

ISSUE DATE:

Mar. 10, 2008



Ontario

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

PL060754
PL050096

Canadian Hydro Developers, Inc. has appealed to the Ontario Municipal Board under subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to the Official Plan for the Township of Amaranth to redesignate land within the area generally bounded by Highway 89 to the north, 6th Line to the east, 25th Side Road to the south and Amaranth-East Luther Town Line to the west in the Township of Amaranth from 'Agricultural' and introduce site-specific policies pertaining to wind energy developments, thereby permitting development of a wind project on the subject properties

OMB File No. O060140

Canadian Hydro Developers, Inc. has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 46-88 of the Township of Amaranth to rezone lands respecting the area generally bounded by Highway 89 to the north, 6th Line to the east, 25th Side Road to the south and Amaranth-East Luther Town Line to the west from General Agricultural (A1) to General Agricultural (A1-#) Exemption Zone to permit the development of the wind plant and include site-specific regulations pertaining to wind turbine setbacks and applicable definitions

OMB File No. Z060109

Canadian Hydro Developers, Inc. has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 69-2004 of the Township of Amaranth to rezone lands respecting the area generally bounded by Highway 89 to the north, 6th Line to the east, 25th Side Road to the south and Amaranth-East Luther Town Line to the west from Agricultural (A) to Agricultural (A-#) Exception Zone to permit the development of the wind plant and include site-specific regulations pertaining to wind turbine setbacks and applicable definitions

OMB File No. Z060110

Canadian Hydro Developers, Inc. has referred to the Ontario Municipal Board under subsection 41(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, determination and settlement of details of site plans for wind turbines on lands in various locations (Melancthon II Wind Project) in the Township of Amaranth and a second transformer also in the Township of Amaranth

OMB File No. M060091 and M070025

Allto Investments Holdings Inc. appealed to the Ontario Municipal Board under subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from a decision of the Minister of Municipal Affairs and Housing to approve the Official Plan for the Township of Amaranth, specifically sections 3.10 and 3.10(e)(v) being policies relating to wind energy

Approval Authority File No. 22-OP-5450

OMB Case No. PL050096

OMB File No. O050177

APPEARANCES:

Parties

Township of Amaranth
Canadian Hydro Developers Inc. (CH)
Paul Thompson and Theresa Kidd
John and Joan Lever
Rick Dewsbury
Bob Younker

Counsel

A. Burton and D. St. Germain
T. Bermingham

DECISION DELIVERED BY N.C. JACKSON AND ORDER OF THE BOARD

On November 16, 2007 this panel delivered a written Interim Decision (Attachment 1) approving of the Official Plan Amendment (Exhibit 25) and Zoning By-law Amendments (Exhibit 69). The Site Plan Appeal for a second transformer was not approved because of noise anticipated having regard to an existing transformer, the site plan for which is to be amended for the second transformer (conditions Exhibit 70). The Board reasons were detailed in the Interim Decision. Continuation of the Hearing respecting transformer noise was scheduled on notice to other Parties. The Board in the first phase hearing was requested to withhold its final Order on all matters pending Municipal agreement with the Appellant (CH) on Amenities, Construction, Emergency Measures, De Icing, Noise Dispute Resolution, and Decommissioning.

In addition to the Parties reflected in the style of cause above, the following were present on Continuation:

Bob Currie (Participant)
William Palmer
William Vick (Participant)

Ted Whitworth (Participant)

At the commencement of this second phase hearing, counsel for Amaranth, Mr. Burton confirmed that agreements had been authorized by the Township Council on February 20, 2008. Members of the public interested from this hearing were given notice and the opportunity to address the Council. Five presentations were made to Council. Council then passed By-law 11-2008 approving of the various agreements and protocols. This By-law, made Exhibit 73 herein, approves and authorizes the following:

1. Amenities Agreement,
2. Development Agreement,
3. Road Agreement,
4. Template Site plan Agreement (for turbines),
5. Construction Environmental Management Plan,
6. Noise Complaint Management Protocol (Turbine), and Noise Complaint Protocol for Generators,
7. Icing Protocol,
8. Emergency Preparedness and Response Plan.

