

AUG 23 2013

**Environment and Land Tribunals
Ontario**

Niagara Escarpment Hearing Office

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August 21, 2013

Patrick Duffy
Stikeman Elliott LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9**NOTICE OF DECISION**made under the provision of the
*Niagara Escarpment Planning and
Development Act, R.S.O. 1990*H.O. Case No.: 13-027
(NEC File No.: N/S/2012-2013/191)

Dear Mr. Duffy:

Re: Loretta Shields, appellant against Niagara Escarpment Commission conditional approval of an application for a development permit made by Niagara Region Wind Corporation (N/S/2012-2013/191) to construct a below grade 115kV transmission line within the municipal road right of way of Mountainview Road in the Town of Lincoln. The proposed route along Mountainview and Kemp Road East within the Niagara Escarpment Plan area would be from Walkers Road down the Escarpment to King Street.

Pursuant to s. 25 of the *Niagara Escarpment Planning and Development Act, R.S.O. 1990, c.N.2*, as amended ("*NEPDA*"), I have inquired into the merits of the Niagara Escarpment Commission's ("*NEC*") decision and have taken into consideration the evidence presented before me at the pre-hearing conference in order to render my report and opinion.

.../2

Mr. Duffy
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A copy of my report with reasons is attached. According to s. 25(12.1) of the *NEPDA*, I find that the NEC's decision to issue a Development Permit, were it to include the revised condition, agreed to by the Parties, would be correct and should not be changed. The decision of the NEC is, therefore, confirmed.

Yours truly,

"Dirk VanderBent"

Dirk VanderBent
Hearing Officer

Attachment

cc: Hon. David Oraziotti
Minister of Natural Resources
c/o Robert Pineo
Niagara Escarpment Program Team Leader
Natural Heritage and Land Use and Environmental Planning Section
Ontario Ministry of Natural Resources
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Niagara Escarpment Hearing Office

Case No.: 13-027
(NEC File No.: N/S/2012-2013/191)

Shields v. Niagara Escarpment Commission

In the matter of an appeal by Loretta Shields filed April 9, 2013 for a hearing before a Hearing Officer pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act*, R.S.O. 1990, c. N.2, as amended, with respect to a decision of the Niagara Escarpment Commission dated March 27, 2013 whereby the Commission conditionally approved Development Permit application N/S/2012-2013/191 made by Niagara Region Wind Corporation to construct a below grade 115kV transmission line within the municipal road right of way of Mountainview Road in the Town of Lincoln; In the matter of a pre-hearing conference held on August 6, 2013 in the Council Chambers, Grimsby Town Hall, 160 Livingston Avenue, Grimsby, Ontario; and
In the matter of a proposed settlement agreement.

Before: Dirk VanderBent, Hearing Officer

Appearances:

Loretta Shields - Appellant, on her own behalf
Jane Thompson - Counsel for the Niagara Escarpment Commission
Patrick Duffy - Counsel for the Applicant, Niagara Region Wind Corporation

Dated this 21th day of **August, 2013.**

REPORT TO THE MINISTER OF NATURAL RESOURCES CONFIRMING THE DECISION OF THE NIAGARA ESCARPMENT COMMISSION

Background

[1] On November 15, 2012, the Niagara Region Wind Corporation ("NRWC") submitted development permit application N/S/2012-2013/191 to the Niagara Escarpment Commission ("NEC") to construct a below grade 115kV transmission line within the municipal road right-of-way of Mountainview Road in the Town of Lincoln (the "Transmission Line"). The purpose of the Transmission Line is to connect a proposed wind farm to the Beach Transformer Station in Hamilton, Ontario. The location of the transmission line is within areas designated Escarpment Natural Area, Escarpment Protection Area and Escarpment Rural Area.

[2] On March 27, 2013, the NEC conditionally approved the application subject to 30 conditions (the "Conditional Approval").

