

# Municipalities and the Green Energy Act: *Benefits, Burdens, and Loss of Power*

On May 14, 2009, the Government of Ontario passed the Green Energy and Green Economy Act (GEGEA).<sup>1</sup> The GEGEA enacts the Green Energy Act and amends over 16 other Acts. Many of the schedules of the GEGEA have now been proclaimed into force.<sup>2</sup> Regulations were prescribed on September 24, 2009. The stated purpose of the GEGEA is to “green” Ontario’s energy sector through increased energy conservation and renewable energy generation.

The GEGEA has important implications for municipalities across the province: as governing bodies, as electricity generators, and as electricity consumers. The GEGEA removes municipal planning powers over the development of renewable energy generation facilities, permits municipalities to generate up to 10 MW of renewable electricity, and requires municipalities to prepare and implement conservation and demand management (CDM) plans.

This paper will consider each of these changes and the implications of the GEGEA for local distribution companies (LDCs) owned by municipalities.

## Planning Powers

The GEGEA introduces significant changes to municipal planning powers.

### Municipal Planning Powers Prior to the GEGEA

Prior to the GEGEA, municipalities were considered “the key review and approval body for the construction”<sup>3</sup> of a renewable energy generation project. Under the *Planning*

*Act*, municipalities have the power to enact official plans and zoning by-laws to determine local planning policy and to restrict the use of land respectively.<sup>4</sup>

Renewable energy generation projects frequently required an application to the municipality to amend either or both the official plan and zoning by-laws.<sup>5</sup> If a municipality decided that a renewable energy generation project was not consistent with good planning, it could refuse the application or impose conditions upon an approval. A refusal or the imposition of onerous conditions confronts a proponent with a potentially lengthy and costly appeal to the Ontario Municipal Board (OMB). Even an approval could result in a third party appeal to the OMB. In each case, the consequent cost and delay is a powerful deterrent to the project.

1 S.O. 2009, c. 12.

2 Including the *Green Energy Act*, S.O. 2009, c. 12, and changes to the *Electricity Act*, the *Ministry of Energy Act*, the *Ontario Energy Board Act*, the *Environmental Protection Act*, the *Cooperative Corporations Act*, and the *Planning Act*.

3 Canadian Wind Energy Association, “Overview for Municipalities of the Review and Approvals Required for Wind Farms in Ontario” <[www.canwea.ca/images/uploads/File/Wind\\_Energy\\_Policy/Municipal\\_Policy/Rural\\_Municipalities\\_Review\\_and\\_Approval\\_Processes\\_-\\_Final.pdf](http://www.canwea.ca/images/uploads/File/Wind_Energy_Policy/Municipal_Policy/Rural_Municipalities_Review_and_Approval_Processes_-_Final.pdf)>.

4 *Planning Act*, R.S.O. 1990, c. P.13, ss. 17 and 34.

5 Canadian Wind Energy Association, *supra*, note 3.

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Paul Manning is a Partner at Willms & Shier Environmental Lawyers LLP and a Certified Specialist in Environmental Law.

Joanna Vince is a J.D. student at the University of Toronto Faculty of Law and an articling student designate at Willms & Shier Environmental Lawyers LLP.

Because of the vulnerability of local politicians to local public opinion, detractors viewed municipal planning powers among the main weapons in the arsenal of NIMBY opponents to renewable energy projects in their neighbourhood.

## Changes Under the GEGEA

The GEGEA endeavours to streamline the approvals process for renewable energy projects by:


- ▶ exempting them from environmental assessment requirements under the *Environmental Assessment Act*;
- ▶ consolidating approvals under the *Environmental Protection Act* into a single “Renewable Energy Approval”<sup>6</sup>; and
- ▶ curtailing municipal powers under the *Planning Act*.

The GEGEA amends the *Planning Act* to create a number of exemptions for renewable energy generation facilities. These exemptions include altering subsections 50 (3) and 50 (5) to ensure that subdivision and part lot control

As part of its consultation obligations under the Renewable Energy Approvals Regulation, there is a limited duty on the proponent of a renewable energy project to consult with the municipality by delivering to it a consultation form. The form and format of that consultation form has yet to be prescribed by the MOE.<sup>13</sup>

The regulation does not specify precisely what must be included in the consultation, but it will likely involve information such as location of water works, sanitary sewers, and gas/hydro.<sup>14</sup> This consultation is not required for a wind facility with a capacity >3 kW and < 50 kW.<sup>15</sup>

The combination of these proposed changes will, in essence, upload the planning responsibilities and processes for renewable energy projects from the municipality to the province. The result will be a loss of power for municipalities, that will lose the ability to control energy generation projects within their borders. Municipalities are left with a vestigial consultation and a narrow right of appeal to the ERT.



