consistent
14 with the city's position on Wild Turkey Road at
15 that time?

16 MR. COLE: Sorry, what is the
17 question?

18 BY MR. MAX:

19 184 Q. Was that the city's
20 position at the time?

21 REF MR. COLE: She can't testify to
22 that.

23 But I am going to tell you,
24 though, that I am, at the moment, not challenging
25 paragraph 233.

1 BY MR. FAITH:

2 185

Q. Well as far as this

3 witness knows, was that the city's position at the

4 time that Ron Taylor gave his evidence at the ERT

5 hearing?

6 MR. COLE: I have no reason to

7 disagree with that.

8 MR. FAITH: All right, that's

9 all. Why don't we take five minutes, okay.

10 MR. COLE: Sure.

11 --- Upon recess at 2:09 p.m.

12 --- Upon resuming at 2:20 p.m.

13 MR. COLE: I have a short

14 re-examination.

15 RE-EXAMINATION BY MR. COLE:

16 186

Q. I want to ask you a

17 little bit about timing. You said you had a

18 conversation with Mr. Wimellbacher sometime in

19 around November, and you went on to say that it

20 was right after that call that you spoke to

21 Mr. Taylor.

22 A. Correct.

23 187

Q. Now by the time you spoke

24 to Mr. Taylor, had you or any member of your team

25 taken steps to further investigate these issues?

1 A. No, we did not. We have
2 to receive direction.

3 188 Q. Next I want to talk to
4 you about the location of the road here and see if
5 I can just bring a little more clarity to it.

6 Would the city approve the use
7 or the upgrading of a road if the physical
8 location of that road is unclear or uncertain?

9 A. No.

10 189 Q. And, similarly, there was
11 some discussion about the by-laws and what was
12 legible and what was illegible, and in that
13 context of the documents that you looked at and
14 everything else that you have looked at, I want to
15 ask you another question about location.

16 Can you tell, today, on what
17 land this Wild Turkey Road is?

18 A. No.

19 MR. FAITH: I think we are
20 going to be entitled to cross-examine. I don't
21 think that the first question arose from
22 cross-examination. You have been asking questions
23 to clarify your position on the location issue
24 which didn't respond to any particular issue that
25 arose from the cross-examination, other than one

1 that you raised yourself. So I would like to ask
2 the witness a couple of questions to follow-up.

3 MR. COLE: I am not sure that
4 I agree with anything that you have said, but I am
5 not objecting to you asking some follow-up
6 questions.

7 MR. FAITH: All right.

8 RE-CROSS-EXAMINATION BY MR. FAITH:

9 190 Q. Mr. Cole asked you
10 whether if the location of the road was uncertain,
11 whether the city would give its permission for the
12 upgrading of that road --

13 A. Correct.

14 191 Q. -- you remember. And you
15 said "no"?

16 A. Correct.

17 192 Q. But the question we have
18 for you is if you knew that either private owners
19 owned the land or the city owned the land, then
20 you'd agree it would be possible to work out a way
21 in order to allow the upgrading of the road?

22 A. Are you asking me if it
23 was definitive, the ownership?

24 193 Q. Yes.

25 A. Then, yes.

1 If the ownership of the road
2 was definitive then, yes, they would be able to
3 grant that permission.

4 194 Q. Definitive in respect of
5 one or the other. Either private owners who were
6 consenting or the city was consenting, even if you
7 didn't know exactly the boundaries of whose land
8 was where, if you had all consenting parties could
9 you allow the upgrading of the road?

10 A. No.

11 195 Q. And why not?

12 A. Because the municipality
13 would only have jurisdiction over the road, the
14 majority of the roads in any municipality are not
15 surveyed. And so in order to grant permission by
16 by-law to open up and amend a road, or without a
17 by-law, they would have to know the boundaries of
18 the road.

19 196 Q. And what is the city
20 going to need to know in order to allow upgrading
21 of the road under those circumstances that I
22 mentioned before?

23 A. It would have to be done
24 by survey.

25 197 Q. So what is required is a

1 survey?

2 A. Correct.

3 198 Q. And once a survey is
4 done, then the city would feel comfortable so long
5 as everyone was consenting, if necessary, to allow
6 the upgrading of the road?

7 A. Correct.

8 MR. FAITH: May I just have a
9 second.

10 All right, I think we are good,
11 yes, thank you.

12 RE-EXAMINATION BY MR. COLE:

13 199 Q. You mentioned that the
14 city would need a survey, so what would the survey
15 need to show?

16 A. The survey would be
17 required to show the width of the road, the
18 location of the road, any encumbrances or rights
19 of ways that traverse the road, easements that are
20 -- or restricted covenants on the road.

21 200 Q. And how would this survey
22 be secured? How would you come about doing all of
23 that if you don't know the location of the road in
24 that context?

25 A. You would retain a

1 surveyor to survey the road and do the title
2 searching.

3 201 Q. And based on the
4 information that is available to you today, is
5 that something that could be done today?

6 A. Yes.

7 MR. COLE: Okay, thank you.

8 MR. FAITH: Thank you.

9 --- Whereupon examination adjourned at 2:26 p.m.

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3 I HEREBY CERTIFY THAT I have, to the best
4 of my skill and ability accurately
5 transcribed the foregoing proceeding.
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9 Lisa Lamberti, Court Reporter
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Appendix E

RUSSELL ON ROADS
2nd EDITION

by

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Road Principle 1

Public Highways (1791-2008)

- 1.1 “Public Highway”: Definition
- 1.2 Highways: The Public Right!
- 1.3 Municipalities: Trustees for the Environment
- 1.4 Powers to Restrict Common Law Rights of Passage
- 1.5 Highways/Roads Grandfathered by the Act of 2001
- 1.6 Acquiring Ownership of Roads after January 1, 2003

1.1 “Public Highway”: Definition

The *Municipal Act*, S.O. 2001, s. 25 (effective January 1, 2003), contains the following definition:

s. 1(1) “highway” means a common and public highway and includes any bridge, trestle, viaduct or other structure forming part of the highway and, except as otherwise provided, includes a portion of a highway;

With the possible exception of trespass/forced roads over private property (and roads under the *Road Access Act*), the term “common and public highway” in the *Municipal Act, 2001* refers to roads *owned* by the municipality. (For the history of road legislation, see Road Principle 3.)