[3] On April 9, 2013, Loretta Shields appealed the NEC's decision to the Niagara Escarpment Hearing Office ("NEHO"). Ms. Shields is a member of the West Lincoln Glanbrook Wind Action Group ("WLGWAG"). Neil Switzer filed the appeal with the NEHO. Although this appeal appeared to be on behalf of WLGWAG, which is an unincorporated association, in subsequent correspondence with the NEHO, Mr. Switzer advised that the appeal was filed on behalf of Ms. Shields.

[4] A pre-hearing conference ("PHC") was held on August 6, 2013. All parties were in attendance. In addition, Mr. Switzer attended to assist Ms. Shields in making her submissions. Also in attendance were the Township of West Lincoln, represented by Brian Treble, and the Mountainview Niagara Escarpment Community Association, an incorporated association represented by Harold Theil and Marcia Christie. At that time, the parties advised the Hearing Officer that they had reached an agreement to resolve the issue raised in the appeal, by proposing an amendment to Condition 18 of the Conditional Approval.

Relevant Legislation and Rules

[5] *Niagara Escarpment Planning and Development Act ("NEPDA")*

25(12.1) The decision of the delegate shall be confirmed, if,

- (a) the decision of the delegate was a decision to issue a development permit;
- (b) the parties who appeared at the hearing have agreed on all the terms and conditions that should be included in the development permit and all of these terms and conditions are set out in the report of the officer under subsection (11); and

- (c) the opinion of the officer expressed in his or her report under subsection (11) is that, if the decision of the delegate included the terms and conditions referred to in clause (b), the decision would be correct and should not be changed.

Same

(12.2) If subsection (12.1) applies, the decision of the delegate shall be deemed to be a decision to issue the development permit with the terms and conditions referred to in clause (12.1) (b).

Rules of Practice of the Environmental Review Tribunal

206. Where the Parties agree to the terms and conditions that should be included in a revised development permit, the Tribunal may confirm the decision of the Niagara Escarpment Commission pursuant to section 25(12.1) of the *Niagara Escarpment Planning and Development Act* and shall include the terms and conditions in its report.

Issue

[6] The issue in this appeal is whether the NEC's decision to conditionally approve the application for a development permit, with Condition 18 amended as proposed by the parties, would be correct and should not be changed.

Discussion, Analysis and Findings

[7] The Hearing Officer first notes that the Township of West Lincoln and the Mountainview Niagara Escarpment Community Association both requested party status. However, as they were both consulted respecting the proposed amendment to Condition 18, and agree with this amendment, it became unnecessary to address their requests for party status.

[8] The Hearing Officer also notes that, prior to the PHC, NRWC filed a motion with the NEHO requesting that the Hearing Officer dismiss the appeal. However, as this appeal has been resolved, it became unnecessary to address this motion.

[9] The NRWC agrees with the proposed amendment, and both Ms. Shields and Mr. Switzer advised the Hearing Officer that they too had participated in the negotiations leading to the proposed amendment. They further confirmed that they also agree that the issue raised in the appeal will be resolved if the proposed amendment to Condition 18 is accepted by the Hearing Officer. The NEC also adopts this position.

[10] Condition 18 of Conditional Approval states:

18. Prior to any development including site disturbance or site preparation, the applicant shall submit to the Niagara Escarpment Commission a letter describing the role and mandate of a Community Liaison Committee including the Mountainview Niagara Escarpment Community Association to be established as part of the renewable energy project to address early and ongoing project communication and

dispute resolution regarding the construction and operation of the Project.

[11] Ms. Shields' appeal emphasizes that Condition 18 only requests that the NWRC submit a letter describing the plans for a community liaison committee ("CLC"). Ms. Shields' concern is that this provision will not be adequate to ensure that disputes respecting the proposed transmission line are resolved in a fair and timely manner.

[12] The Conditions of Approval including the proposed amendment to Condition 18 are attached to this report as Appendix A. The proposed amendment to Condition 18 incorporates new requirements that the CLC will specifically apply to the development of wind farm project within the Town of Lincoln, and that NWRC must submit the terms of reference for this CLC in a form acceptable to the NEC. It further requires that these terms of reference must describe the role and mandate of the CLC for the Transmission Line.

