

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

**DURHAM CITIZENS LOBBY FOR ENVIRONMENTAL AWARENESS AND
RESPONSIBILITY INC.**

Applicant

and

**THE REGIONAL MUNICIPALITY OF DURHAM and COVANTA DURHAM
YORK RENEWABLE ENERGY LIMITED PARTNERSHIP and THE
CORPORATION OF THE MUNICIPALITY OF CLARINGTON**

Respondents

**APPLICATION UNDER section 440 of the *Municipal Act, 2001*, S.O. 2001, c.25 and
Rule 14.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194**

NOTICE OF APPLICATION

TO THE RESPONDENTS

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following pages.

THIS APPLICATION will come on for a hearing on August 12, 2011, at 9:30am.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: _____ Issued by _____
Local Registrar

Address of court office Durham Region Courthouse
150 Bond Street East
Oshawa ON L1G 0A2

TO: The Regional Municipality of Durham
605 Rossland Rd. E.
Whitby, ON L1N 6A3

AND TO: Covanta Durham York Renewable Energy Limited Partnership
c/o Kelly L. Greenwood (Registered Agent)
1800 - 1801 Hollis St.
Halifax, NS B3J 3N4

AND TO: The Corporation of the Municipality of Clarington
40 Temperance Street
Bowmanville, ON L1C 3A6

APPLICATION

1. The applicant makes application for:
 - a. A declaration that the respondents are undertaking a public work in breach of s. 24 of the *Planning Act*, R.S.O. 1990, c. P.13, as amended (the “*Planning Act*”);
 - b. A declaration that the proposed waste-to-energy facility (the “Proposed Facility”) contravenes the Corporation of the Municipality of Clarington’s (the “Municipality of Clarington”) zoning by-laws on the site proposed by the Regional Municipality of Durham (the “Subject Site”) and is therefore restrained;
 - c. A declaration that the *Host Community Agreement* dated February 18, 2010 between the Regional Municipality of Durham and the Municipality of Clarington (the “Host Community Agreement”) is invalid as an illegal restraint on, and divestiture of, the legislative powers and decision making authority of the council of the Municipality of Clarington;
 - d. the applicant’s costs for this application on a substantial indemnity basis; and
 - e. such further and other relief as counsel may advise and this Court considers just.
2. The grounds for this application are:
 - a. Rule 14.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which permits a proceeding to be brought by way of application in respect of any matter where it is unlikely that there will be any material facts in dispute;

- b. *Planning Act*, s. 24, which prohibits the creation of a public work that does not conform to an official plan that is in effect;
- c. The *Municipality of Clarington Official Plan*, as amended, and in particular ss. 11.4.2, which states that the goals, objectives and policies applicable to business parks, which is the planning designation relevant to the Subject Site, shall be set out in secondary plans;
- d. The *Clarington Energy Business Park Secondary Plan* (the “Clarington Secondary Plan”), ss. 3.5.1, which prohibits the processing of waste materials on the northern part of the Subject Site and ss. 3.6.2, which prohibits waste-to-energy facilities except those with site-specific zoning amendments on the southern portion of the Subject Site;
- e. A site-specific zoning amendment has not been requested or granted to permit a waste incineration facility on the Subject Site;
- f. The *Durham Regional Official Plan*, June 5th, 2008 consolidation, which does not provide an authorization for a waste-to-energy facility on the Subject Site;
- g. The *Municipal Act, 2001*, S.O. 2001, c. 25 as amended, (the “*Municipal Act*”), s. 440, which authorizes a taxpayer to bring an application to restrain an action that contravenes a by-law of a municipality passed under the *Municipal Act*;
- h. Municipality of Clarington Zoning By-law 84-63, and specifically
 - i. ss. 23B.1 and 23B.2, which, when read together, do not currently allow a waste incineration facility on the northernmost portion of the Subject Site;

