

The Winds of Change are Blowing: Recent Changes to the *Planning Act* in relation to Green Energy

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SUMMARY/KEY POINTS

- **The Past:** The [Green Energy Act, 2009](#)² (the "GEA"), *inter alia*, exempted renewable energy generation facilities³ and renewable energy projects⁴ (i.e. solar, wind, bioenergy, and waterpower projects) ("Projects") from certain provisions of the [Planning Act, 1990](#)⁵ (the "*Planning Act*"). The exemptions from the *Planning Act* enabled land owners to enter into leases for the siting of Projects on a portion of their property for a maximum of 50-years (as opposed to the standard 21-year maximum)⁶ and exempted renewable energy projects from provisions of the *Planning Act* dealing with official plans⁷, zoning by-laws⁸, and development permits^{9, 10}
- **The Present - The Repeal of the GEA:** Effective January 1, 2019, the GEA was repealed by the [Green Energy Repeal Act, 2018](#)¹¹ (the "Act"). The Act repealed the exemptions to the *Planning Act* afforded by the GEA and restored municipal planning authority regarding the siting of Projects – therefore, now **leases for renewable energy projects will require *Planning Act* consent if the lease term (including renewals and extensions) is 21 years or longer.** The Act also provides that there is no appeal to the Local Planning Act Tribunal (the "LPAT") for the refusal of an application to amend an official plan to authorize a Project¹² or to amend a zoning bylaw to permit a Project.¹³
- **Post-GEA – Key Regulations Guiding Transition:**
 - [O. Reg. 121/19: Transitional Matters – Renewable Energy Generation Facilities](#) ("O. Reg. 121/19"), exempts operational and in-process Projects from municipal siting approval, provided that the Projects comply with certain conditions. Also, if a Project that is exempt from municipal siting approval is expanded, renovated or altered on the same parcel(s) of land, such Project will remain exempt from municipal siting approval. However, if a Project proposes to expand onto an adjacent parcel, the proposed expansion would be subject to siting approval by the relevant municipality.
 - [O. Reg. 122/19 – Renewable Energy Approval under Part V.0.1 of the *Environmental Protection Act*](#) ("O. Reg. 122/19") requires that in order to be eligible to apply for or receive a renewable energy approval under the *Environmental Protection Act*, local municipal authorities must provide written confirmation that the proposed use of land at the Project location is not prohibited by a zoning by-law or zoning order under the *Planning Act* and the applicant must also be able to prove that the proposed Project serves a demand for electricity.¹⁴

¹ The author is grateful for the support and input of [Jane C. Helmstadter](#), Partner, [Bennett Jones LLP](#).

² S.O. 2009, c. 12. [*Green Energy Act*].

³ *Electricity Act*, 1998, S.O. 1998, c. 15, Sched. A s. 2(1) "renewable energy generation facility" means 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.

⁴ *Supra* note 3 s. 2(1) "renewable energy project" means the construction, installation, use, operation, changing or retiring of a renewable energy generation facility.

⁵ R.S.O. 1990, c P.13. [*Planning Act*].

⁶ Michael R. Barrett, Ernest W. Belyea, Leonard J. Griffiths & David Hunter, "The Green Energy and Green Economy Act, 2009" (25 February, 2009), online <<https://www.bennettjones.com/Publications-Section/Updates/The-Green-Energy-and-Green-Economy-Act-2009>>.

⁷ *Planning Act*, *supra* note 5 s 62.02(3) as it appeared between December 6, 2018 to December 21, 2018.

⁸ *Supra* note 5. s 62.0.2(6) as it appeared between December 6, 2018 to December 21, 2018.

⁹ *Ibid.* s 62.0.2(8) as it appeared between December 6, 2018 to December 21, 2018.

¹⁰ Paul Manning & Joanne Vince, "Municipalities and the Green Energy Act: Benefits, Burdens and Loss of Power" *Municipal World* (January 2010), 5, online: <<https://www.willmsshier.com/docs/default-source/documents-downloads---compliance-enforcement/municipalities-and-the-green-energy-act-update.pdf>>.

¹¹ S.O. 2018, c. 16 [Repeal Act].

¹² *Supra* note 11. s. 22(7.1.1) and s. 22(7.2)(d).