[13] The Hearing Officer notes that the proposed amendment to Condition 18 addresses the concern raised by the appellant. The Hearing Officer finds that the amendment clarifies NWRC's obligations respecting the terms of reference for the CLC as it relates to the Transmission Line. The additional requirement that the NEC must approve NWRC's terms of reference for the CLC also adds greater assurance that these terms of reference will be adequate. As such, the Hearing Officer finds that these additional requirements are in accordance with the Niagara Escarpment Plan. Therefore, the Hearing Officer accepts that, if the Conditional Approval is amended as proposed by the parties, the decision would be correct and should not be changed. Consequently, pursuant to s. 25(12.2) of the *NEPDA*, the NEC's decision shall be deemed to be a decision to issue the Conditional Approval with revised Condition 18.

DECISION

[14] The NEC's decision to conditionally approve the NRWC's development permit application N/S/2012-2013/191, with Revised Condition 18 as set out in Appendix A, is confirmed pursuant to s. 25(12.1) of the *NEPDA*.

NEC Decision Confirmed with Revised Condition

"Dirk VanderBent"
Dirk VanderBent, Hearing Officer

Appendix A

Revised Conditions of Approval

1. Non-fulfillment or breach of any of the conditions shall render the Development Permit void.
2. Site inspections of the property may be undertaken by the Niagara Escarpment Commission to ensure that the development complies with the Development Permit. Persons who possess expert or special knowledge related to the Development Permit may accompany the Commission representative on the site inspection(s).
3. No building permit or other licence, certificate, permit or other similar permission relating to development shall be issued or considered to be in force unless a Development Permit is in effect.
4. The Development Permit shall expire three years after its date of issuance unless the development has been completed.
5. The underground transmission line shall be in accordance with the site plan and Development Permit application submitted.
6. No grading of the existing contours of the roads is permitted except that which is absolutely necessary for the construction of the underground transmission line.
7. All drawings submitted to the Niagara Escarpment Commission to satisfy the Development Permit conditions must include:
 - a) a bar scale
 - b) the application number
 - c) the address or location of the development
 - d) the date and revision dates
 - e) the consultant's name and contact information.
8. **Prior to any development including site disturbance or site preparation**, the applicant shall submit for the approval of the Niagara Escarpment Commission, in consultation with the Region of Niagara, the Town of Lincoln, the Niagara Peninsula Conservation Authority, detailed design plans identifying the location and design of the proposed transmission line and the buried concrete encased duct bank including plan view and cross-section drawings confirming the design, depth and location within the municipal road right of way. Once approved, these detailed design plans shall form part of the Development Permit.

9. **Prior to any development including site disturbance or site preparation**, the applicant shall submit for the approval of the Niagara Escarpment Commission, in consultation with the Region of Niagara, the Town of Lincoln, the Niagara Peninsula Conservation Authority, detailed construction plan drawings identifying the haul route, limits of construction, construction phasing, method of installing the buried transmission line and appropriate construction mitigation measures, including erosion and sediment control plans, construction envelope and demarcation details, cut-off collars, engineered fill requirements, temporary material storage areas, staging areas, refuelling areas and dewatering details, during in accordance with the recommendations of the tree/woodlot/significant woodlot preservation plan. The detailed design drawings shall identify installation of "Limit of Work" fencing to ensure that no material or equipment is placed outside the work area and to limit potential effects on adjacent vegetation and habitat, and incorporate buffers from any identified species at risk habitat. No grading of the existing contours of the land is permitted along the transmission line route except that which is absolutely necessary for the construction/placement of the transmission line.
10. Notwithstanding any other approval or any conflict or inconsistency with any plans or conditions relating to any other approval (including a Renewable Energy Approval), development shall only occur in accordance with the final construction plan drawings approved by the Niagara Escarpment Commission pursuant to Condition 9 of this Development Permit approval.
11. **Prior to any development including site disturbance or site preparation**, the applicant shall submit for the approval of the Niagara Escarpment Commission, a tree/woodlot inventory, impact assessment and preservation plan (including an invasive species management plan), prepared by a Landscape Architect, Arborist or other qualified consultant.
 - a) A vegetation management/monitoring plan identifying which trees and vegetation are to be preserved will be required.
 - b) Confirmation in writing by a qualified consultant that protective fencing has been installed and inspected prior to construction commencing, shall be provided to the Niagara Escarpment Commission.
 - c) Subsequent to the completion of the works, including mitigation, a letter certifying that the work has been completed in accordance with the approved plan by a qualified consultant.