The words “common and public” are unnecessary for a highway is a common and public way, as distinguished from a “by-way.”¹

1.2 Highways: The Public Right!

Since the days of Roman law, highways have been sacrosanct. To the public, a highway stands on the right-hand side of heaven.

By English common law, a “highway” is a strip of land over which the public has the right to travel, to pass and repass no matter who owns the fee (title) in the land.²

*“The term ‘highway’ comprises all portions of land over which every subject of the Crown may lawfully pass.”*³

The proof of the pudding is found in the following judicial decisions:

¹ *The Municipal Manual*, by C.R.W. Biggar, M.A. 1900, p.806.

² *Membery v. Smith* (1918), 15 O.W.N. 119.

³ *Pratt on Highways* (14th Ed), c. 1.

Toronto (City) v. Consumers' Gas Co. (1940)⁴—This decision affirms that a highway is a way over which all members of the public are entitled to pass and repass and conversely every piece of land that is subject to such public right of passage is a highway or part of a highway

Vancouver (City) v. Burchill, [1932]⁵—Rinfret, J. states:

The landowner enjoys the absolute right to exclude anyone and to do as he pleases upon his property. It is idle to say that the municipality has no such right upon its streets. It holds them as trustee for the public. The streets remain subject to the right of the public to 'pass and repass'; and that character, of course, is of the very essence of a street.

Big Point Club v. Lozon [1943],⁶—at page 495, Hope, J. states:

Ownership of highways is held by municipalities in trust for all such of the King's subjects as have occasion to make use of them for purposes of communication or for other lawful purposes, or in order to gain access to or egress from adjacent lands.

At page 496:

Road allowances are strips of Crown land reserved from public sale and settlement

...

[per Robinson, C.J. in *Badgely v. Bender* (1834)⁷] A piece of land marked out in the original plan of a township, as an allowance for a road, does not lose that character, because it has never been used as a road for a period of 40 years.

... original road allowance cannot be extinguished except by the appropriate procedure under the Act; that a grant even by the Crown cannot extinguish it; and that the right of the public remains in perpetuum: though it may lie dormant, it may be revived, until steps under the Act have killed it. [in *Nash v. Glover* (1876)⁸]

At page 497, Hope J. makes reference to the case of *Ontario Hydro-Electric Power Commission v. Grey*⁹ which reads in part:

... the right of the public to free passage along the King's Highway is paramount and cannot be interfered with even by the Crown itself.

Williams & Wilson Ltd. v. Toronto (City) (1846)¹⁰—The issue was a 6 ft. strip at the edge of Scott Street in Toronto. Was it part of the road allowance, or was it privately owned by the Plaintiffs? The facts showed that Scott Street was

⁴ 1940 CarswellOnt 43, 52 C.R.T.C. 98, [1940] 4 D.L.R. 670, [1941] O.R. 175 (Ont. C.A.), affirmed [1941] S.C.R. 584, 1941 CarswellOnt 83, [1941] 4 D.L.R. 422, 53 C.R.T.C. 387 (S.C.C.).

⁵ [1932] S.C.R. 620, 1932 CarswellBC 98, [1932] 4 D.L.R. 200 (S.C.C.) at 625 [S.C.R.].

⁶ 1943 CarswellOnt 29, [1943] 4 D.L.R. 136, [1943] O.R. 491 (Ont. H.C.).

⁷ (1834), 3 U.C.Q.B. (O.S.) 221 (U.C. C.A.).

⁸ (1876), 24 Gr. 219, 1876 CarswellOnt 94 (Ont. H.C.).

⁹ (1924), 55 O.L.R. 339 (Ont. C.A.).

¹⁰ 1946 CarswellOnt 160, [1946] O.R. 309, [1946] O.W.N. 329, [1946] 4 D.L.R. 278 (Ont. H.C.).

laid out as a public highway and paved and sidewalks were constructed, but nothing of this nature was done over the 6 ft. strip in question.

1.3 Municipalities: Trustees for the Environment

*Scarborough (Borough) v. R.E.F. Homes Ltd. (1979)*¹¹—R.E.F. Homes Ltd. cut down three silver maple trees on a municipal road allowance (two were 36” in diameter, and one 18” diameter). Damages were assessed at \$4,000.00 plus Court costs. Lacourciere, J.A., states at page 257:

In our judgment, the municipality is, in a broad general sense, a 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.

1.4 Powers to Restrict Common Law Rights of Passage

Section 35 of the Act of 2001 was a surprise. In the amendment of 2006, c.32 was modified to read as follows:

s. 35. Without limiting sections 9, [Natural Personal Powers], 10, [Broad authority, single-tier municipalities], and 11, [Broad authority, lower-tier and upper-tier municipalities] a municipality may pass by-laws removing or restricting the common law right of passage by the public over a highway and the common law right of access to the highway by an owner of land abutting a highway.

The old *Municipal Act*, R.S.O. 1990, c. M.45, s. 297(9), and its predecessor legislation permitted councils to close a highway for vehicular traffic and for pedestrian traffic, or vice versa, or both. Beyond that, there was little flexibility.

Sidebar: Section 35 opens a whole new field of opportunity for municipalities. They can restrict roads for, say, recreational purposes and also restrict *who* can use the road and *what* can use the road, etc. Of equal importance is the fact that many municipalities (other than cities and towns) have many kilometres of roads once maintained, long since abandoned, but never closed. The old maxim “once a highway, always a highway” (until lawfully closed) can raise its head. To avoid the reinstatement of maintenance on these roads, municipalities will no doubt come up with some interesting innovations using s. 35.

¹¹ (1979), 1979 CarswellOnt 1588, [1979] O.J. No. 78, 10 C.E.L.R. 40, 9 M.P.L.R. 255 (Ont. C.A.). See also *Goudreau v. Chandos (Township)* (1993), 1993 CarswellOnt 59, 16 M.P.L.R. (2d) 224, 14 O.R. (3d) 636, 48 M.V.R. (2d) 290 (Ont. Gen. Div.).

