

Proposed Green Energy Act Places Limits on Municipal Land Use Planning Powers

March 4, 2009

By Barnet H. Kussner and Robert B. Warren

On February 23, 2009, the Government of Ontario introduced and gave first reading to the *Green Energy Act, 2009* (the “Act”). The purpose of this new legislation is to promote the development of renewable energy generation facilities and the use of renewable energy. Renewable energy includes energy generated by wind, water, biomass, biogas, biofuel, solar energy, geothermal energy and tidal forces.

To accomplish its primary objective, the Act proposes to eliminate a number of perceived existing impediments to the development of renewable energy generation facilities and renewable energy projects. This includes the land use planning controls exercised by municipalities over whether, how and where such facilities and projects may be built.

Less Municipal Control Over Green Energy Projects

If the Act becomes law, municipalities will no longer be able to regulate or prohibit the location of renewable energy generation facilities and renewable energy projects through Official Plans, zoning by-laws or site plan control or regulate the creation of new parcels of land and the granting of rights in such parcels for up to 40 years in relation to such projects.

The following municipal powers under the Planning Act would no longer apply to renewable energy generation facilities or projects:

1. Provisions under an Official Plan;
2. A by-law, order or agreement made under Part V including a zoning by-law under section 34 and a site plan control by-law under section 41;
3. A by-law made under section 33 (demolition control);
4. A regulation made or passed under section 70.2 (development permits); and
5. A by-law passed under section 113 or 114 of the City of Toronto Act, 2006 (zoning and site plan control, respectively).

In addition, the granting of an interest in land in relation to renewable energy generation facilities or projects would be added as a further exception to the general prohibition against subdivision of land, so long as the interest granted does not exceed a total period (including renewal rights) of 40 years.

The limits that the Act proposes to place on municipal control over these projects should also be read in conjunction with the Act’s proposed amendments to the Environmental Protection Act. These latter amendments severely limit the ability of a person to object to the issuance of a “renewable energy approval” – that is, an approval to engage in a renewable energy project – unless the person can establish that engaging in the renewable energy project will cause serious and irreversible harm to plant life, animal life, human health or safety of the natural environment. These tests would likely prove very difficult to meet.

Electricity Act Restrictions Eased

The Act also proposes to liberalize existing restrictions under the Electricity Act governing municipal ownership of electrical utilities. Currently, a municipality that seeks to generate, transmit, retail or distribute electricity must establish a separate corporation under the Ontario Business Corporations Act (OBCA) that operates at arm's length from the municipality. However, the Act would allow a municipality, a local board or an existing municipal services corporation to generate electricity without establishing a separate OBCA corporation for that purpose, provided it is a "renewable energy generation facility that does not exceed 10 megawatts".

For more information on the *Green Energy Act, 2009* and its potential implications, please contact Barnet Kussner of our Municipal Practice or Robert Warren of our Energy Practice.

WeirFoulds^{LLP}

www.weirfoulds.com

Toronto Office

4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office

1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035