- ii. ss. 23C.1 and 23C.2, which, when read together, do not currently allow a waste incineration facility on the remainder of the northern portion of the Subject Site;
 - iii. ss. 23D.1 and 23D.2, which, when read together, prohibit a waste incineration facility on the southern portion of the Subject Site; and
 - iv. ss. 3.18, which provides a limited exemption to Zoning By-law 84-63 for the provision of public services that is dependent, for its availability, on the user of a site, and which is available only to a limited group of government actors, including the Municipality of Clarington, any Department of the Regional Municipality of Durham and other levels of government, but not to private persons, including private corporations and not to the Regional Municipality of York;
- i. Minutes from the Council of the Regional Municipality of Durham dated June 24, 2009 (the “June 24, 2009 Durham Council Minutes”);
 - j. The Memorandum of Understanding between the Regional Municipality of Durham and the Regional Municipality of York dated June 25, 2009, signing of which was authorized by a vote recorded in the June 24, 2009 Durham Council Minutes;
 - k. The minutes from the Regional Municipality of Durham Works Committee meeting on June 15, 2011;
 - l. The draft Co-Owners’ Agreement between the Regional Municipality of Durham and the Regional Municipality of York, provided to the Durham

Region Works Committee by the Commissioner of Works on June 15, 2011, which, if approved and executed, would make the Regional Municipalities of York and Durham equal owners of the Proposed Facility;

- m. The Project Agreement between the Regional Municipality of Durham and the Regional Municipality of York as Owner and Covanta Durham York Renewable Energy Ltd. (“Covanta”, a limited partnership registered under the laws of Nova Scotia, Canada) as “DBO Contractor” signed November 25, 2010, which signing was authorized by a vote recorded in the June 24, 2009 Durham Council Minutes, and which agreement specifies that Covanta, and not the Regional Municipality of Durham, will design, build and operate the Proposed Facility, meaning that Covanta is providing any services provided by the Proposed Facility;
- n. The Durham York Energy Centre Site Plan Application submitted by Warren Fisher, Project Manager, Constructions Department, Covanta Energy Corporation, 445 South Street, Morristown New Jersey, 07960 on May 6, 2011 with respect to the Proposed Facility;
- o. The Host Community Agreement, s. 13, which purports to bind the Council of the Municipal Corporation of Clarington to a variety of commitments, including agreements
 - i. To be a willing host to the Proposed Facility;
 - ii. Not to oppose the Proposed Facility;
 - iii. To expedite the review of applications related to the Proposed Facility; and

- iv. That public ownership of the Proposed Facility triggers the public use exemption to Zoning By-law 84-63;
- p. The Host Community Agreement, s. 14, which states that the Host Community Agreement is entered into solely between the Regional Municipality of Durham and the Municipality of Clarington and that it excludes the creation of any rights or beneficial interests in any third party save and except the Regional Municipality of York;
- q. The respondents have also breached the principles of natural justice and procedural fairness in failing to consult with the public as required by statute with respect to an effective amendment to the in-force zoning by-law;
- r. Such further and other grounds as counsel may advise and this Court may consider just.

3. The following documentary evidence will be used at the hearing of the application:

- a. the affidavit of Douglas Anderson; and
- b. such further and other material as counsel may advise and this Court may permit.

July 22, 2011

Eric K. Gillespie Professional Corporation
10 King Street East, Suite 600
Toronto, Ontario
M5C 1C3

Eric K. Gillespie (LSUC # 37815P)

Tel: (416) 703-6326
Fax: (416) 703-9111

Solicitors for the applicant

BETWEEN:

**Durham Citizens Lobby for
Environmental Awareness and
Responsibility Inc.**

- and -

**The Regional Municipality of Durham
et al.**

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding Commenced at Oshawa

Notice of Application

**Eric K. Gillespie
Professional Corporation**
10 King Street East, Suite 600
Toronto, Ontario
M5C 1C3

Eric K. Gillespie - LSUC # 37815P

Tel: (416) 703-6326

Fax: (416) 703-9111

Lawyers for the Applicant