F.A.S.'

Municipal Advisory Service

Legal Review

MAY 1978

I N D E X

NB. The Index will be updated with every mailing.

1. RE. PRESTON SAND AND GRAVEL COMPANY LIMITED

November 29th 1973 CIT: 3 O.M.B.R. 86-89
D. Jamieson, Vice Chairman
and H. E. Roberts

J. M. Harper, Q.C. for Preston Sand and Gravel Co. Ltd.
Vernon B. Copp, Q.C. for the City of Cambridge

Report to the Minister of Natural Resources under s. 5(4) of the Pits and Quarries Control Act 1971.

This case was a reference by the Minister of Natural Resources of an application by Preston Sand and Gravel Co. Ltd. for a licence to operate a gravel pit. Sixty acres of land in the City of Cambridge, Regional Municipality of Waterloo, were under consideration, with an estimated extraction of 500,000 tons per annum of high quality gravel. This pit would be worked out in 3 years if it was used as the sole source of aggregate for the company. An average of 100 truck loads daily would be experienced, with a maximum of 200. Trucking hours were from 7 a.m. to 6 p.m. (4:30 p.m. in winter). The site has been worked since 1900 according to previous owners, and apparently existed as a non-conforming use. However, as soon as the current owners began operations, local residents objected and picketed the grounds, causing operations to be discontinued. The basis of the objections were as follows: noise levels; incompatible use; pre-empting of the Official Plan currently under preparation; unique physical and natural environment; too intensive an activity for the area; stream waters would be contaminated; noise and dirt from previous operations caused property damage and this could be expected to occur again.

Evidence adduced by a professional engineer (hired by the company) concerning noise levels was not sufficient to discount residents' fears.

The conclusion of the Board was that operation of the pit would be against the interests of the public and therefore recommended against a licence being granted.

2. RE. TOWNSHIP OF UXBRIDGE RESTRICTED AREA BY-LAWS 1517 AND 1613

December 10th 1973 CIT: 3 O.M.B.R. 92-97
D. Jamieson, Vice Chairman

A. M. McLennan, for the Township of Uxbridge
G. D. Finlayson, Q.C. for Standard Paving and Materials Limited and others
J.DG. Parkinson, Q.C. for John D. Regan Co. Ltd.
H. T. Nichol, Q.C., for the Town of Whitby
D. H. Wood for J. W. Walker

Applications under s.35 of the Planning Act for approval of restricted area by-laws and under s.34 of the Planning Act for approval of an Official Plan.

This was an application by the Corporation of the Township of Uxbridge for final approval of its restricted area by-law 1585, by-law 1613, by-law 1634 and part of by-law 1517. Also, approval was requested to s.4.2(f) (iv) of the Official Plan of the Township of Uxbridge. (The effect of this section of the Official Plan was to prohibit the use of excavations for garbage dumps, and the Board approved it without reservation.)

The purpose of the restricted area by-laws was to afford some measure of control over lands owned by gravel operators, which then comprised some 10% of the township. The township proposal suggested a three-pronged approach: lands at the time being used for extractive purposes should be zoned M3; surrounding lands required for future use over the next 3-5 years should be zoned HM3 (a mining holding zone); and a further zone, A3, be used to designate agricultural lands which could be rezoned with sufficient notice and upon application at some future date.

The pit operators objected that land zoned M3 did not conform exactly to lands currently being used for pit operations; that holding lands were insufficient to meet their demands over the next 3-5 years; and that the A3 category was redundant, since sufficient protection was afforded by HM3 category.

The Board noted that apparently because of a lack of funds, the Township failed to provide adequate information concerning the boundaries of existing operations, and concerning future requirements for aggregate. However, it noted that better information was becoming available which the Council should avail itself of. The Board also agreed that the A3 category appeared to be redundant and suggested that the Municipality reconsider this issue.

The Board recommended that temporary approval of the by-laws be granted until December 31st, 1974, and that Council apply for final approval by December 31st, 1974.

3. RE. TOWNSHIP OF WEST FLAMBOROUGH

March 28th 1974 CIT: 3 O.M.B.R. 239-241
A. H. Arrell, Q.C., Vice Chairman
and S. C. Speigel

J. F. Easterbrook, Q.C. for Jacob Cooke
Geo. Yates, Q.C. for R. F. Young and others
Hugh F. McKerracher, Q.C. for the Township of Flamborough

Reference by the Minister of Natural Resources under s.5(3) of the Pits and Quarries Control Act 1971, for a report on an application for licence to operate a gravel pit by Jacob Cooke.

