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<b>TO:</b>	<b>CHAIR AND MEMBERS BUILT AND NATURAL ENVIRONMENT COMMITTEE MEETING on September 26, 2011</b>
<b>FROM:</b>	<b>JAMES P. BARBER CITY SOLICITOR</b>
<b>SUBJECT:</b>	<b>RENEWABLE ENERGY PROJECTS</b>

<b>RECOMMENDATION</b>
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That, on the recommendation of the City Solicitor, this report **BE RECEIVED** for information.

<b>PREVIOUS REPORTS PERTINENT TO THIS MATTER</b>
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June 21, 2010, Planning Committee, Agenda Item #2, "Renewable Energy Facilities Exemptions in the Green Energy Act".

<b>BACKGROUND</b>
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This legal opinion is intended for the BNEC and City Council of the City of London and is general legal advice regarding the powers of a municipal corporation. It is not intended to be and should not be considered specific legal advice to persons and individuals in relation to any particular green energy installation. In the event that a person or individual has questions regarding a specific green energy installation, they should obtain the advice of their own legal counsel.

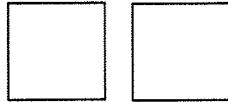
Council resolved at its June 28, 2010 meeting:

That the report from the General Manager of Planning and Development, dated June 21, 2010 with respect to renewable energy facilities exemptions in the *Green Energy Act* **BE REFERRED** to the City Solicitor to review whether there are any provisions within the *Municipal Act* that would afford additional protection for the municipality relating to public safety, and to report back at a future meeting of the Planning Committee.

As with the June 21, 2010 report, the scope of this report is limited to Solar Energy and Wind Energy projects that do not require Renewable Energy Approval under the *Environmental Protection Act*. The intent of the report is to discuss whether municipal by-laws would apply to regulate such projects. This report does not discuss "renewable energy testing facilities" or "renewable energy testing projects", nor does it discuss other renewable energy sources such as water, biomass, biogas, biofuel, geothermal energy tidal forces, or solar energy harnessed other than by photovoltaic technology.

As has been stated in previous reports to Council, renewable energy projects (defined as the "construction, installation, use, operation, changing or retiring of a renewable energy generation facility" that generates electricity from a renewable energy source) are exempt from much of the *Planning Act*. The exemption from the *Planning Act* means that the following local planning instruments do not apply to or affect renewable energy projects:

- Official Plans
- Demolition Control By-laws
- By-laws or Orders passed under Part V of the Planning Act, including zoning, site plan, holding and interim control by-laws
- Development Permit System By-laws



## **1. Solar Energy**

### ***Green Energy Act – Solar Energy - Mounted to Wall/Roof, Ground Source Energy***

Under the *Green Energy Act (GEA)*, municipal by-laws that prevent or restrict activities with respect to designated renewable energy projects, designated renewable energy sources, and designated renewable energy testing projects, are inoperative to the extent that the by-law would otherwise prevent or restrict that activity. However, the *GEA* prescribes some types of by-laws that would still be operative: 1. Tree Conservation by-laws; 2. Protection of groundwater by-laws; and 3. By-laws under the *Ontario Heritage Act*.

The *GEA* makes certain by-laws inoperative only if the activity relates to certain designated activities. If the activity is not a designated activity under the *GEA*, then the by-law is not inoperative under the *GEA*. The following are the designated activities for which certain municipal by-laws would be inoperative (with the exception of by-laws for tree conservation, groundwater protection, and heritage designation):

#### **A. Designated Renewable Energy Projects**

A renewable energy project related to a renewable energy generation facility that uses solar energy harnessed by photovoltaic technology as its renewable energy source, if the project meets the following criteria:

1. The photovoltaic technology is mounted on the roof or wall or both of a building.
2. The photovoltaic technology is installed in compliance with the *Building Code Act, 1992*.

#### **B. Designated Renewable Energy Sources**

(i) Ground source energy, if the ground source energy is harnessed by ground source heat pump technology and the ground source heat pump technology is installed in compliance with the *Building Code Act, 1992*. O. Reg. 15/10, s. 2 (1).

(ii) Solar energy, if the solar energy is harnessed by thermal air technology or thermal water technology that meets the following criteria:

1. The thermal air technology or thermal water technology is mounted on the roof or wall or both of a building.
2. The thermal air technology or thermal water technology is installed in compliance with the *Building Code Act, 1992*.

Therefore, **with respect to any size solar renewable energy project that uses photovoltaic technology and that is mounted to a wall or building (or both)**, as long as it is installed in compliance with the Ontario Building Code, no municipal by-laws will be operative to the extent they prevent or restrict the activity (with the exception of tree conservation by-law, by-law that protects groundwater, *Ontario Heritage Act* by-laws).