- d) Should post-construction monitoring identify additional vegetation impacts due to construction, the mitigation shall include replacement of trees lost on a per calliper basis.

Once approved, these plans shall form part of the Development Permit. No trees other than dead or diseased trees shall be cut or removed along the transmission line route, except those identified and approved by the Niagara Escarpment Commission as absolutely necessary for the construction/placement of the transmission line.

12. **Prior to any development including site disturbance or site preparation**, the applicant shall submit for the approval of the Niagara Escarpment Commission, a landscape plan prepared by a landscape architect or other qualified consultant addressing all planting requirements associated with screening and visual and environmental mitigation requirements.
 - a. Species selection shall be appropriate to the local area and all trees, shrubs, groundcovers and nursery stock shall be native to Ontario.
 - b. installation of all plant material shall be completed within the first growing season (April to October) following completion of the transmission line.
 - c. All plant material shall be guaranteed for a minimum of 18 months following installation. All plant material found during this time to be dead or dying must be replaced with a size and species satisfactory to the Niagara Escarpment Commission.
 - d. Subsequent to the completion of the works, a letter shall be submitted to the Niagara Escarpment Commission by the consulting Landscape Architect or Arborist certifying that the work has been completed in accordance with the approved plan.

Once approved, the landscape plan shall form part of the Development Permit.

13. **Prior to any development including site disturbance or site preparation**, the applicant shall submit for the approval of the Niagara Escarpment Commission, in consultation with the Niagara Peninsula Conservation Authority, design and construction details surrounding the proposed watercourse crossings, including the location of the buried transmission line relative to existing culverts and details demonstrating how flows within these watercourses will be maintained during and following construction, how runoff will be controlled and how fish habitat will be protected.

14. **Prior to any development including site disturbance or site preparation**, the applicant shall provide a letter to the Niagara Escarpment Commission describing how consultation with business and property owners was undertaken to address concerns regarding the maintenance of property access and the control of noise and dust during the construction period and including confirmation that access to all private properties along the route will be maintained throughout the construction period.
15. **Prior to any development including site disturbance or site preparation**, the applicant shall complete to the satisfaction of the Niagara Escarpment Commission, in consultation with the Region of Niagara and the Niagara Peninsula Conservation Authority, a review of groundwater quality and quantity impacts of the construction of the underground transmission line indicating how impacts are to be mitigated and outlining a pre-construction and post-construction private water well monitoring and protection program for all wells located within 120 metres of the proposed construction to identify monitoring of water quality and quantity, mitigation measures, and a notification, response and dispute resolution protocol to address potential impacts to private wells along the transmission line route.
16. **Prior to any development including site disturbance or site preparation**, the applicant shall complete to the satisfaction of the Niagara Escarpment Commission, additional geotechnical investigations along the proposed transmission line to confirm the extent of dewatering required and to supplement existing borehole data to confirm whether bedrock will be encountered during construction and how the location of bedrock will impact the proposed method of construction so as to avoid the use of blasting.
17. **Prior to any development including site disturbance or site preparation**, the applicant shall consult with the Bruce Trail Conservancy and provide a letter to the Niagara Escarpment Commission confirming how they will address continuity of access to the Bruce Trail during construction and how safety along this section of Mountainview Road can be improved, if feasible.
- Revised 18. **Prior to any development including site disturbance or site preparation**, the applicant shall submit Terms of Reference in a form acceptable to the Niagara Escarpment Commission describing the role and mandate of a Community Liaison Committee, for the portion of the transmission line which is the subject of this development permit. The committee shall include representation by the Mountainview Niagara Escarpment Community Association. The letter shall include a commitment to a time for the Committee to be established to address early and ongoing project communication and dispute resolution regarding the