The applicant owned 50 acres of land, from which he wished to extract a total of 1.9 - 2.4 million tons. To the north of the land was a pit in which 1.2 million tons of similar gravel remained. A previous pit on the west had been rehabilitated as recreational land. Area residents using this recreational land objected to a new pit, because dust and other inconveniences would spoil their enjoyment. It was also considered that additional truck traffic on the road would cause problems, as the road was already in bad condition. 150 trucks per day would be added to the current traffic, which was already one truck every five minutes.

Zoning was M5 at the time which permitted the pit operation, but the Township was opposing the application because of the condition of the road, which it had no interest in upgrading at the time.

The Board therefore rejected the application.

4. RE. TOWNSHIP OF GLOUCESTER: LICENCE TO OPERATE A QUARRY

April 11th 1974 CIT: 3 O.M.B.R. 249-252
D. S. Colbourne

Adrian T. Hewitt, Q.C. and John E. McGee for Francon, division of Canfarge Ltd.
E. J. Shaver for Township of Gloucester
Robert K. Carleton for Jean Gravelle and others
Joseph Lieff, Q.C. for Jacques Pinard

Report to the Minister of Natural Resources under s.5(3) of the Pits and Quarries Control Act 1971, c.96, concerning an application for a licence to operate a quarry by Francon.

Some quarrying had already taken place on this site in 1971, but accidently continuity was not maintained thereby necessitating the application. The site would not be required for intensive use for 10 years, and processing of aggregates would occur on the company's other site in the township. Evidence was adduced concerning depth of excavation, vehicular traffic estimates, description of possible buildings, and water table effects. Zoning of the land was heavy industrial, but surrounded by some residential uses. Complaints from residents concerned blasting effects, property values and water table contamination. The municipal planner outlined three problems which he felt were of concern: traffic; blasting effects; and environmental impacts on clay deposits north of the site.

The Board felt that the blasting and environmental concerns were not valid; nor were arguments concerning property values as the land use then in existence would not be materially altered by the approval of the application. However, given the condition of the road, trucking was considered to be a major problem.

The Board recommended that the licence not be granted until the road was improved.

5. RE. TOWNSHIP OF MANVERS

March 24th 1975 CIT: 4 O.M.B.R. 380-383
A. B. Ball and
H. E. Stewart

W. K. Lycett, Q.C. for Sam Manetta

Reference by the Minister of Natural Resources under s.5(4) of the Pits and Quarries Control Act, 1971, c.96, for a report on an application for a licence to operate a gravel pit by Sam Manetta.

The applicant wished to sell the gravel on his land to an operator for extraction only. The land was zoned extractive industrial and the proposed use therefore conformed with the by-law. A consultant was hired by the applicant, who gave evidence concerning the unsuitability of the land for agriculture, but who did not provide information concerning the quality and quantity of aggregate to be extracted or its specific use. The volume of traffic to be encountered was not described, nor were methods of extraction and processing, or scheduling of production.

The existing road was appraised by the County of Victoria engineer and deemed structurally inadequate for trucking traffic, with an average safe speed being 40 m.p.h. Reconstruction and upgrading was required for pit traffic and county funds for this project were very limited.

Seven residents voiced opposition on grounds of: traffic, dust, noise and water pollution.

The Board recommended that the application not be granted because of: a) evidence concerning the condition of the road; b) lack of evidence concerning the rate and method of production, and truck traffic effects; c) as others would actually operate the pit, there was no evidence concerning how the rehabilitation agreement between the applicant and the township would be implemented; d) insufficient evidence was presented to determine need for the aggregate; e) no evidence was presented concerning the protection of local hydro towers; f) insufficient evidence was presented to allow an evaluation of the effect on the water table.

The applicant was given the opportunity to adduce further evidence, but did not present further information.

6. RE. TOWNSHIP OF MERSEA

May 15th 1975 CIT: 4 O.M.B.R. 460-462
H. H. Lancaster and
E. A. Seaborn

George A. Gallagher, Q.C. for Kennette Contracting Company Ltd.
Spencer L. Pearsall, Q.C. for Township of Mersea

Reference by Minister of Natural Resources under s.5(4) of the Pits and Quarries Control Act, 1971, Vol. 2, c.96, for a report on an application for a licence to operate a gravel pit, by Kennette Contracting Company Ltd.

The applicant owned 4.99 acres of land, fronting on the Fraser Road and partly lying behind two residences, on which it wished to operate a pit to extract sand and gravel. Several other pits, both municipally and privately owned, surrounded the site. Scattered residential uses also were close by, created through land severances.

According to the site plan filed, a depth of 12-15 feet would be excavated, with set back of 50-100 feet from site boundaries, unless otherwise negotiated with the township. The applicant provided uncontradicted evidence on the exhaustion of supplies in the area within 3-5 years without his proposed operation.