¹³ *Planning Act* *Supra* note 5 s. 34(11.0.7).

¹⁴ Environmental Registry of Ontario, "Amending the Renewable Energy Approvals Regulation to help restore municipal authority" (11 June 2009) online: <<https://ero.ontario.ca/notice/013-4040>>.

ANALYSIS AND COMMENTARY

1) IMPACT OF THE ACT ON THE *PLANNING ACT*

A. Repeal of *Planning Act* Exemptions:

Overview/Background: When the Act was introduced as Bill 34 in the Ontario legislature on September 21, 2019, the Ontario government had already cancelled 758 renewable energy contracts.¹⁵ Environmental advocacy groups and opposition parties said that eliminating the GEA was largely symbolic given that the renewable energy contracts that the Act was targeting had already been cancelled months before.¹⁶ The Ontario government stated that the aim of the Act was to "...put the brakes on additional projects," and to give, "...municipalities the final say over the siting of future energy projects in their communities."¹⁷ The Act restores municipal authority over Project in part through the repeal of clauses 50(3)(d.1) and 50(5)(c.1) and Section 62.0.2 of the *Planning Act* by sections 8(7), 8(8), 8(9) (respectively) of the Act. For ease of reference, excerpts of the repealed *Planning Act* clauses can be found in **Appendix "A"**.¹⁸

Repeal of Exemption Clauses 50(3)(d.1) and 50(5)(c.1) of the *Planning Act*: The repeal of clauses 50(3)(d.1) (subdivision control) and 50(5)(c.1) (part-lot control) of the *Planning Act* ended exemptions from subdivision and part-lot control for certain transactions entered into for the siting of Projects. Therefore, Projects must now seek *Planning Act* consent for transactions that do not conform to clauses 50(3) (subdivision) and 50(5) (part-lot control) of the *Planning Act*.

Repeal of Section 62.0.2: The GEA had enacted the new Section 62.0.2 of the *Planning Act*, which provided "... that the following [did] not apply to renewable energy undertakings: policy statements and provincial plans, with certain exceptions; section 24, which requires public works and by-laws to conform with official plans; demolition control by-laws under section 33; zoning by-laws and related by-laws and orders under Part V; development permit regulations and by-laws under section 70.2; by-laws under section 113 or 114 of the *City of Toronto Act, 2006*; and orders under section 17 of the *Ontario Planning and Development Act, 1994*."¹⁹ Section 8(9) of the Act repealed Section 62.0.2 of the *Planning Act*, which means that Projects must obtain approval from municipal planning authorities if the Project does not conform with official plans and by-laws (etc.) applicable to the proposed site for the Project. This reestablishes municipalities as the key review and approval body for Projects and restores a powerful forum in which the public can express concern over proposed Projects and to influence development in communities.²⁰

B. No LPAT Appeals for Renewable Energy Projects: Previously, the GEA had replaced the third party right of appeal to the LPAT (formerly the Ontario Municipal Board) with a limited right of appeal to the Environmental Review Tribunal,²¹ where an appeal hearing could only be requested on the grounds that the Project will cause "serious harm to human health or serious and irreversible harm to plant life, animal life, or the natural environment."²²²³ The Act completely reverses the right of appeal situation under the *Planning Act*: "[n]ew clause 22 (7.2) (d) provides that there is no appeal to the Local Planning Appeal Tribunal in respect of a refusal or failure to adopt or approve requested amendments to an official plan that propose to authorize a renewable energy undertaking (defined as a renewable energy generation facility, project, testing facility or testing project). New subsection 34 (11.0.7) provides that there is no appeal to

¹⁵Canadian Broadcasting Corporation, "PCs poised to kill Green Energy Act" (20 September 2018) online: <<https://www.cbc.ca/news/canada/toronto/ontario-green-energy-act-scrapped-1.4831927>>.

¹⁶*Supra* note 15.

¹⁷*Ibid.*

¹⁸ *Planning Act supra* note 5 s 50(3)(d.1) and 50(5)(c.1) as they appeared between December 6, 2018 to December 21, 2018.