construction and operation of the Project as it affects development of the Project within the Town of Lincoln and subject to development control under the NEPDA. Prior to submission of the Terms of Reference to the NEC, the NRWC shall consult with the MNECA.

19. **Prior to any development including site disturbance or site preparation**, the applicant shall enter into an agreement with the Region of Niagara for the crossing of Regional Road 81 respecting the location, construction and maintenance of all Niagara Region Wind Corporation facilities on this Regional road right-of-way.
20. **Prior to the issuance of the Development Permit**, the applicant shall enter into a Road Use agreement with the Town of Lincoln.
21. **Prior to any development including site disturbance or site preparation**, the applicant shall submit to the Niagara Escarpment Commission an Emergency Response and Communications Plan that has been developed with the Town of Lincoln and other applicable emergency services.
22. No excavation, grading or other soil disturbances, or construction shall take place prior to the issuance of a letter from the Ministry of Tourism, Culture and Sport confirming that an archaeological assessment has been completed to the satisfaction of the Ministry and that all archaeological resource concerns have met licensing and resource conservation requirements. Adverse impacts to any significant archaeological resources found on the site shall be mitigated through preservation or resource removal and documentation.
23. Should archaeological resources be discovered during construction, the applicant shall immediately cease construction and undertake an archaeological assessment and mitigation by a licensed archaeologist. Adverse impacts to any significant archaeological resources found on the site shall be mitigated through preservation or resource removal and documentation. No further excavation, grading or other soil disturbances or construction, shall take place within 50 metres of the location where the resource was found prior to the issuance of a letter from the Ministry of Tourism, Culture and Sport confirming that all archaeological resource concerns have met licensing and resource conservation requirements.
24. That no vegetation clearing shall occur between May 1st and July 31st. In the event that vegetation clearing is required, surveys will be undertaken by a qualified biologist to identify the presence/absence of nesting birds within the areas to be cleared. If an active nest is located, a designated buffer will be established in consultation with NEC staff and marked off in the field within which no construction activity will be allowed while the nest is active.

25. The detailed design drawings shall identify that construction activities shall be avoided in all identified amphibian breeding ponds and that site disturbance shall be minimized in their vicinity. Alterations to surface and drainage patterns in the vicinity of the breeding ponds shall be avoided. Additionally construction activities adjacent to breeding ponds shall occur, to the extent reasonably practical, outside of amphibian breeding months (April — June).
26. Should any Species at Risk be identified prior to or during construction, the Ministry of Natural Resources and the Niagara Escarpment Commission shall be notified.
27. **Prior to any development including site disturbance or site preparation**, the boundaries of all wetlands within 30 m of the proposed construction area will be staked in the field by a qualified ecologist to assist with the demarcation of the construction area, to ensure construction activities avoid these sensitive areas and to assist with the proper field installation of erosion and sediment controls. These barriers shall be regularly monitored and properly maintained during and following construction until soils in the construction area are re-stabilized with vegetation.
28. All material storage or staging areas and vehicle re-fueling shall be avoided in the NEP area. If necessary, **prior to any development including site disturbance or site preparation**, these areas shall be identified and approved by the Niagara Escarpment Commission and shall be located a minimum of 30 metres from all wetlands, water bodies and wooded areas.
29. This conditional approval shall be void if a Development Permit is not issued within three (3) years of the date of confirmation of the Commission's decision.
30. **Prior to any development including site disturbance or site preparation**, the limit of private properties shall be staked by an Ontario Land Surveyor.

NOTE: This approval shall not be used as support for any proposed wind farm south of the Niagara Escarpment.