

Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement
local



ISSUE DATE: December 10, 2019

CASE NO(S): MM180027

The Ontario Municipal Board (the “OMB”) is continued under the name Local Planning Appeal Tribunal (the “Tribunal”), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

PROCEEDING COMMENCED UNDER subsection 11(5) of the *Aggregate Resources Act*, R.S.O. 1990, c. A.8, as amended

Referred by:	Ministry of Natural Resources & Forestry
Objector:	Jackie Bates
Objector:	Jim Bates
Objector:	Theresa Broek Bill McFarlane
Objector:	Dave & April Boyce; and others
Applicant:	C. H. Demill Holdings Inc.
Subject:	Application for a Class A license for the removal of aggregate
Property Address/Description :	Part Lot 7, Concession 3
Municipality:	Township of Tyendinaga
LPAT Case No.:	MM180027
LPAT File No.:	MM180027
LPAT Case Name:	Bates v. Ontario (Natural Resources & Forestry)

Heard: November 12, 2019 via Telephone Conference Call

APPEARANCES:

Parties

Counsel*/Representative

C.H. Demill Inc.

A.E. Fleming*

Joyce McFarlane and Linda Fuller
Brad and Bonnie Robinson

Self-Represented

Morris and Susan Munro
Jim and Jackie Bates
Cynthia Osborne
Shirley Campbell and Joe Liotine
Les and Wendy McGeachy
F. James Taylor
Dave and April Boyce
Robert and Theresa McFarlane
John and Marjorie McFarlane
Bill McFarlane and Theresa Broek
Frank Prevost
Mike and Sheila Fox
Betty Lou Walsh
Trudy McFarlane

DECISION DELIVERED BY R.G.M. MAKUCH AND ORDER OF THE TRIBUNAL

BACKGROUND

[1] This is the second Pre-Hearing Conference (“PHC”) convened for the purpose of finalizing a Procedural Order (“PO”), which will govern this proceeding and to hear submissions from counsel respecting the inclusion/non-inclusion of certain issues on the issues list for the hearing of this matter.

[2] Member Hodgins in his Memorandum of Decision from this first PHC, had directed Tony Fleming to initiate and coordinate the preparation and submission of a PO including an issues list for the hearing of this matter along with Richard Lindgren, counsel for the Citizens Against Melrose Quarry (“CAMQ”), which had been granted participant status by Member Hodgins. Mr. Lindgren at that time had agreed to assist the objectors in the preparation of their case for the hearing.

[3] Mr. Lindgren requested and was granted permission by the Tribunal to present oral submissions at this PHC on behalf of the Objectors as a friend of the Tribunal respecting what issues would be proper for inclusion in the issues list for the hearing.

[4] Susan Munro, who is a party in this matter, had filed a written submission dated November 6, 2019 on behalf of the Objectors.

[5] The two issues in dispute are as follows:

- 1) traffic impacts that may arise from the proposed Melrose Quarry (Issue 2(e);
and
- 2) the Applicant's compliance history under the *Aggregate Resources Act* ("ARA" / "Act") and other provincial statutes (Issue 4).

APPLICANT'S ARGUMENT

[6] The Applicant objects to the inclusion of these issues for the following reasons:

Traffic

Proposed issue 2 (e) reads as follows:

2. Has the proponent proposed adequate measures for monitoring, investigating public complaints, contingency planning, and implementing measures in relation to:
 - (e) traffic impacts?

[7] This issue is objected by the Applicant because the application is for the expansion of an existing quarry and that it has been made very clear throughout the process that this is not a doubling of the approved output of the quarry. If approved, the new quarry and existing quarry will be combined so that the total annual production limit remains as currently approved for the existing quarry. As such, there will be no increase in traffic and no new entrance to the public road proposed. The "new" quarry will function in exactly the same manner from a traffic perspective as the existing quarry according to Mr. Fleming, who also maintains that there is no information contained in any of the letters of objections that raises a triable issue related to traffic.

[8] Furthermore, the Applicant is aware of no study or concern expressed with respect to its existing entrance and traffic safety. It is argued that many of the objectors raise issues associated with impacts to the municipal road or compliance with traffic

laws, both of which are outside the jurisdiction of the Tribunal. Accordingly, this issue ought not to be included in the issues list.