¹⁹ Bill 34, *An Act to repeal the Green Energy Act, 2009 and to amend the Electricity Act, 1998, the Environmental Protection Act, the Planning Act and various other statutes, 1st Reading, 42nd Leg, Ontario, 2018, 2*, online: <https://www.ola.org/sites/default/files/node-files/bill/document/pdf/2018/2018-09/b034_e.pdf>

²⁰ *Supra* note 10, 6.

²¹ Tribunals of Ontario Environment & Land Division, "About the ERT" online: <<https://elto.gov.on.ca/tribunals/ert/about-the-ert/>> "The Environmental Review Tribunal (ERT) is an independent and impartial tribunal established by provincial legislation. Amongst other things, the ERT holds public hearings on appeals arising from, decisions regarding the issuance, alteration, revocation, cancellation or closure of an order, approval, licence, permit, registration or account under the Clean Water Act, 2006, the Environmental Protection Act, the Nutrient Management Act, 2002, the Ontario Water Resources Act, the Pesticides Act, the Resource Recovery and Circular Economy Act, 2016, the Safe Drinking Water Act, 2002, the Toxics Reduction Act, 2009, and the Waste Diversion Transition Act, 2016."

²² Environmental Protection Act, R.S.O. 1990, c. E.19, s 142.1

²³ *Supra* note 10, 6.

the Local Planning Appeal Tribunal in respect of all or any part of an application for an amendment to a zoning by-law passed under section 34 if the amendment or part of the amendment proposes to permit a renewable energy undertaking. These new provisions do not apply to an appeal by the Minister of Municipal Affairs and Housing."²⁴

2) O. REG. 121/19: TRANSITIONAL MATTERS – RENEWABLE ENERGY GENERATION FACILITIES

A. Grandfathering – Exemptions from Sec. 62.0.2 of the *Planning Act* for Existing Projects:

Following the repeal of the GEA, it was unclear whether operational and in-process Projects would remain exempt from municipal approval requirements. On May 31, 2019, the Ontario government published O. Reg. 121/19, which provided transitional treatment for operational and in-process Projects and confirmed that, despite the repeal of the GEA, section 62.0.2 of the *Planning Act* would continue to apply to Projects *unless* one of the following conditions is met:²⁵

1. The Project has a renewable energy approval that was issued prior to June 1, 2019;²⁶
2. The Project is the subject of a contract with the Independent Electricity System Operator ("IESO") under one of the programs listed below, that was entered into before June 1, 2019 and no party to the contract had exercised a right to terminate the contract before that day:²⁷
 - a. Feed-in Tariff (FIT) Program,^{28 29}
 - b. microFIT Program;³⁰
 - c. Large Renewable Procurement Facility (LRP);³¹
 - d. Renewable Energy Supply program;
 - e. Renewable Energy Standard Offer Program (RESOP); or
3. The construction or installation of the Project began before June 1, 2019 and was completed before August 31, 2019.³²

B. Extending, Altering, Renovating or Adding to an Existing Project:

With respect to the expansion of existing project, "[g]oing forward, if an existing renewable energy project subject to a renewable energy approval or IESO contract undertakes a change involving a geographic expansion onto an adjacent property (beyond that set out in the approval or, in its absence, the contract), the project change would be subject to municipal planning authority."³³ However, if a Project were to

²⁴ *Supra* note 19, 2.

²⁵ Environmental Registry of Ontario, "New regulation under the Planning Act to prescribe transitional provisions for the Green Energy Repeal Act, 2018" (10 June 2019) online: <<https://ero.ontario.ca/notice/013-4265>>.

²⁶ O Reg 121/19, s. 1(1)(a).

²⁷ *Supra* note 26 s. 1(1)(b).

²⁸ "The Feed-In Tariff (FIT) Program was developed to encourage and promote greater use of renewable energy sources including on-shore wind, waterpower, renewable biomass, biogas, landfill gas and solar photovoltaic (PV) for electricity generating projects in Ontario.... Per the December 16, 2016 directive from the Minister of Energy, the final FIT Application Period was held in 2016 and the IESO ceased accepting applications under the FIT Program." Independent Electricity System Operator "Feed-in Tariff Program" online: <<http://www.ieso.ca/sector-participants/feed-in-tariff-program/overview>>.