The aforementioned documents, *inter alia*, require the production of financial securities in the amount of \$800,000.00 and Insurance in the amount of \$5,000,000.00. Existing security from the approved first transformer station remains in the amount of \$650,000.00

The Board asked for questions on these matters and none were posed. The Board accepts this By-law and its enclosed agreements and protocols as evidence of compliance with outstanding municipal concerns, some of which are beyond the mandate of this Board insofar as the enabling authority is in the *Municipal Act* rather than the *Planning Act*.

The Board on consent amends the Interim Decision of November 16, 2008 to reflect the settlement between the Township and CH in Exhibit 53. Specifically, Interim

Decision on page 7, Paragraph 3, is amended to delete the reference, in the 4th last line of the page, to 350 metres and to substitute 450 metres. This applies to the setback to non-participating residences.

The Board has also filed as Exhibit 74 a further communication from Janikke Heiberg to the Township. Ms Heiberg had been a Participant and then a Party in the first phase hearing. She indicates she is out of the Country but wishes to cross appeal. She references an affidavit presented on her behalf by Counsel for the Township during final argument in the November 16 Decision. Ms Heiberg was present during some of that hearing and gave oral evidence. The affidavit of Fred Evans presented in her absence during argument was considered by this panel and made Exhibit 60.

Regarding the humming noise from the existing transformer and expectations of noise from the second transformer, CH called further evidence from S. Titus and V. Gambino as a panel of acoustical engineering experts. They confirmed undertaking further work following the completion of Phase One of this Hearing (Interim Decision). The practical result is that even though CH was meeting MOE noise standards as disclosed in the Certificate of Approval for Generator One and in investigations, CH has agreed to replace the existing Generator One and to install a second generator that will be quieter than the existing generator. The replacement was raised by the Board at the conclusion of the earlier hearing. The existing GE generator is rated at 83 dBA whereas the two new Siemens Generators are rated at 80 dBA. The noise engineers testified further that the two new Generators were tested and manufacturer's data showed them to operate lower at 71 DBA. Although the hum may still be audible, the engineers testified it will be greatly reduced in terms of existing noise impact at the sensitive receptors including Mr. Thompson and the Whitworths. When questioned by the Board, the acoustical engineers testified that the rated level of noise from the two new transformers combined will be approximate to what exists, but that at their tested levels, the noise from the two new generators will be significantly reduced.

The noise engineers testified that the fourth wall planned to the east of the two new Generators will have the effect of reducing deflected noise.

The possibility of resonating or reflecting noise has been studied further with analysis and recordings in the homes of Mr. Thompson and the Whitworths. This analysis, undertaken by an independent Engineering firm, HGC Engineering, appears in

Exhibit 71 Tab 3 and represents the fall Acoustical Audit required by the MOE as the first of four independent audits to be done. The audible levels of transformer noise were confirmed at the low range within MOE Guidelines. HGC Engineering found the residents' concerns related to audibility, whereas the MOE Guidelines relate to numerical magnitude of the sound levels. This first acoustical audit has been accepted by the MOE.

The noise levels reflected in this first audit of the transformer to be replaced will, according to engineers Titus and Gambino, be reduced to between one quarter and one third of what now exists after replacement of the transformer. Their opinion is that the reduction from 83 dBA to 71 dBA is significant since 7dBA difference is equivalent to the doubling of the sound level. They indicated that in field testing showed a difference between the existing transformer (GE) at 86 dBA and the proposed Siemens at 68 dBA that translates into one quarter noise loudness.

Further noise investigation work on the complaints, by Titus and Gambino dated December 10, 2007 (Exhibit 71, Tab 6), compared the transformer noise with noise from a car pass-by and concluded that there was considerably higher sound level from the car pass-by. Their work on an acoustic scan of the transformer station estimated sound at the receptors to be 360 Hz which they translated to a 9-14 dBA sound level. They compared these readings with World Health Organization guidelines at 30dBA in a bedroom and 40 dBA as maximum indoor sound and concluded the readings were well within acceptable levels. The conclusions of Titus and Gambino were that the concerns at the receptors to the audibility of the existing transformer noise were related to the very quiet nature of the surrounding area and would not be expected to cause adverse noise impact or material discomfort and not represent adverse effect under the *Environmental Protection Act*. When questioned by Parties opposing, they maintained the testing they referred to had taken into account worst case conditions (heat and cold).