Three residents opposed the application, largely basing their objections on the inconveniences encountered with existing pits. The Board noted that the zoning (Rural) permitted extraction but did not encourage residential uses.

The Board recommended that the application be approved, on the grounds of: a) established need; and b) no material change in overall development of the area caused by an additional use of the same nature as already in operation. An additional three months was recommended, however, for rehabilitative work on completion of the excavation.

7. RE. TOWNSHIP OF ZORRA RESTRICTED AREA BY-LAW 28-1974

September 25th 1975 CIT: 5 O.M.B.R. 179-180
H. H. Lancaster

A. M. Graham for Township of Zorra
P. C. Hill for Township of Downie
G. H. Bishop for Herrington North Homeowners' Association,
Jack Rutherford, Edward Monteith and David Pryke

Application for approval of an amending zoning by-law under s.35 of the Planning Act.

The Township of Zorra sought to rezone a 15 acre site from general agriculture (A2) to general quarrying and gravel pit use (M3). It was part of a 68 acre site in the Township of Zorra purchased by the Township of Downie in 1973 for gravel extraction. Gravel had previously been extracted by 1969-1973 from this site. The site was to be used for township purposes only, not more than a total of six weeks in any one year, with crushing operations occurring only for two to three weeks annually.

Evidence indicated some of the land in the 68 acres was good for agricultural purposes (hay) but that the subject 15 acres was not. Five other pits were in operation in the area, but the township faced questions of cost, not of supply, in road maintenance activities and therefore required its own pit.

Residents objected on the grounds of conservation and preservation of farmland, and increased truck traffic. However, the Board noted that the site would divert current traffic somewhat to a more remote site, thereby having an overall favourable impact on the townships.

For that reason, and because the site had a history of such a use, and because the demand for gravel was increasing, the Board approved the application.

8. MONTEITH ET AL. V. TOWNSHIP OF DOWNIE ET AL.

December 23rd 1976 CIT: 6 O.M.B.R. 285-287
J. A. Wheler and
M. Corbett

P. C. Hill for Townships of Downie and Zorra
John M. Skinner for Edward Monteith, Jack Rutherford, and
Harrington North Homeowners' Association

Motion for review of a decision of the Board under s.42 of the Ontario Municipal Board Act, R.S.O., 1970, c.323.

The applicants for review were Edward Monteith and Jack Rutherford, officers of the Harrington North Homeowners' Association. They were appealing the decision of the Board dated September 25th 1975, which approved zoning by-law 28-1974, to permit 15 acres of a holding of 68 acres to be used for the purpose of gravel extraction (see above summary number 7).

The motion for review was based on two factors: a) issue was taken with the finding of the Board that the site was of little use for agricultural purposes; and b) the gravel concession road had been washed out either as a result of a storm, or as a result of gravel trucks, or both. There was no allegation of procedural unfairness in the previous hearing. The township had extracted gravel without a licence but with the written permission of the Ministry of Natural Resources, pending this hearing.

The Board found that the applicants did not like the previous approval permitting a gravel pit in the area, and therefore had applied for review of the decision. No re-hearing was justified, and upon receipt of an agreement between the Townships of Downie and Zorra to improve the concession road to accommodate the truck traffic, no re-hearing would be granted.

9. E.R.S. HOLDINGS LTD. V. TOWN OF PICKERING

December 9th 1976 CIT: 6 O.M.B.R. 262-267
B. E. Smith and
M. Corbett

Donald N. Plumley for E.R. Shutz and E.R.S. Holdings Ltd.
Christopher M. T. Sheffield for Town of Pickering
Alec M. McLennan for the Township of Uxbridge
Terence L. Clarke for Regional Municipality of Durham
Guy L. R. E. Poppe for Canadian Pacific Railway

Three matters were heard together: a) reference by Minister of Housing for an amendment to the Official Plan of Pickering to change the designation of lands from rural to pits and quarries; b) an application by E.R.S. Holdings, pursuant to s.35(22) of Planning Act, R.S.O. 1970, c.349, to change permitted use of the lands from agriculture to industrial to permit the operation of a gravel pit; and c) a reference by the Ministry of Natural Resources for hearing pursuant to s.5(3) of the Pits and Quarries Control Act, 1971, Vol. 2, c.96.

The lands involved were owned by E.R.S. Holdings, and comprised 63 acres between Uxbridge, Pickering and Whitby. All 3 applications were opposed by Pickering, Uxbridge and the Regional Municipality of York. The land was surrounded by arable farm and pasture land, and recreational and environmentally sensitive areas. The area was described as "a unique scenic rural tranquil environment".