Applicant's Compliance History

[9] Issue 4 is set out as follows:

What is the proponent's history of compliance under the *Aggregate Resources Act (ARA)*, regulations or other environmental statutes, and should the proposed *ARA* license and/or site plan (if approved) include additional conditions to prevent unacceptable impacts to area residents and the environment? If so, which additional conditions are appropriate?

[10] This issue is objected to because there has never been an objection raised to the proposed license on the basis of the Applicant's compliance history and none of the objection letters raise this issue according to Mr. Fleming. The Ministry of Natural Resources and Forestry ("MNRF"/ "Ministry") Referral letter dated March 7, 2018 directs as follows: "It is requested that the OMB hearing be scoped to consider only those issues that are specified in the objection letters."

[11] Section 11(5) of the *ARA* provides that:

The Ministry may refer the application and any objections arising out of the notification and consultation procedures that are prescribed or set out in a custom plan to the Local Planning Appeal Tribunal for a hearing, and may direct that the Local Planning Appeal Tribunal shall determine only the issues specified in the referral. [emphasis added].

[12] Therefore, according to Mr. Fleming the jurisdiction of the Tribunal under the Act is limited to the nature of the referral from the Ministry. In this case, the Ministry has specifically scoped the issues to be addressed to only those matters raised to be addressed by the objectors in the objection letters. As no objector raised compliance history as a reason to object to the license, the Tribunal is precluded by the referral from adding this issue to the list of issues to be determined at the hearing. This issue should therefore be struck from the list according to Mr. Fleming.

OBJECTORS' ARGUMENT

[13] The Objectors submit that both issues are proper, relevant and admissible matters that must be considered by the Tribunal under the ARA.

Traffic

[14] Section 12 of the *ARA* requires that the Minister and the Tribunal “shall have regard to” a number of different matters when considering whether a licence application should be issued or refused under the Act. In particular, subsection 12(1) specifically lists the following matter: “(h) the main haulage routes and proposed truck traffic to and from the site.”

[15] In light of this mandatory consideration, the Applicant has prepared and filed a “traffic assessment” report (Greer Galloway Group, August 3, 2011) in support of its ARA licence application. This report purports to identify and evaluate traffic-related issues associated with the establishment and operation of the Melrose Quarry, and concludes that:

- the local road network provides “a safe environment for all vehicle operators”;
- the *ARA* licence application “will not necessarily increase traffic using the local road network”; and
- the “safety of all drivers... would be maintained at its highest levels”.

[16] With respect to the Applicant’s argument that there is “no triable issue” regarding traffic impacts because the proposed Melrose Quarry “will function in exactly the same manner from a traffic perspective as the existing quarry,” and furthermore that the Applicant is unaware of any concerns related to traffic safety, the Objectors argue that they should have the right to cross-examine the author of this report and should be allowed to proffer evidence on this issue at a hearing of this matter. The Objectors

disagree with the methodology, findings and conclusions of the Applicant's "stale-dated" traffic assessment report. This issue of traffic impacts (e.g. traffic volumes, suitability of local road network, public safety, etc.) have been specifically raised by most objectors in their objection letters filed with the Ministry of MNR in 2011.

[17] Furthermore, the MNR's referral letter dated March 7, 2018 to the Tribunal provides that the hearing issues were those raised in the Objectors' letters. Traffic-related impacts were clearly raised in the objection letters, and the Objectors intend to adduce factual, expert and visual evidence on this matter at the Tribunal hearing.

[18] This is a question of fact and it will be up to the Tribunal to ultimately decide what weight should be attached to the Objectors' concerns on this issue and determine its implications respecting the issuance or refusal of the ARA licence for the Melrose Quarry.

Applicant's Compliance History

[19] Section 12(1) of the ARA specifically directs the Minister and the Tribunal to have regard for an applicant's compliance history under the ARA:

- (j) the applicant's history of compliance with this Act and the regulations, if a licence or permit has previously been issued to the applicant under this Act or a predecessor of this Act.

[20] This subsection is subject to a limited exception (e.g. self-reported non-compliance) that is inapplicable in this case.

[21] It is not disputed that the Applicant currently possesses an ARA licence to operate the existing Long's Quarry, which is located immediately adjacent to the proposed Melrose Quarry and if the Melrose Quarry receives an ARA licence, then quarrying activities will simply cross over (and eliminate) the current boundary between the Long's Quarry and Melrose Quarry. Similarly, on-site access to the Melrose Quarry will be through the Long's Quarry, and de-watering activities (if approved) at the

Melrose Quarry will direct collected water to the sump pond located in the Long's Quarry prior to discharge of the wastewater into a nearby watercourse.