The exemption of renewable energy generation projects from these sections means that municipalities have lost all of their powers to block, alter, or control renewable energy generation projects.

restrictions do not apply to renewable energy project leases between 21 and 50 years. Most significantly, the GEGEA creates a new section 62.0.2, which exempts renewable energy generation projects from numerous sections of the *Planning Act*, including those dealing with official plans,<sup>7</sup> zoning by-laws,<sup>8</sup> demolition control areas,<sup>9</sup> and development permit systems.<sup>10</sup>

The exemption of renewable energy generation projects from these sections means that municipalities have lost all of their powers to block, alter, or control renewable energy generation projects. The public has not only lost a powerful forum in which to express concern and to influence development; it has also lost its third party right of appeal against a planning approval for a renewable energy project to the OMB. The GEGEA replaces the third party right of appeal to the OMB with a limited right of appeal to the Environmental Review Tribunal (ERT) against the grant of a Renewable Energy Approval. A municipality or other appellant will have 15 days from the date of the decision to file an appeal. A hearing can only be requested on the grounds that the renewable energy project will cause “serious harm to human health or serious and irreversible harm to plant life, animal life, or the natural environment.”<sup>11</sup>

The ERT will only be able to review the Renewable Energy Approval on these grounds. The burden is on the person requesting the hearing to prove the harm alleged.<sup>12</sup> This is an onerous burden that may be difficult for an appellant to meet.

## Generation

The GEGEA amends the *Electricity Act* to allow a municipality to generate up to 10 MW using a renewable energy generation facility. Previously, municipalities could only generate electricity using an independent corporation.<sup>16</sup> The overhead cost of doing this restricted energy generation to Ontario’s largest municipalities.

The ability to generate electricity from renewable sources without the creation of an independent corporation will allow municipalities to increase their revenue through participation in the Ontario Power Authority’s (OPA) Feed-in Tariff (FIT) program and selling electricity onto the grid. Al-

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6 *Environmental Protection Act*, R.S.O. 1990, c. E.19, Part V.0.1 and O.Reg. 359/09, Renewable Energy Approvals under Part V.0.1 of the Act (Renewable Energy Approvals Regulation).

7 *Planning Act*, *supra*, note 4 at s. 24.

8 *Ibid.* Part V, *City of Toronto Act*, s. 113.

9 *Ibid.* s. 33.

10 *Ibid.* s. 70.2, *City of Toronto Act*, s. 114.

11 *Environmental Protection Act*, *supra*, note 6, s. 142.1.

12 *Ibid.* s. 145.2.1.

13 O.Reg. 359/09, *supra*, note 6, section 18.

14 MOE, “Proposed Content for the Renewable Energy Approval Regulation under the *Environmental Protection Act*” (June 9, 2009), page 6 online: EBR Registry <[www.ene.gov.on.ca/envision/env\\_reg/er/documents/2009/010-6516.pdf](http://www.ene.gov.on.ca/envision/env_reg/er/documents/2009/010-6516.pdf)>.

15 Renewable Energy Approvals Regulation, *supra*, note 6, s. 18 (3).

16 *Electricity Act*, 1998, c. 15, s. 144.

ternatively, municipalities may decide to use the electricity generated to power their own facilities (particularly when considering the 10 MW limit). This will allow municipalities to “green” their operations,<sup>17</sup> decrease energy expenditures, and shield themselves from increasing and unpredictable fuel prices.<sup>18</sup>

The ability to self-generate is particularly important when considering that municipalities are the second largest electricity consuming sector in Ontario, second only to the pulp and paper sector. In total, municipalities consume 6.6 billion kWh of electricity per year. This results in a large monetary expenditure of over \$680 million<sup>19</sup> on electricity each year. Self-generating electricity can reduce this monetary expenditure and free up much needed funds for use elsewhere in the municipality’s budget.

### What is a Renewable Energy Generation Project?

As a generator, a municipality will be looking to take advantage of the streamlined approvals regime introduced by the GEGEA for renewable energy projects. “Renewable energy project” means the construction, installation, use, operation, changing, or retiring of a renewable energy facility.<sup>20</sup>

The *Environmental Protection Act* defines “renewable energy generation facility” as:

... a generation facility that generates electricity from a renewable energy source and that meets such criteria as may be prescribed by regulation and includes associated or ancillary equipment, systems and technologies as may be prescribed by regulation, but does not include an associated waste disposal site, unless the site is prescribed by regulation for the purposes of this definition.<sup>21</sup>

Renewable energy sources include wind, water, biomass, biogas, biofuel, solar energy, geothermal energy, tidal forces, and other energy sources prescribed by regulation.<sup>22</sup>

Biogas is defined to include landfill gas.<sup>23</sup> The OPA’s FIT program includes a special rate for landfill gas capture of 11.1 cents per kWh for facilities ≤ 10 MW and 10.3 cents per kWh for facilities > 10 MW.<sup>24</sup>

Energy from waste (EFW) is not treated as a renewable energy resource, except where the waste is also a biomass. As such, it is not included in the FIT program and will not have the benefit of the streamlined approval process. It remains to be seen whether EFW will be accommodated in future iterations of regulations under the GEGEA and the FIT program.