1.5 Highways/Roads Grandfathered by the Act of 2001

Section 26 of the *Municipal Act, 2001*, states as follows:

- s. 26. The following are highways unless they have been closed:
1. All highways that existed on December 31, 200.

That, I think you will agree, could be called a “no frills” definition. It raises the question: what highways does it include? From the author’s research, 14 categories of Public Highways/Roads would be grandfathered under this definition:

1. **Original Road Allowances**—These are the road allowances laid out on the original Crown surveys of towns, townships and villages. The term “original” has special significance. (See Road Principle 2.)
2. **Shore Road Allowances**—Those 66 foot shore road allowances laid out on some original Crown surveys starting in the 1850s and graphically shown as a thin double line along the shoreline. (See Road Principle 19.)
3. **Roads Reserved in the Crown Patent**—Many Crown patents (Deeds from the Crown) “reserved” a road allowance. These roads are not *original* road allowances. Depending on the circumstances, these may or may not be “assumed” by the municipality for maintenance purposes. (See Road Principles 2 and 31.)
4. **Roads Created by Magistrates in Quarter Sessions**—In Upper Canada from the late 1700’s to 1841, magistrates had the power to lay out and maintain roads by statute labour. The earliest roads were laid out in the areas of Prescott, Kingston and Niagara. (See Road Principle 6.)
5. **Colonization Roads: Ottawa-Huron Tract**—A few colonization roads were laid prior to the 1850s, but the majority were commissioned during the years 1853 to 1907. These were in the area referred to as the Ottawa-Huron Tract (principally between the Ottawa River and Georgian Bay). Colonization road funds were also expended in other parts of the Province such as Thunder Bay, Fort Frances, Kenora, etc. (See Road Principle 7.)
6. **Roads Created under the Free Grants & Homestead Acts and The Public Lands Act**—Any road in a free grant location which is in lieu of or partly deviating from an allowance for road. (See Road Principle 29 and Road Principle 19.)
7. **Registered Plans of Subdivision**—Roads and lanes on Registered Plans of Subdivision. (See Road Principle 16.)
8. **Roads Downloaded by Legislation**—Roads that have been downloaded by the Province to Regions, Counties, and Townships under the *Public Transportation and Highway Improvement Act*, R.S.O. 1990, c. P. 50, or

by a County to a member municipality under s. 275 of the old *Municipal Act*, R.S.O. 1990. (See Road Principle 24.)

9. **Roads Created by By-laws**—Roads laid out and constructed by the authorization of municipal by-laws.
10. **Boundary Roads**—Boundary roads over which adjacent municipalities have joint jurisdiction. Initially, most boundary roads were *original* road allowances. The great restructuring frenzy of the late 1900s created many new boundary roads. (See Road Principle 30).
11. **Roads Created by “Dedication” and “Acceptance”**—Roads *dedicated* by an owner, and *accepted* by the municipality as a public highway, with or without a confirming by-law. After January 1, 2003, a Public Highway can only be established by the passing of a By-law. (See Road Principle 4.)
12. **Roads Created by “Implied Dedication” and “Implied Acceptance”**—Implied Dedication after long public use. (See Road Principle 4.)
13. **Trespass/Forced Roads across Private Lands**—Roads, which by decades of usage by the public and maintenance by the municipality, may be “impliedly dedicated” and “impliedly accepted” by the municipality as a public highway, without a confirming by-law. After January 1, 2003, there must be a by-law accepting the road as a municipal highway. (See Road Principle 5.)
14. **Northern Ontario: Five Percent (5%) Road Reservations**—Northern Ontario, (in general, north of the line formed by the French River, Lake Nipissing, Mattawa River) is a huge tract of land where few roads have been laid out on the original Crown surveys. In these areas, the Crown grant reserves either 5% or 10% of the land conveyed for future highway purposes. Roads created under this provision would be public highways and grandfathered into the new Act. (See Road Principle 26.)

1.6 Acquiring Ownership of Roads after January 1, 2003

After January 1, 2003, (when the *Municipal Act, 2001* came into force), municipalities (upper-tier, lower-tier, single-tier) could acquire ownership of roads by the following means:

- by a by-law accepting a road as a Public Highway (see Jurisdictional/Maintenance Trap, Road Principle 6.10)
- by those transferred (downloaded) to a municipality under the *Public*

*Transportation and Highway Improvement Act*¹², the *Municipal Act, 2001*, or any other Act.

After January 1, 2003, “local” municipalities (single-tier and lower-tier) also acquire jurisdiction (ownership) of the following roads:

- those made by Crown surveyors (s. 28 (2)(a));
- all road allowances, highways, streets and lanes shown on a registered plan of subdivision (s. 28 (2)(b));
- all roads downloaded by an upper-tier municipality to a lower-tier municipality, (s. 52 (5)).

Sidebar: For the death knell of the common law principle that a municipality could accept or acquire a new road by “implied acceptance”, see Road Principle 4.

¹² *The Public Transportation and Highway Improvement Act*, R.S.O. 1990, c. P. 50.

Road Principle 2

“Original” Road Allowances

- 2.1 “Original” Road Allowances
 - 2.2 Dedication by the Crown
 - 2.3 Original Surveys by Individuals and Corporations
 - 2.4 Public Highways: Whether Opened or Not
 - 2.5 Municipalities Not Compelled to Open Original Road Allowances
 - 2.6 “Laying out” and/or “Opening” a Road
 - 2.7 Roads “Reserved” in Crown Patents
 - 2.8 Signage on Concession Roads
 - 2.9 “Road Allowances” vs. “Roadways”
-

2.1 “Original” Road Allowances

Surprisingly, the *Municipal Act, 2001* only mentions the words “original road allowance” in three sections, namely 66, 67 and 68. These sections relate to the “road in lieu of” situations. (See Road Principle 25.)

Although the term “original” has all but disappeared from the Act of 2001, its significance is firmly entrenched in the law. Its history goes back to the 1780s, which gives the term seniority. These are roads laid out in the original Crown surveys of townships, towns and villages with numbered concessions and lots. There would be road allowances between each concession, and later surveys (in many instances) had sideroads at every fifth lot.¹ Included in this definition are those one chain (66 feet, 20.12 m) *shore road allowances* designated in many original Crown surveys after the 1850s.