The *GEA* does not designate solar energy systems that are ground-mounted (i.e. not mounted to a wall/roof of a building) and therefore the provisions that make by-laws inoperative do not apply to solar energy systems that are ground-mounted.

### ***Environmental Protection Act***

Under the provisions of the *EPA*, a person cannot engage in a renewable energy project (in which electricity must be generated) unless they have a “renewable energy approval” (REA). The requirement to obtain a REA however does not apply in certain circumstances, as follows:

- A Class 1 or 2 solar facility
  - Class 1 solar facility can be located anywhere (whether on roof/wall of building or ground-mounted) and has a “name plate capacity” of 12 kW or less;
  - Class 2 solar facility can be mounted on the roof or wall of a building and has a “name plate capacity” of more than 12 kW.

Thus where the solar facility is located on a roof/wall of a building, no REA is needed, regardless of the “name plate capacity”.

A REA is required where the solar facility is ground-mounted and more than 12 kW “name plate capacity”.

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**Conflicts**

The *EPA* contains a conflict provision (s. 179) which provides “Where a conflict appears between any provision of this Act or the regulations and any other Act or regulation in a matter related to the natural environment or a matter specifically dealt with in this Act or the regulations, the provision of this Act or the regulations shall prevail.” It appears that the test for determining whether a municipal by-law could restrict the operation of a renewable energy facility is whether there is a conflict between the Act and the authority under the *Municipal Act* or regulations to create the by-law. It may also be that the “impossibility of dual compliance test” is applicable, and the test would be whether it was possible to comply with the *EPA* at the same time as the municipal by-law, and whether the municipal by-law frustrates the purpose of the provincial Acts (see *Spraytech v. Hudson*, 2001, SCC).

Further, the *Municipal Act, 2001* also contains a conflict provision (s.14) which provides that a “by-law is without effect to the extent of any conflict with,

- (a) a provincial or federal Act or a regulation made under such an Act; or
- (b) an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or regulation”. This provision goes on to state “Without restricting the generality of subsection (1), there is a conflict between a by-law of a municipality and an Act, regulation or instrument described in that subsection if the by-law frustrates the purpose of the Act, regulation or instrument.

***Building Code Act and Building Code***

Where a solar collector that is mounted on a building and has a face area equal to or greater than ( $\geq$ ) 5 m<sup>2</sup>, such solar collector is deemed to be a building under the BCA. The BCA therefore applies, and a building permit would be required for the construction or demolition of the “building” where the face area is equal to or greater than ( $\geq$ ) 5 m<sup>2</sup>. A building permit may be required where the solar collector is mounted on a building and has a face area that is less than (<) 5 m<sup>2</sup>, depending on the circumstances.

**Conclusion:**

- For wall/roof mounted photovoltaic Solar Energy, no municipal by-laws except the City’s Tree Conservation By-law, Heritage Act by-laws (if any) will apply to restrict or prohibit the activity. Building Permit is required if face area  $\geq$  5m<sup>2</sup> and may be required if < 5m<sup>2</sup>.
- For ground-mounted photovoltaic Solar Energy, municipal by-laws (other than *Planning Act* e.g. zoning by-laws) could apply as long as the by-law is passed for a legitimate municipal purpose, and as long as the by-law requirements do not conflict with or frustrate the purpose of the *EPA* provisions, or any REA issued under the *EPA*. The stated purpose of the Renewable Energy provisions under the *EPA* is to “provide for the protection and conservation of the environment.” A Building Permit may be required, depending on the circumstances.

**2. Wind Energy**

***Green Energy Act***

Renewable energy projects that use wind power are not designated under the *GEA* and therefore the provisions that make by-laws inoperative under this Act do not apply to such wind power projects.

***Environmental Protection Act***

Under the provisions of the *EPA*, a person cannot engage in a renewable energy project (in which electricity must be generated) unless they have a “renewable energy approval” (REA). The requirement to obtain a REA however does not apply in certain circumstances, as follows:

- A Class 1 wind facility
  - Class 1 wind facility is located “where no part of a wind turbine is located in direct contact with surface water other than in a wetland”, has a name plate capacity of 3 kW or less, and has any sound power level.

Thus where the wind facility is less than or equal to 3 kW “name plate capacity”, no matter where it is located (i.e. on a wall/roof or ground-mounted), no REA is required.

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A REA is required for a wind facility whenever the “name plate capacity” is more than 3 kW, no matter where the wind facility is located (i.e. on a wall/roof or ground-mounted).

Please also refer to the **Conflicts** discussion above, which is also applicable.

