

ONT. COURT OF APPEAL CONFIRMS CITY CAN'T SUBSTITUTE A DIFFERENT ACCESS/TRANSPORT ROUTE FOR ONE SPECIFIED IN REA

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On September 1, 2015 we reported in Fogler's Environmental and Energy Newsletter that the Ontario Divisional Court in *Wpd Sumac Ridge Wind Inc. v. Corp. of the City of Kawartha Lakes* 2015 ONSC 4164 quashed a resolution passed by the City. The resolution would have blocked all requests by the holder of a Renewable Energy Approval ("REA"), Sumac Ridge Wind, to use an unopened portion of Wild Turkey Road for access and/or other vehicular traffic for its approved wind turbine development. The Divisional Court found that the resolution would frustrate the operation of the REA. On June 22, 2016 the Ontario Court of Appeal upheld this decision, permitting Sumac Ridge Wind to apply again to use Wild Turkey Road for its project. The City could not simply refuse to consider such an application. The Court considered that an outright refusal to even consider the application, given that access to Wild Turkey Road was integral to the viability of the wind project, would frustrate a project fostered by the *Green Energy and Economy Act* 2009 S.O. 2009, c.12. As such, the outright refusal was taken in bad faith. The Court was careful to point out however, that it wasn't ordering the City to take any action or interfering with its discretion in regards to development within its borders. The City retained its jurisdiction to negotiate over legitimate considerations such as indemnity, liability and decommissioning costs so long as it did so in good faith.

The City argued that its refusal to consider the road access application did not frustrate a provincial law because, applying the test in *Alberta (Attorney General) v. Maloney*, 2015 SCC 51, the Green Energy law was merely permissive and did not provide any positive entitlement. According to the City, the REA, granted under the Green Energy law, was simply an instrument intended to secure environmental compliance. The Court of Appeal disagreed, holding that the REA reflected the Provincial objective of encouraging the development of green energy and was therefore a positive entitlement. The decision as to whether the project was in the public interest was in the hands of the Ministry's Director and out of the reach of the municipality. (at par.69)



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