At page 169 of the *New Municipal Manual* of 1859, R.A. Harrison’s² states:

Original allowances for roads are generally allowances laid out in the first or original survey of a Township.

¹ In the Upper St. Lawrence and Niagara areas, Crown surveys of townships were, for the most part, laid out between the years 1783 to 1793. In 1783, Kingston Township was the first township to be surveyed (John L. Ladell, *They Left Their Mark*, p. 73). Further west, but still following the inland area along the shores of Lake Ontario and Lake Erie, and extending to Essex County (Windsor), township surveys were mostly completed by the late 1790s. North of this imaginary line, but still in Southern Ontario (south of Lake Nipissing), many of the original Township surveys were commissioned between 1815 and 1890.

² R.A. Harrison later became Chief Justice of Ontario.

In the case of *Morton v. St. Thomas (City)* (1881),³ Patterson, J.A. expressed the opinion that these words—“original road allowances”—were applicable only to original surveys of a township or village *as a whole* and that they had no reference to subdivisions of small town lots. The courts have consistently adhered to this view.⁴

2.2 Dedication by the Crown

Badgely v. Bender (1834)⁵—Mr. Bender sold Mr. Badgely a parcel of land in the Township of Stamford (now City of Niagara Falls), stating that title was clear. Subsequently, a claim was made that a public road went through the property according to a plan which was alleged to be the “original plan” of the Township. The issue was “is this an original plan of the Township?”

The majority of the Court found it to be an original plan of the Township. Macaulay J. wrote a dissenting judgment being of the opinion that there was insufficient evidence that a plan, before the Court, was an “original plan” of the Township. In reviewing the law on “dedication” of roads, he stated on page 230:

A highway may be created by “dedication”, and the public roads allowed by the crown in the original organization of several townships of this province, are of that origin. It was enacted by 50 Geo. III, c. 1, s. 12 [The Highway Act of 1810] “that all allowances for roads, made by king surveyors, in any town, township or place already laid out, should be deemed common and public highways.” This enactment contemplated the dedication of roads. The act of the king’s surveyor in making an allowance, is regarded as a dedication on part of the crown, and the statute operates as an acceptance thereof as a public way, on behalf of the community.

2.3 Original Surveys by Individuals and Corporations

If the *original survey* of a municipality was laid out not by the Crown but by private individuals or Corporations such as the Canada Company, which purchased large tracts of land, the road allowances in these surveys are, by legislation, also “original” road allowances.⁶

³ (1881), 6 O.A.R. 323.

⁴ *Beemer v. Grimsby (Village)* (1886), 13 O.A.R. 225; *Cameron v. Wait* (1878), 3 O.A.R. 175 (Ont. C.A.), affirmed (1879), (S.C.C.); *Chappus v. La Salle (Town)*, 60 O.L.R. 564, [1927] 3 D.L.R. 764 (Ont. H.C.), affirmed [1928] 2 D.L.R. 386, 62 O.L.R. 139 (Ont. C.A.).

⁵ (1834), 3 U.C.Q.B. (O.S.) 221 (U.C. C.A.).

⁶ *The Surveys Act*, 1849, 12 Vic. c 35, s 34.

Sidebar: It is interesting to note that the words “original survey” and “original plan” did not appear in the *Surveys Act* until the *Surveys Act*, S.O. 1958, c. 107, s. 1,⁷ where it states:

1. In this Act:

(m) “*original plan*” means a plan certified by the Surveyor-General as being the original plan of an original survey;

...
(o) “*original survey*” means a survey made under competent authority;

2.4 Public Highways: Whether Opened or Not

Original road allowances, (i.e., concession roads, sideroads, shore road allowances) whether “opened” or “not opened”, “used” or “not used”, are public highways until closed according to law. Yes, even when they extend over the most inhospitable terrain. In the original surveys of townships after the first decade of the 1800s, most side roads were laid out at every fifth lot running at right angles to the concession roads. These were one chain in width (66 ft. or 20.12 m).

In the case of *Badgely v. Bender* (1834)⁸ the headnote states:

A piece of land, marked out in the original plan of the township, as an allowance for road, does not lose that character, because it has never been used as a road for a period of 40 years, and a copy of the original plan of the township is admissible in evidence to prove such allowance, although it does not appear by whom, not from what materials, the plan was compiled.

2.5 Municipalities Not Compelled to Open Original Road Allowances

In the case of *Hislop v. McGillivray (Township)* (1888)⁹ the Supreme Court of Canada confirmed that municipal council’s had the sole power to determine whether or not to open an original road allowance for public travel.

Mr. Biggar, in his *Municipal Manual* in 1990, comments as follows at page 819:

⁷ *Legal Aspects of Surveying Water Boundaries*, by Lambden and de Rijcke states at p.31, “In the long history of the *Surveys Act*, from its antecedents in instructions of the Crown, the *Ordinance* of 1785 and the statute of 1798, S.U.C. 38, Geo. 3, c. 1, respecting surveys, no definition was given of ‘original survey’ or ‘original plan’ until the revision of 1958.”

⁸ (1834), 3 U.C.Q.B. (O.S.) 221 (U.C. C.A.).

⁹ *Hislop v. McGillivray (Township)* (1888), [1888] O.J. No. 50, 15 O.A.R. 687 (Ont. C.A.), affirmed (1890), 1890 CarswellOnt 7, 17 S.C.R. 479 (S.C.C.).

The council has a right to determine whether an original road allowance shall or shall not be opened; and the Courts have no jurisdiction to compel municipalities to open such allowances and make them fit for public travel.

2.6 “Laying out” and/or “Opening” a Road

These terms came before the courts for adjudication in the case of *Palmatier v. McKibbin* (1894).¹⁰ The issue was a Quarter Sessions Road laid out by a surveyor in 1834. MacLennan, J.A. states at page 451:

Now the question is, what is the meaning of “opening a road”, as the phrase is used in the Statute? Does it mean laying it out on the ground by survey in the usual manner, and declaring that as so laid out it is a public highway; or does it mean something more, namely, clearing the ground of the forest or other obstructions so as to make it more or less fit for actual use? I think it is plain that it is used in the first of these senses only, and that “laying out” and “opening out” are used in an equivalent sense.¹¹

2.7 Roads “Reserved” in Crown Patents

Frequently, one will encounter “Crown patents” that reserve a one chain (66 ft.) shore road allowance where no such designation appeared on the original Crown survey of the municipality. These roads in Crown patents, sometimes referred to as “reservations” or “exceptions”, are not original road allowances.¹² Depending on the circumstances, a “reservation” may or may not be a public highway. (See Road Principle 31.)