**Building Code Act and Building Code**

Where a structure that supports a wind turbine generator has a rated output of more than (>) 3 kW, such structure is deemed to be a building under the BCA. The BCA therefore applies, and a building permit would be required for the construction or demolition of the “building” (whether it is attached to a building or ground-mounted). A building permit may be required where the wind turbine generator is attached to a building and has a rated output of less than or equal to (≤) 3 kW, depending on the circumstances.

**Conclusion:**

- For wind energy, certain by-laws (other than under the *Planning Act* e.g. zoning by-laws) could be applicable, (including for instance by-laws passed under authority of the *Municipal Act, 2001* to prohibit and regulate noise, vibration, odour, dust and outdoor illumination, licensing by-laws) as long as the by-law is passed for a legitimate municipal purpose, and as long as requirements do not conflict with or frustrate the purpose of the *EPA* provisions or any REA issued under the *EPA*. The stated purpose of the Renewable Energy provisions under the *EPA* is to “provide for the protection and conservation of the environment.” A building permit is required where the rated output is more than 3 kW, and may be required where the wind turbine generator is attached to a building and rated output is ≤ 3 kW.

Refer to Summary Chart attached as Appendix “A”.

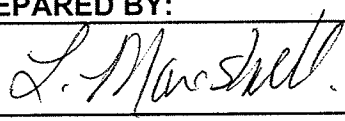
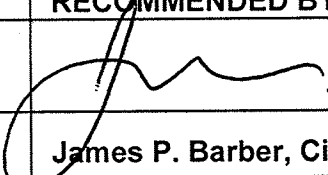
**Recent Decisions – Wind Farms**

On July 18, 2011, the Environmental Review Tribunal released its decision on *Erickson v. Director, Ministry of Environment*. The ERT found that the applicant did not meet the burden of showing that the wind farm project would, more likely than not, cause serious harm to human health.

On March 3, 2011, the Ontario Superior Court of Justice dismissed an application for judicial review in *Hanna v. Attorney General for Ontario*, which challenged the promulgation of sections under the *EPA* regarding “Renewable Energy Approvals Regulation” prescribing minimum setback requirements for wind energy facilities and requiring that they conform to the MOE’s published “Noise Guidelines for Wind Farms”. The applicant failed in its argument that there is medical uncertainty about the impact on human health of living in proximity to an industrial wind turbine and that the “precautionary principle” mandates resolution of this scientific issue before setting regulatory standards. The court stated in paragraph 29 “The health concerns for persons living in proximity to wind turbines cannot be denigrated, but they do not trump all other considerations.”

**More Consultative Powers - Municipalities**

Regulation 359/09 of the *Environmental Protection Act* was amended, effective January 1, 2011, to require a proponent of a renewable energy project to give notice to the City Clerk in which the project location is situated of public meetings for the purpose of conducting consultations in respect of the project. The proponent must also distribute drafts of various required documents to the Clerk.

<b>PREPARED BY:</b>	<b>RECOMMENDED BY:</b>
	
<b>Lynn Marshall, Solicitor II</b>	<b>James P. Barber, City Solicitor</b>

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APPENDIX "A"

<u>Type of Energy Project – generating electricity</u>	<u>Environmental Protection Act Renewable Energy Approval (REA)</u>	<u>Planning Act</u>	<u>Building Code Act</u>	<u>Green Energy Act</u>	<u>Municipal By-laws</u>
<p>1. <u>WIND</u></p> <p>-Wall or Roof Mounted; and Ground-mounted</p>	<p>REA only required if &gt;3 kW “name plate capacity”</p>	<p>-NO land use controls under the <i>Planning Act</i></p>	<p>Building Code applies if &gt;3 kW rated output, and <u>may</u> apply if ≤ 3kW rated output and attached to a building.</p>	<p>N/A</p>	<p>-by-laws may be applicable (unless there is a conflict with other legislation or instrument)</p>
<p>2. <u>SOLAR Photovoltaic</u></p> <p>-Wall or Roof Mounted</p>	<p>no REA required</p>	<p>-NO land use controls under the <i>Planning Act</i></p>	<p>Building Code applies if ≥ 5 m<sup>2</sup> in face area, and <u>may</u> apply if &lt; 5m<sup>2</sup></p>	<p>-no by-law applies to the extent it restricts or prohibits the activity (other than for tree conservation, groundwater, or <i>Ontario Heritage Act</i>)</p>	<p>- no by-law applies to the extent it restricts or prohibits the activity (other than for tree conservation, groundwater, or <i>Ontario Heritage Act</i>)</p>
<p>-Ground-mounted</p>	<p>REA only required if &gt;12 kW “name plate capacity”</p>	<p>-NO land use controls under the <i>Planning Act</i></p>	<p>Building Code may apply if built on a “building”</p>	<p>N/A</p>	<p>-by-laws may be applicable (unless there is a conflict with other legislation or instrument)</p>