Mr. Thompson testified in opposition. In his brief of materials, Exhibit 75 and statement Exhibit 76, he takes issue in particular with the MOE and how it interprets and applies Ministry Guidelines. He questions the measurement of the 5dBA tonal adjustment, the timing of testing and the requirement of the 4 season acoustical audits, the acceptance by the MOE of the first acoustical audit prepared before the issuance of the recent Certificate of Approval, and the response of the MOE. Mr. Thompson's

communications with the Minister of the Environment and the Environmental Commissioner of Ontario are within Exhibit 75. Mr. Thompson questions whether analysis was conducted within 1000 metres of the Transformer station and labels the failure to do a critical error. (According to the acoustical engineers, the ESR requires this 1000 metre analysis in setback for the wind turbines).

Mr. Thompson questions the effectiveness of the noise abatements planned and is concerned with the combined effect from the two transformers. He queries the small grounding transformer that the two acoustical engineers testified to. Correspondence is included in Exhibit 75 from several different residents not present, living further from the transformer station than Mr. Thompson and the Whitworths, describing the intermittent transformer hum. Mr. Thompson continues to maintain he has suffered adverse effect within the meaning of section 14 of the *Environmental Protection Act*. Mr. Thompson played further recordings of monitorings of the transformer hum and ambient sound. The disc is made Exhibit 77. The noise levels were barely audible even when the volume was turned up.

In response CH maintained an acoustical audit will be completed in the summer months of July and August and that the replacement of the transformer under Ontario Hydro's auspices will take place this spring.

The Board has listened carefully to the complaints and finds, to the degree that the complaints address the planning function before this Board, that the plans to replace the existing transformer and install second transformer now meet the good planning test. The Board must resist the urge to become an enforcement agency when that responsibility in law rests elsewhere. The Board's function is adjudicative planning, keeping in mind the public interest. In this case, the Board's jurisdiction is limited. Mr. Thompson requests that CH move its transformers to another site. The Board cannot force this to take place since the in-force zoning on the subject property already specifically permits transformer use. The Board agrees with Mr. Bermingham's characterization that zoning determines whether a use is permitted while site plan determines how that will happen (sections 34 and 41 of the *Planning Act*).

The issues have now come to site plan approval in a situation where the transformer use is already in an approved zoning by-law. There is an existing site plan approval and an approved amendment for the existing transformer. To the degree that

a further amendment is now necessary, (even though the approved plan showed the first transformer and an expanded area for a second transformer), this Board is now in the position, after this second phase of the hearing, to settle the site plans and conditions imposed under section 41 of the *Planning Act*. The Board accepts the evidence of the acoustical engineers Titus and Gambino that the replacement transformers with other site plan measures proposed (4th easterly wall and excavation) will function in a manner such that the intermittent hum will be significantly reduced and audibility levels will be within MOE guidelines. The level of noise, if noticeable, will be significantly less than the present level and much less than other ambient noise such as motor vehicle traffic.

The MOE processes will continue with further acoustical audits. The MOE, the Township, and CH are requested to keep Mr. Thompson advised of those processes and the results. Monitoring of the new transformers will be part of the process. That is significant when there is some impact from Proposals that the Provincial Policy Statement indicates are to be permitted since the PPS also states impacts are to be minimized. The Board finds that is the result in this case. The site plan Appeal is allowed and the site plans and conditions are settled in accordance with the revised conditions, site plans, agreement, and noise complaint Protocol for the Amaranth Transformer station as set out in Tab 8 of Exhibit 71 made Attachment 2. Mr. Burton confirmed to the Board that security will be required.

Now that municipal requirements are met in the form of By-law 11-2008, the Board is also able to complete the Official Plan and Zoning Appeals. Both are allowed for the reasons provided for in the Interim Decision. The Board approves of the Official Plan Amendment in the form of Exhibit 25 and amends Zoning By-law 46-88 in the form of the By-laws in Exhibit 69 made Attachments 3 and 4 respectively.

The Board so Orders.

"N.C. Jackson"

N.C. JACKSON
MEMBER