### Other Incentives for Municipal Participation in Energy Generation

The GEGEA amends the *Electricity Act* to allow the Minister of Energy and Infrastructure to direct the OPA to provide programs or funding for the participation of municipalities in the development of renewable energy generation projects.<sup>25</sup> To date, the minister has not directed the OPA to provide programs under this provision.

### Local Distribution Companies

The vast majority of LDCs are owned by municipalities. LDCs gain similar benefits and burdens under the GEGEA

as their municipal owners. The GEGEA allows LDCs to generate electricity from renewable energy sources up to 10 MW. While this only enables LDCs to generate renewable electricity on a small scale, it allows them to provide a “green” product to their consumers.

The GEGEA gives the government the power to make regulations governing the implementation of Ontario’s “smart grid.” Smart grids allow for electrons and information to flow in two directions, in theory allowing for greater control over and efficiency in electricity supply and demand. The actual responsibilities for each party in the implementation of a smart grid have, at the time of writing,<sup>26</sup> yet to be determined. LDCs will have a significant responsibility in the implementation of a smart grid in Ontario. These responsibilities will be clarified by a directive from the province to the Ontario Energy Board.<sup>27</sup>

LDCs will also be subject to the potential burden of developing a conservation and demand management (CDM) plan, discussed in the following section.

### Conservation and Demand Management Plans

As part of an initiative to conserve energy, the *Green Energy Act* gives the province the power to create regulations requiring public agencies, including municipalities, to develop a CDM plan.<sup>28</sup> At the time of writing, no regulations mandating the development of CDM plans have been released.

The regulations can specify the time period to be covered by the plan. The regulations can also require that the plan is filed with the Ministry of Energy and Infra-

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17 See comments of George Smitherman, *Hansard*, 2009/05/11, Session 39:1.

18 Association of Municipalities of Ontario, “AMO Written Submission to the Standing Committee on General Government” (April 16, 2009), p. 3.

19 Power Application Group Inc. for the Independent Electricity System Operator, “Ontario Municipalities: An Electricity Profile” (January 25, 2008), p. 2.

20 *Environmental Protection Act*, *supra*, note 6, s. 1 by reference to the *Green Energy Act*, *supra*, note 2, s. 1.

21 *Environmental Protection Act*, *supra*, note 6, section 1 by reference to *Electricity Act*, *supra*, note 16, s. 2.

22 *Electricity Act*, *ibid.* s. 2.

23 O.Reg. 160/99, Definitions and Exemptions, s. 1.


24 OPA, FIT Price Schedule, September 30, 2009.

25 *Electricity Act*, *supra*, note 16, s. 25.32 (4.6).

26 October 19, 2009.

27 At the time of writing, the Ontario Energy Board (OEB) had issued initial guidelines relating to accounting, funding and planning for distribution system development to accommodate renewable generation and to develop a smart grid. The OEB is also in the process of amending its codes to anticipate expansion of the grid and allocation of responsibilities.

28 *Green Energy Act*, *supra*, note 2, s. 6 (1).



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structure.<sup>29</sup> If CDM plans are required, they will have to include:

- ▶ a summary of annual energy consumption for each of the public agency's operations;
- ▶ a description and a forecast of the expected results of current and proposed activities and measures to conserve the energy consumed by the public agency's operations and to otherwise reduce the amount of energy consumed by the public agency, including by employing such energy conservation and demand management methods as may be prescribed;
- ▶ a summary of the progress and achievements in energy conservation and other reductions since the previous plan; and
- ▶ such additional information as may be prescribed.<sup>30</sup>

Additional requirements may be prescribed by regulation. Perhaps of greater concern are two other provisions of the *Green Energy Act*: the power to require municipalities to meet prescribed conservation and demand management targets and standards<sup>31</sup> and the obligation to implement the CDM plan.<sup>32</sup>

Though no regulations prescribing targets have been released at the time of writing, such requirements will create a heavy burden on municipalities. Many municipalities will not have the financial resources to implement conservation or other measures to meet set targets. Additionally, the legal obligation to reduce emissions

removes municipalities' right to claim emissions credits under most emissions trading systems, and so eliminates a potentially valuable additional source of funding.<sup>33</sup>

## Conclusion

Through the GEGEA, the province arrogates to itself municipal powers in relation to renewable energy projects. Protagonists will applaud the facilitation of green energy. Opponents will criticize the loss of an adequate forum for the public voice. It remains to be seen whether legal innovation will find alternative forums for that voice to be heard.

The conservation requirements under the GEGEA will be burdensome to municipalities and LDCs. However, if the province can be persuaded to provide or facilitate "pump priming" finance, the savings to municipalities and LDCs may, in due course, result in both environmental and economic benefits, especially where a municipality or LDC is also able to take advantage of their new generation powers under the GEGEA. MW

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29 Ibid. s. 6 (3).

30 Ibid. s. 6 (5).

31 Ibid. s. 6 (4).

32 Ibid. s. 6 (8).

33 See AMO, *supra*, note 18, at p. 11.

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