[22] In addition, the MNRF has advised the Objectors that if an ARA licence is issued for the Melrose Quarry, then it will be open to the MNRF to merge the two quarry licences and to combine the annual tonnage limits for both quarries. This scenario is acknowledged in the submissions filed by counsel for the Applicant. The MNRF has also confirmed that the combined annual tonnage limit can be increased upon application by the site operator.

[23] Given the close factual and technical nexus between the two quarries, the Objectors argue that the issue of whether – or to what extent – the proponent has complied with its ARA licence for the Long's Quarry is a relevant matter for the Tribunal to consider, when deciding if the Melrose Quarry application should be granted or refused.

[24] The Objectors acknowledge that the Applicant's ARA compliance history was not expressly mentioned in the Objectors' letters filed in 2011. However, the Objectors submit that this fact is neither persuasive nor determinative of whether the issue can be raised at the hearing and considered by the Tribunal. The Applicant it seems does not dispute the relevance of a proponent's compliance history under section 12 of the ARA, but argues that this issue should be excluded on the grounds that this issue was not specifically mentioned in the Objectors' letters filed some eight years ago.

[25] A review of the file shows that the MNRF conducted site inspections and prepared inspection reports, which indicated that the Applicant was not in compliance with certain requirements under the ARA. The apparent non-compliance according to the Objectors, post-dates the 2011 objection letters. The Objectors maintain that they became aware of the above-noted inspection reports well after the expiry of the deadline for filing objection letters. They argue that under these circumstances, the post-2011 evidence of non-compliance under the ARA is both relevant and has probative value, and that this after-acquired information should be received and duly

considered by the Tribunal.

[26] In order to fully and fairly discharge its adjudicative duties under the ARA, the Objectors submit that it is imperative for the Tribunal to obtain the best available and up-to-date evidentiary record so that it can reach an informed decision about the proposed Melrose Quarry. In short, the hearing record should not be restricted to the status quo as it existed in 2011.

[27] The Objectors argue that they should be able to proffer evidence on this issue and again, this is a question of fact and it will be up to the Tribunal to ultimately decide what weight should be attached to the Objectors' concerns on this issue and determine its implications respecting the issuance or refusal of the ARA licence for the Melrose Quarry.

DISPOSITION

[28] The Tribunal has carefully considered the submissions before it and agrees with the submissions presented on behalf of the Objectors and finds that the issue of traffic impacts was raised in the objection letters and was referred to by the Ministry in its referred to in its referral letter dated March 7, 2018 should remain on the issues list for the hearing.

[29] With respect to Issue 4 e) concerning the Applicant's compliance history under the ARA, the Tribunal finds that this issue should also remain notwithstanding that it was not raised in the objection letters and was not referred to in the Ministry's referral letter. The Objectors could not have known of any of the non-compliance items, which were discovered by the Ministry at some time after the filing of the objection letters and following an inspection of the licensed quarry. The issue should be amended however, to refer only to compliance with the ARA and the regulations.

ORDER

[30] Accordingly, the Issues List attached to the PO will include:

- Issue 2 e) traffic impacts; and
- Issue 4 referring to the Applicant's compliance history under the ARA, however it will be amended to delete reference to other environmental statutes as follows:

4. What is the proponent's history of compliance under the *Aggregate Resources Act (ARA)*, regulations and should the proposed ARA license and/or site plan (if approved) include additional conditions to prevent unacceptable impacts to area residents and the environment? If so, which additional conditions are appropriate?

[31] Counsel are directed to make the necessary amendments to the Issues list and provide the Tribunal with a final PO for issuance.

[32] The hearing will commence on **March 31, 2020 at 10 a.m. at:**

**Recreation Hall (Tyendinaga)
The Hall
363 McFarlane Road
Shannonville, Ontario**

[33] Eight days have been set aside.

[34] I am not seized.

[35] There will be no further notice.

[36] It is so ordered.

“R.G.M. Makuch”

R.G.M. MAKUCH
VICE-CHAIR

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Local Planning Appeal Tribunal

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Website: www.elto.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248