Macaulay J. in *Badgely v. Bender* (1834)¹³, at page 230:

A reservation by the king of a public way, through a tract of land granted by letters patent would not constitute a public way. Such a reservation on the part of the crown might be considered a dedication; but an acceptance by the public must be superadded to create a public right. There must be reciprocity. The crown must be bound by the dedication, and the public by the acceptance.

2.8 Signage on Concession Roads

Today, signs on rural roads frequently refer to the roads as concession roads (e.g., Third Concession Road); this is a misnomer. Correctly stated, the “road”

¹⁰ *Palmatier v. McKibbin* (1894), 21 O.A.R. 441 (Ont. C.A.).

¹¹ At a Seminar of the Ontario Association of Land Surveyors in February 2005, Mr. Jeffrey P. Talbot, B.Tech., O.L.S., of Elora, Ontario, presented a paper called “Lost Highways”. After examining the reports of scores of Quarter Sessions Roads, he questioned whether the “examination survey” performed prior to the writing of the road report was sufficient to constitute a “laying out” without some further action under authority of the confirmed report. (Now published in GEOMATICA Volume 60, No. 3, (2006), pp 249-265.)

¹² See Ministry of Natural Resources Policy PL 4.03.01 relating to the Release and Voidance of Reservations and Conditions in Land Grants. December 1, 2001.

¹³ See Footnote 5.

referred to is the road allowance between the Third and Fourth Concession (it could be between the Second and the Third Concession, depending on where local folks started counting). Concessions are the patented lands between the public road allowances. The road allowances are not part of the land in the concession.

The word “concession” is an Ontario term; it was taken from the French word *concedere* which means to give a grant.¹⁴

2.9 “Road Allowances” vs. “Roadways”

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*,¹⁵ is “that part of a highway designed or intended for use by vehicular traffic”.

In the case of *Lucas v. Ontario (1991)*¹⁶ it was held that a “roadway” included the entire shoulder.

¹⁴ *The Settlement of Upper Canada*, by Wm. Canniff, M.D., M.R.C.S.E., (the Mike Publishing Company, Belleville, Ontario. 1971) p. 37.

¹⁵ *Public Transportation and Highway Improvement Act*, R.S.O. 1990, c. P.50, s. 1.

¹⁶ (1991), 1991 CarswellOnt 2448 (Ont. Gen. Div.).

Road Principle 5

Trespass/Given/Forced Roads

- 5.1 *Municipal Act, 2001*: Grandfathered
 - 5.2 Definition and Background
 - 5.3 Judicial Decisions: Trespass/Given/Forced Roads
 - 5.4 Presumption of Dedication by the Crown
 - 5.5 Ownership of the “Soil and Freehold”
 - 5.6 Width of Trespass Roads
 - 5.7 Widening a Trespass/Given/Forced Road
 - 5.8 Alternatives: Court Applications and/or Expropriation
 - 5.9 Registered Plans and former Trespass Roads
 - 5.10 The *Municipal Act, 2001* (as amended in 2006)
-

5.1 *Municipal Act, 2001*: Grandfathered

Trespass roads (also referred to as “given” roads or “forced” roads) used by the public are to be found in most areas of the Province. While, they are not specifically mentioned in the *Municipal Act, 2001*, they may—depending on the circumstances—be grandfathered as a “public highway” by s. 26.

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

- 1. All highways that existed on December 31, 2002.

5.2 Definition and Background

A “trespass” or “given” road is a publicly used road that crosses private property and to which the municipality does not have legal title to the soil and freehold.

Certainly, for the first half of the 1800s when the landscape was still heavily treed, trails (roads) were narrow and few in number. A trespass road over an owner’s 100 acre parcel of land was a welcome benefit, not considered an intrusion or liability. It gave the land owner easier access to the grist mill and the general store, and to his neighbours for socializing. It provided news from passers-by of near and far events. Yes, a road was the pipeline for information.

By the 1860s we start to see a different outlook, especially in the farm areas of Southern Ontario below the Pre-Cambrian shield. Most farms were being fenced, curtailing the possibility of trespassing. In addition, municipal councils,

using statute labour,¹ were opening more and more concession roads and sideroads for travel. Railways were popping up like mushrooms and this provided an additional means of transportation. The need for new trespass roads diminished.

Municipal Maintenance

Many of these trespass roads were maintained by statute labour. While this maintenance indicates an intention on the part of the municipality to *accept* the road as a municipally-maintained road, it did not always mean that the owner of the land had *impliedly dedicated* it for permanent public use. It depends upon the facts of each case. (See also Road Principle 4: Dedication, Acceptance and Assumption).

5.3 Judicial Decisions: Trespass/Given/Forced Roads

A number of judicial decisions relate to trespass roads and the principle of “Implied Dedication” and “Implied Acceptance”. These decisions are based on the following formula:

Implied Dedication (By Owner) + Implied Acceptance (by the Municipality) on the Performance of Statute Labour = Municipal Ownership

Whether a private owner has or has not “impliedly dedicated” the land to the public for highway purposes, must in every case be a question of fact. The intention is evidenced by the manner in which the land itself has been dealt with by the owner. Some judicial decisions on the subject are as follows:

*Dunlop v. York (Township) (1869)*² —per Spragge, V.C.:

In a new country like Canada it would never do to admit user by the public readily as evidence of an intention to delegate. Such user is very generally permissive, and allowed in a neighbourly spirit; and it may go on for a number of years with nothing further from the mind of the owner of the land - that his rights should be thereby affected.”, and “a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment by the public.

*St. Vincent (Township) v. Greenfield (1886)*³—Osler, J.A., at page 307 states:

If the origin of the road is unknown, it is presumed to be a highway if statute labour has been usually performed upon it.

