

## ENVIRONMENTAL & ENERGY LAW

### COURT RULES MUNICIPAL BY-LAWS FRUSTRATE REA

**Albert Engel, B.Sc., LL.B., M.E.S.**

On August 14, 2014, in *East Durham Wind, Inc. v. The Municipality of West Grey*, 2014 ONSC 4669 ("*East Durham*"), Ontario's Divisional Court found that the Municipality of West Grey's entrance permit policy and oversize/overweight vehicle by-law (collectively referred to as "permitting by-laws") frustrated, pursuant to section 14(2) of the *Municipal Act*, S.O. 2001, c.15 ("Municipal Act"), the purpose of East Durham Wind, Inc.'s Renewable Energy Approval ("REA") issued for the construction of a 14 turbine wind farm. As a result, the Court ruled that the permitting by-laws must be held inoperable to the extent of their conflict with the REA pursuant to section 14(2) of the *Municipal Act*, S.O. 2001, c.15 ("Municipal Act").

Section 14 of the *Municipal Act* provides that a by-law is without effect to the extent of any conflict with, among other things a provincial Act or instrument. Section 14(2) of the *Municipal Act* states that there is a conflict between a by-law of a municipality and a provincial Act or instrument if the by-law frustrates the purpose of the Act, regulation or instrument. In previous decisions, courts have held municipal by-laws that purported to regulate wind farm developments to be void for vagueness (*Wainfleet Wind Energy Inc. v Wainfleet (Township)*, 2013 ONSC 2194 ("*Wainfleet*")) and in direct conflict with the REA regime and of no force and effect by way of s.14(1) of the *Municipal Act* (*Suncor Energy Products v. Town of Plympton-Wyoming*, 2014 ONSC 2934 ("*Suncor*")). *East Durham* is the first decision where a court has held municipal by-laws to be inoperative because they frustrated the purpose of an REA.

In *East Durham*, the Court found that the permitting by-laws frustrated the purpose of the REA by preventing the construction of a provincially authorized project in furtherance of the province's goal of increasing renewable energy generation. The project required entrance permits and oversize/overweight vehicle permits in order to facilitate construction and ongoing maintenance of the project. The Municipality of West Grey decided to reject the REA-holder's applications for both types of permits. The Court quashed these decisions and ordered the Municipality to reconsider the applications in light of the Court's findings that municipal by-laws cannot *de facto* prohibit required private land access or use of public highways to construct renewable energy projects.

Together, *Wainfleet*, *Suncor* and *East Durham* are strong judicial authority for the proposition that provincially approved renewable energy projects may be constructed despite municipal opposition.

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Albert M. Engel, Partner  
416.864.7602  
[aengel@foglers.com](mailto:aengel@foglers.com)



Stanley Berger, Partner  
416.864.7626  
[sberger@foglers.com](mailto:sberger@foglers.com)



Yadira Flores, Associate  
416.365.3744  
[yflores@foglers.com](mailto:yflores@foglers.com)



Tom Brett, Partner  
416.941.8861  
[tbrett@foglers.com](mailto:tbrett@foglers.com)

Fogler, Rubinoff LLP  
Lawyers  
77 King Street West  
Suite 3000, PO Box 95  
TD Centre North Tower  
Toronto, ON M5K1G8

Tel: 416.864.9700  
Fax: 416.941.8852  
[foglers.com](http://foglers.com)