²⁹ Under the Feed-in Tariff Program, "[p]articipants are paid a guaranteed price over a 20-year contract term (40 years for waterpower projects) for all the electricity that is generated and delivered to the Ontario grid." See Government of Ontario, "Archived – Renewable energy development in Ontario: A guide for municipalities" online: <<https://www.ontario.ca/document/renewable-energy-development-ontario-guide-municipalities/40-feed-tariff-program>>.

³⁰ "The microFIT Program was established to support the development of small or "micro" renewable electricity generation projects (10 kilowatts (kW) or less in size) such as solar panel installations. Suppliers are paid a guaranteed price over a 20-year term (40 years for waterpower projects) for the electricity they produce and deliver to the province's electricity grid.... With the achievement of the annual procurement target in late 2017, the IESO is no longer accepting Applications." Independent Electricity System Operator "microFIT Overview" online: <<http://www.ieso.ca/en/Get-Involved/microfit/news-overview>>.

³¹ "The Large Renewable Procurement (LRP) was a competitive process for procuring large renewable energy projects generally larger than 500 kilowatts. The first LRP process began early in 2014 and concluded in April, 2016, with the execution of 454.885 megawatts (MW) of new wind, solar, and waterpower contracts." Independent Electricity System Operator, "Energy Procurement Programs and Contracts – Large Renewable Procurement" online: <<http://www.ieso.ca/en/Sector-Participants/Energy-Procurement-Programs-and-Contracts/Large-Renewable-Procurement>>.

³² *Supra* note 26 s. 1(1)(c).

³³ *Supra* note 25.

expand within the same parcel or parcels of land on which the Project is situated, such Project would not be subject to municipal siting approval.

3) **O. REG. 122/19: RENEWABLE ENERGY APPROVALS UNDER PART V.0.1 OF THE ENVIRONMENTAL PROTECTION ACT**

"In Ontario, you need a renewable energy approval for large wind, solar or bio-energy projects. The Renewable Energy Approvals Regulation ([O. Reg. 359/09](#)) outlines criteria for applicants to get a renewable energy approval."³⁴

On May 31, 2019, the Ontario government published [O. Reg. 122/19 – Renewable Energy Approval under Part V.0.1 of the *Environmental Protection Act*](#) ("**O. Reg. 122/19**"), which amended O. Reg. 359/09. The amendment, "... require[s] project developers to submit written confirmation from local municipal authorities indicating that the proposed use of land at the project location is not prohibited by a zoning by-law or zoning order under the *Planning Act*. Applicants will need to provide this confirmation to be eligible to apply for or receive a renewable energy approval. The written confirmation must be prepared by:

1. each local municipality where the project is located, or
2. each planning board that has jurisdiction in the area, or
3. the Ministry of Municipal Affairs and Housing (MMAH), if the project location is situated in an area without municipal organization or a planning board.

These changes apply to new renewable energy projects as well as existing projects if they propose to expand their facility onto a new parcel of land. The changes apply to all applications for renewable energy approvals that are currently under review by the ministry."³⁵

Furthermore, O. Reg. 122/19 further affords municipal planning authorities control over the siting of Projects by requiring applicants seeking a renewable energy approval to obtain municipal confirmation that the proposed Project is compliant with the *Planning Act* and also demonstrate that, "...there is demand for the electricity that is proposed to be generated at the renewable energy generation facility."³⁶

Practical Implications of the Act

For leasing legal professionals, the key impact of the repeal of Clauses 50(3)(d.1) and 50(5)(c.1) of the *Planning Act* and the restoration of subdivision and part-lot control is that leases for renewable energy projects will now require *Planning Act* consent if the lease term (including renewals and extensions) is 21 years or longer.

This will impact the way in which new leases are structured, since many renewable energy leases were typically structured to have a three-phase term: 1) a feasibility study period; 2) a construction period; and 3) a twenty-year tenancy period once the site was operational. The term would therefore typically exceed the 21 year limitation period.

³⁴ *Supra* note 14.

³⁵ *Ibid.*

³⁶ *Supra* note 22 s 57.2(1).