¹ This was an obligation of all males over the age of 21 to contribute horses, wagons and implements and their labour for the maintenance of public used roads. (See Road Principle 32.)

² (1869), 1869 CarswellOnt 76, 16 Gr. 216 (Ont. Ch.), at p.222-31 [Gr.].

³ (1886), 12 O.R. 297 (Ont. H.C.), affirmed (1887), 15 O.A.R. 567 (Ont. C.A.).

Lord Ellenborough, C.J. in *Rex v. Lloyd* (1808)⁴:

If the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor exclude persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public.

***Belford v. Haynes* (1850)⁵:**

Whether the private owner of lands has or has not dedicated them to public highways for highway purposes it must in every case be a question of fact.

C.R.W. Biggar, *Municipal Manual*, 1900, at page 809:

Such a presumption will, therefore, arise from the fact that a way is used by the public openly and as of right without objection by the owner of the soil.

In England, and especially in urban localities, such public user—even for a short time—is sufficient to create the presumption of a dedication.

***Maccoomb v. Welland (Town)* (1907),⁶**—In considering the problems of determining intention after the passage of time, Meredith, J.A. said at page 345:

The one question is whether any one owning the land in question ever dedicated it, that is, made a gift of it, to the public for the purposes of a highway. That question is one purely of fact. Nearly all the cases of this character, which come before the Courts, have to be determined upon circumstantial evidence only; no direct evidence is available. The owners who were supposed to have dedicated were sometimes unknown, and often long since dead. In such cases it is not difficult to infer from the mere fact of the evidence of the way, the exercise of the right of public passage over it, for such a length of time and in such a manner that it must have been with knowledge of the owner, that its existence was actually based upon a dedication by him; unless there is outweighing evidence to the contrary.

***McGregor v. Watford (Township)* (1906)⁷:**

I am disposed to hold also, if it was necessary, that the road in question laid out in 1873 has been so used and controlled by the municipality and so abandoned by the owner and his successors in title, as to entitle the defendants [the municipality] to deal with it as they have done.

***Dawes v. Hawkins* (1860), Byles J.⁸:**

Once a highway, always a highway” is an established maxim, for the public cannot release their rights and there is no extinctive presumption or prescription.

⁴ (1808) 1 CAMP, 260.

⁵ *Belford v. Haynes* (1850), 1850 CarswellOnt 319, 7 U.C.Q.B. 464 (U.C. Q.B.).

⁶ *Maccoomb v. Welland (Town)* (1907), 1907 CarswellOnt 469, 13 O.L.R. 335, 9 O.W.R. 143 (Ont. C.A.).

⁷ *McGregor v. Watford (Township)* (1906), 13 O.L.R. 10 (Ont. Ch.).

⁸ *Dawes v. Hawkins* (1860), 8 C.B.N.S. 848, 141 E.R. 1399.

Sidebar: Where a trespass/given/forced road has by common law, become a “public highway” it is, in most cases, part of a larger parcel of land, still registered, in private ownership. Once a road has acquired this classification, the owner cannot stop the public from using it.”

After January 1, 2003, the doctrine of “Implied Acceptance” for new situations, does not apply. A municipality can only acquire jurisdiction by the passage of a by-law.

5.4 Presumption of Dedication by the Crown

The Crown may dedicate, as a private person may, any lands for use as a public highway. Two cases on the subject are *R. v. Moss* (1896)¹⁰ and *Turner v. Walsh* (1881)¹¹ in which Sir Montague Smith delivering the judgments said:

The presumption of dedication may be made where the land belongs to the Crown, as it may be where the land belongs to a private person. From long-continued user of a way by the public, whether the land belongs to the Crown or the private owner, as the case may be, in the absence of anything to rebut the presumption, may and indeed ought to be presumed.

5.5 Ownership of the “Soil and Freehold”

In most cases, the original owner of the land who permitted the trespass (most likely in the 1800s) and his children, have long since left the area. Then follows a succession of owners who, over the years, have also acquiesced in the use of the road by the public. That by itself does not give the municipality legal (paper) title, since that area is still in the name of the present, or past, registered owner. It is usually a new owner, who, on learning that the municipality does not have paper title to this long-standing highway encroachment across his land, rises up in righteous indignation. To get paper title requires a conveyance from the owner, or failing this, an application to the courts for a declaration of ownership.

⁹ *Gibbs v. Grand Bend (Village)* (1995), 1995 CarswellOnt 1056, [1995] O.J. No. 3709, 49 R.P.R. (2d) 157, 30 M.P.L.R. (2d) 270, 129 D.L.R. (4th) 449, 86 O.A.C. 321, 26 O.R. (3d) 644 (Ont. C.A.), additional reasons at (1996), 1996 CarswellOnt 626 (Ont. C.A.).

¹⁰ *R. v. Moss* (1896), 1896 CarswellNat 29, 26 S.C.R. 322 (S.C.C.).

¹¹ *Turner v. Walsh* (1881), (1880-81) L.R. 6 App. Cas. 636 (Australia P.C.).

Sidebar: Legal issues over trespass roads are never black and white. Each is determined on a case-by-case basis. Certainly, the most essential fact is the length of time the road has been used by the public with the acquiescence of the owner. The English decisions have found in favour of an implied dedication for public use over a much shorter period than has been the case in Canada.

In the English case of *Rugby Charity v. Merryweather* (1790), Lord Kenyon, C.J. mentions a case in which six years was held sufficient; and in *Jarvis v. Dean* (1826) it was held that four or five years user of a new street, though it had not been paved or lighted and led nowhere, but to the fields, was sufficient to warrant a jury in finding (as they did) that there had been a dedication of it to the public as a highway. The Ontario Courts have found in favour of 40 years use, but it could be much less depending on the facts of the case.

5.6 Width of Trespass Roads

Initially trespass roads were very narrow, having a width sufficient for a wagon. As statute labour was applied, and tree stumps removed, the width increased, usually to a width of 15 to 20 ft. (4.57 or 6.09 m). The width was only the land actually used for travel. As municipalities moved from statute labour to Road Departments (most switched over between 1915 and 1930) trespass roads were widened still further to accommodate the increased traffic. While the owner of the soil and freehold may acknowledge the existence of a trespass road as a public highway, he may not readily consent to the municipality increasing further the width of the road without compensation.

5.7 Widening a Trespass/Given/Forced Road

Widening a trespass road today involves negotiations with the owner. The municipality needs a survey, a transfer/deed from the registered owner, and a partial discharge of any mortgages affecting the private property. Owners will usually cooperate if they see advantages, such as an opportunity to obtain a land severance.

5.8 Alternatives: Court Applications and/or Expropriation

If negotiations for widening the trespass road are not successful, then the municipality is left with a Court Application.

The Application is a double-header. The first part is an Application asking for a declaration that the existing trespass road has been *impliedly dedicated* by the owners, and *impliedly accepted* by the municipality prior to the start of the *Municipal Act, 2001* (January 1, 2003). That settles one portion of the title. It

doesn't solve the problem regarding the widening, but it might open the door for a more meaningful negotiation with the owner of the adjacent land.

The second part of the Application would be to commence expropriation proceedings involving only the additional land needed to widen the road to the desired width (usually 20 m). This brings into play the *Expropriations Act*.¹²

5.9 Registered Plans and former Trespass Roads

Often when lands are being subdivided by means of a registered plan of subdivision, the road on a plan may previously have been a trespass road. The Registered Plan, if prepared after 1892,¹³ would require the road to have a minimum of 66 ft. (20 + m), space permitting. Prior to January 1, 1980, the law was that these roads on registered plans did not become public highways owned by the municipality, until after the registration of the plan and the sale of a lot in accordance with the plan.¹⁴ That requirement—that after registration, there must be the sale of a lot—was repealed effective January 1, 1980.

5.10 The *Municipal Act, 2001* (as amended in 2006)

Section 26 of the Act captures the pre 2003 Trespass/Given/Forced roads that have been assumed by a municipality.

s. 26 Highway—interpretation

The following are highways unless they have been closed:

1. All highways that existed on December 31, 2002.

¹² *Expropriations Act*, R.S.O. 1990, c. E.26.

¹³ *The Consolidated Municipal Act*, 1892, c. 45, s. 45.

¹⁴ This requirement, that in addition to registration there had to be a binding deed or mortgage registered pursuant to the plan, was revoked by the Registry Act, S.O. 1979, c. 94, s. 28, effective January 1, 1980.

Road Principle 6

Quarter Session Roads

- 6.1 *Municipal Act, 2001*
 - 6.2 Locating Quarter Session Roads
 - 6.3 Historical Background: 1788 to 1849
 - 6.4 Appointment of Overseers and Surveyors of Highways
 - 6.5 The *Highway Act* of 1810 (A “Rembrandt”)
 - 6.6 Roads reserved in Crown Patents
 - 6.7 The Demise of Justices in Quarter Sessions
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6.1 *Municipal Act, 2001*

The new Act does not specifically mention Quarter Session Roads, nor did the earlier *Municipal Acts*. These roads were laid out between the years 1788 and 1849 under the direction of justices sitting in Quarter Sessions, either on their own or on approval of the petition of 12 ratepayers. Unless closed, these roads continue to be public highways and many are in use to this day, while others remain abandoned.

If not formally closed, these roads are grandfathered forward by s. 26 of the *Municipal Act, 2001*, which states:

- s. 26. The following are highways unless they have been closed
 - 1. All highways that existed on December 31, 2002

6.2 Locating Quarter Session Roads

One needs to be a diligent researcher to determine if a road was, or is, a Quarter Sessions Road. Quarter Session Roads can be found mainly in areas adjacent to the St. Lawrence River, Lake Ontario and Lake Erie, extending from Cornwall in the east to Essex County (Windsor) in the west. It is only when searching old records that we find information on Quarter Session Roads.¹ Records prior to 1849 are a rare bird.

¹ The Author was involved on a road file in Prince Edward County concerning a strip of land once believed to be an old Quarter Sessions Road. Searching old records (basement boxes) revealed an Order of the Justices in Quarter Sessions dated July 9, 1811 establishing a strip as a public highway. If the road was never closed by by-law it is still a public highway.

6.3 Historical Background: 1788 to 1849

By the Proclamation of 1788, the southern part of Ontario was divided into districts, and these were further modified by Act in 1791. From then until the *District Councils Act* in 1841, the affairs of the districts were committed to several District Courts of General Quarter Sessions of the Peace, composed of magistrates appointed by the Governor or Lieutenant Governor in Council.² In the rural areas of the Province the justices continued with their powers to December 31, 1849. The next day the first municipal councillors took over those powers.

The powers of Courts of General Quarter Sessions included the construction and management of court houses, gaols and asylums; the laying out and maintaining of highways, the making of assessments to pay the wages of the House of Assembly; the appointment of district and township constables, as well as street and highway surveyors; the granting of licences to sell liquor, etc. Every year, in a parish of a town or township, they oversaw the appointing of a clerk, two assessors, a collector and a number of overseers of highways and fence-viewers.

These locally appointed town officials had little legislative authority. They could determine the height of lawful fences and, by an Act in 1794,³ they had the power to ascertain and determine in what manner, and for what periods, “horned cattle, horses, sheep and swine, or any of them, shall be allowed to run at large, or restrained from doing so”. The earliest meeting recorded was in Adolphus Town in March of 1793.⁴

The Justice of the Peace for the districts, in their Quarter Sessions assembly, retained all authority. The magistrates who exercised these enormous powers in Quarter Sessions were life appointees of the Government and often had very meager qualifications for public office. Many were retired army officers and men of sufficient income to render them indifferent to the hardships and wants of the average hard working settler.⁵

6.4 Appointment of Overseers and Surveyors of Highways

Prior to 1849 (1841 in the case of counties), the justices appointed persons to be employed as Overseers of highways and roads as well as Surveyors of highways to whom applications could be made in writing by 12 freeholders for the alteration of existing highways or the opening of a new highway.

In many areas, the road allowances laid out on the original Crown surveys were, for geographical reasons, difficult or impractical for use. Locating more suitable routes, was, for the early settlers, critical.