APPENDIX "A"

**Clauses 50(3)(d.1) and 50(5)(c.1) and Section 62.0.2 of the *Planning Act* R.S.O. 1990, c P.13.
as they appeared between December 6, 2018 to December 21, 2018.**

Subdivision Control

50(3) No person shall convey land by way of a deed or transfer, or grant, assign or exercise a power of appointment with respect to land, or mortgage or charge land, or enter into an agreement of sale and purchase of land or enter into any agreement that has the effect of granting the use of or right in land directly or by entitlement to renewal for a period of twenty-one years or more unless,

...

(d.1) the land or any use of or right therein is being acquired, directly or by entitlement to renewal for a period of 21 or more years but not more than 50 years, for the purpose of a renewable energy generation facility or renewable energy project, and in respect of which the person acquiring the land or any use of or right therein has made a declaration that it is being acquired for such purpose, which shall be conclusive evidence that it is being acquired for such purpose;

Part-lot control

50(5) Where land is within a plan of subdivision registered before or after the coming into force of this section, no person shall convey a part of any lot or block of the land by way of a deed, or transfer, or grant, assign or exercise a power of appointment in respect of a part of any lot or block of the land, or mortgage or charge a part of any lot or block of the land, or enter into an agreement of sale and purchase of a part of any lot or block of the land or enter into any agreement that has the effect of granting the use of or right in a part of any lot or block of the land directly or by entitlement to renewal for a period of twenty-one years or more unless,

...

(c.1) the land or any use of or right therein is being acquired, directly or by entitlement to renewal for a period of 21 or more years but not more than 50 years, for the purpose of a renewable energy generation facility or renewable energy project, and in respect of which the person acquiring the land or any use of or right therein has made a declaration that it is being acquired for such purpose, which shall be conclusive evidence that it is being acquired for such purpose;

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Renewable energy undertakings

Policy statements and provincial plans

62.0.2 (1) Despite any Act or regulation, the following do not apply to a renewable energy undertaking, except in relation to a decision under section 28 or Part VI:

1. A policy statement issued under subsection 3 (1).
2. A provincial plan, subject to subsection (2). 2009, c. 12, Sched. K, s. 3.

Exception

(2) Subsection (1) does not apply in respect of,

(a) the Niagara Escarpment Plan;

(b) another provincial plan, if the provincial plan is prescribed for the purposes of this subsection; or

(c) a provision of another provincial plan, if the provision is prescribed for the purposes of this subsection.

2009, c. 12, Sched. K, s. 3.

Official plans

(3) For greater certainty, an official plan does not affect a renewable energy undertaking. 2009, c. 12, Sched. K, s. 3.

Same

(4) Section 24 does not apply to,

(a) the undertaking of a public work that is a renewable energy undertaking or is intended to facilitate or support a renewable energy undertaking;

(b) the passing of a by-law with respect to a public work described in clause (a); or

(c) the passing of a by-law that is intended to facilitate or support a renewable energy undertaking. 2009, c. 12, Sched. K, s. 3.

Demolition control area

(5) A by-law passed under section 33 does not apply to a renewable energy undertaking. 2009, c. 12, Sched. K, s. 3.

By-laws and orders under Part V

(6) A by-law or order passed or made under Part V does not apply to a renewable energy undertaking. 2009, c. 12, Sched. K, s. 3.

Transition, existing agreements

(7) An agreement that is entered into under Part V before the day subsection 4 (1) of Schedule G to the Green Energy and Green Economy Act, 2009 comes into force applies to a renewable energy project, and to any related renewable energy testing facility and renewable energy testing project, until the day a renewable energy approval is issued under section 47.5 of the Environmental Protection Act in relation to the renewable energy project. 2009, c. 12, Sched. K, s. 3.

Development permit system

(8) A regulation or by-law made or passed under section 70.2 does not apply to a renewable energy undertaking. 2009, c. 12, Sched. K, s. 3.

City of Toronto Act, 2006, ss. 113, 114

(9) A by-law passed under section 113 or 114 of the City of Toronto Act, 2006 does not apply to a renewable energy undertaking. 2009, c. 12, Sched. K, s. 3.

Ontario Planning and Development Act, 1994, s. 17

(10) An order made under section 17 of the Ontario Planning and Development Act, 1994 **does not apply to a renewable energy undertaking.** 2009, c. 12, Sched. K, s. 3.