² *The Municipal Manual*, 11th Edition, by C.R.W. Biggar, M.A., (1900) being the 6th Edition of Harrison's *Municipal Manual*, p. 3.

³ “An Act to provide for the Nomination and Appointment of Parish and Town Officers within the Province”, 1793, 34 Geo. III, c. 8.

⁴ *The Municipal Manual* by C.R.W. Biggar, 1900, p. 4.

⁵ *Ibid*, p. 30.

The surveyor examined the proposed route and prepared a report that went to the Quarter Sessions with his recommendation. Notice had to be published in two of the most public places in the area of the proposed road. The justices could confirm the report, however, if objections were filed to the proposed road; then the surveyor and a jury panel of 12 disinterested men would hear evidence, give a verdict, and that verdict was final and would be incorporated into an official order. These provisions were first set out by the Public Highway Act in 1793.⁶ The Act stated:

... each and every Justice of the Peace, acting under and by virtue of His Majesty's commission, shall be and they are hereby declared to be Commissioners to lay out and regulate the highways and roads with the respective counties, divisions or limits, in which they shall act, of the several districts within this Province.

6.5 The Highway Act of 1810⁷ (A "Rembrandt")

The Highway Act of 1810 repealed the Highway Act of 1793 and became the first major cornerstone of highway legislation in Ontario.

Prior to the Highway Act of 1810, the mere laying out of a road allowance by a Crown surveyor, and the deposit of his plan in the Land Office Department, was not, without evidence of the use or acceptance by the public, sufficient to constitute the road allowance as a public highway. Until such use, the Crown was at liberty to relocate roads. These plans misled new immigrants and loyalists arriving from the United States as to whether or not a road was still located as shown on a plan. Tempers flared.

The Highway Act of 1810 put a stop to this. It stated in s. 2:

s. 2. That it shall and may be lawful for His Majesty's Justices of the Peace in General Quarter Sessions assembled in the month of April in each and every year . . . to appoint as occasion may require, one or more surveyor or surveyors of highways in each and every County and Riding through this Province within their respective Districts to lay out and regulate the Highway and Roads within such County or Riding . . . and if it shall appear to the Justices of the Peace in Quarter Sessions assembled that any such surveyor or surveyors is or are incompetent to discharge to his or their duty, or performance thereof, it shall and may be lawful for the said Justices so assembled to remove the said surveyor or surveyors.

Section 12 provided:

s. 12. And be it further enacted by the authority aforesaid, That all allowances for Roads, made by the King's Surveyors in any Town, Township or place already laid out, or which shall be made in any Town, Township or place within this Province, and also all Roads laid out by virtue of any Act of the Parliament of this Province, or

⁶ "An Act to regulate the laying out, mending and keeping in repair the public highways within this Province", 1793, 33 Geo. III, c. 4.

⁷ 50 Geo III, c. 1.

any Roads whereon the Public Money hath been expended for opening said Roads throughout this Province, or whereon Statute Labour hath been usually performed, or any Roads passing through the Indian lands, shall be deemed Common and Public Highways, unless any such Roads have been already altered according to Law, or until such Road, or Roads shall be altered according to the provisions of this Act.

C.R.W. Biggar, in the *Municipal Manual* at page 813, cites the case of *R. v. Allan* (1833):⁸

Prior to the Highway Act of 1810 the mere laying out of a road allowance by a Crown surveyor, and the deposit of his plan in the Land Office Department (L.O.D.) were not alone sufficient to make it a public highway without evidence of use or acceptance by the public to constitute the road allowance a public highway. Like any private person whose proposal to dedicate land for a highway had not yet been accepted, the Crown was still at liberty to revoke its offer to the public, and to grant to an individual lands which had thus been intended for road allowances.

Biggar also cites the case of *R. v. Great West Railway* (1862):⁹

It was to this state of things that the Statute of 1810 applied. It operated as a parliamentary acceptance of the lands dedicated by the Crown as highways; so that thereafter—"The fact of a Government surveyor laying out allowances for roads in the plan of the original Crown survey of lands was sufficient . . . to give to such roads . . . the legal character of highways, though there may have been no stakes planted in the ground to mark them out. They would be deemed in law highways before they were actually opened and used, and before statute labour or public money had been expended upon them."

6.6 Roads reserved in Crown Patents

The Highway Act of 1810 states that "all allowances for roads" made by the King's surveyors ". . . shall be Common and Public Highways, unless . . . [duly closed]"

A "road allowance" made by Crown surveyors, and a road "reserved" in a Crown Patent (the deed from the Crown) are two different cats. While a "road allowance" is a common and public highway, a "road reservation" only amounts to a "dedication". An "acceptance" requires public acceptance by use, or acceptance by a municipal by-law, or (prior to the *Municipal Act*, 2001) by continuous work being performed by municipal forces resulting in "implied acceptance".¹⁰

⁸ (1831), 2 U.C.Q.B. (O.S.) 90 (U.C. Q.B.).

⁹ (1862), 1862 CarswellOnt 160, 21 U.C.Q.B. 555 (U.C. Q.B.).

¹⁰ See *Badgely v. Bender* (1834), 3 U.C.Q.B. (O.S.) 221 (U.C. C.A.). See also Road Principle 31.

6.7 The Demise of Justices in Quarter Sessions

In 1841, after the passing of the *District Councils Act*,¹¹ much of the power of these magistrates was transferred to the counties and districts, and to councils of urban areas. However, the Justices continued as the chief administrators in rural areas until January 1, 1850, when they received their “pink slips” (Happy New Year!) with the introduction of the first *Municipal Institutions Act* of 1849.¹²

This Act transferred their remaining powers to local municipal councils. (So much for a “life appointment”!)

C.R.W. Biggar, in his *Municipal Manual*, (1900), states at page 9:

Notwithstanding the forebodings of many [including the Justices in Quarter Sessions] who regarded the Acts of 1841 and 1849 as the first steps in a downward career which must end in handing over the government of the province to demagogues and rebels, the municipal history of Canada from 1849 onwards does not indicate that these successive gifts of self-government to the common people produced any such result.

¹¹ The *District Councils Act*, 1841, 4 & 5, Vic. c. 10.

¹² The *Municipal Institutions Act*, 1849, 12 Vic. c. 81.