The application was for 200,000 tons per year. The site was bounded by mature hardwood, and wooded on one side. About 29 acres was to be worked, giving the pit a life of 13½ years and a total of 2.7 million tons of aggregate.

Evidence was adduced from many planners and engineers. Truck traffic, ratepayer opposition, conflicting evidence concerning uses for aggregate and limited evidence concerning water pollution, were factors involved.

Two particular factors were considered by the Board: a) the inappropriateness of pit and quarry zoning in a predominantly rural and recreational area. The Board felt that such an intrusion would be precedent-setting in an area close to known gravel resources. Wayside pit operations might be more appropriate; and b) the refusal of the Town of Pickering, the neighbouring municipalities and the Regional Municipality to zoning for extraction. Interference with these Councils should not be the vote of the Board.

The Report notes that it did not find that the pit could not be regulated to reduce inconveniences of such a use; rather, it found it undesirable to zone 63 acres for extraction in a planned recreational area.

The designation and zoning and licence application were not approved.

10. RE. CITY OF LONDON RESTRICTED AREA BY-LAW C.P. 374(hf)-524
SOUTH WINDS DEVELOPMENT COMPANY LIMITED V. HARRIS

June 28th 1977 CIT: 7 O.M.B.R. 91-95
A. B. Ball

Ford B. Dapueto, for Corporation of the City of London
R. J. Flinn, Q.C., for South Winds Development Co. Ltd. and Riverside Construction Company Ltd.
C. Stanton Stevenson, Q.C. for N. J. Spivak Ltd.
D. W. Lewis for the Township of Westminister

"The owner had proposed a 68-unit apartment development on his land in a predominantly gravel pit area which was vigorously opposed on all sides. He now revised his proposal to a division into four lots on each of which a single-family dwelling would be erected. This met favour from Council who enacted a by-law and from the Committee of Adjustment who approved the severance. Opposition was still advanced from the City Planner and from gravel pit operators in the area, the former on general planning principles and the latter fearing interference with their operation." (p.91-92)

Application under s.35 of the Planning Act by the City of London for approval of a zoning by-law and appeal under s.42 from a decision of the City of London Committee of Adjustment granting a severance of land.

South Winds Development Company Ltd. and Riverside Construction Company Ltd. appealed the Committee of Adjustment severance decision, and opposed the City of London's application for approval of by-law C.P. 374 (hf)-524.

These companies had extensive operations adjacent to the site, which was zoned residential in the official plan and holding 1 under the comprehensive land use by-law C.P. 374-175.

The Municipal Planning department had voiced many objections to the initial proposal for 68 houses: no sewers; heavy truck traffic; nearby landfill operations affecting quality of water; potential complaints about pit operations; natural gas unavailable at this site; electrical service, water supply and telephone problems; extensive bussing to schools; noise and dust problems. They continued to oppose the proposal for four lots, on grounds that in the absence of an overall development plan, it may not be the highest and best use for such a lot. The results of planning studies under way at this time should be awaited.

The Board noted that the application was a deviation from the community planning process that had been in operation in London for many years to provide for orderly development. The Board concluded that the application was premature in the absence of a completed development plan; services were then nonexistent or inadequate; land was surrounded by active pit operations; and access was difficult and dangerous.

The appeal against the Committee of Adjustment was therefore allowed, and the decision on severance was therefore set aside. The application for approval of by-law C.P. 374 (hf)-524 was dismissed.

1) R. v. Springbank Sand and Gravel Ltd.

30 May 1975 Cit.:
Peel County Court (1976) 25 CCC (2d) 535, 6 CELN 2
Hollingworth, Co. Ct. J.

A strong wind blew sand from the Springbank Sand and Gravel pit (a crushing and washing operation) over the adjacent property. The wind continued to blow the sand after the operations had ceased. The accused was charged with causing pollution contrary to Section 14 of the Environmental Protection Act, 1971 (EPA). The accused was aquitted, and an appeal by the prosecution dismissed. Pollution was deemed to have occurred through an Act of God, i.e. the wind was stronger than usually expected. Although the accused did not take every precaution, it was not found to have "caused" the pollution within the meaning of the EPA.

2) R. v. Glen Leven Properties Ltd.

10 February 1977 Cit.:
Divisional Court, Supreme Court of Ontario. (1977) 34 CCC (2d) 349
Reid, Southey and Holland, J.J.

The Trial Judge had dismissed charges that the accused was responsible for emitting a contaminant from its construction operations contrary to Section 14 of the Environmental Protection Act, 1971 (EPA), and Section 6 (b) of Regulation 15, the General (Air Pollution) Regulation under the EPA. Sand had been blown from a construction site to adjoining property by the wind. The charge was dismissed on the grounds that sand was a natural substance and therefore not a contaminant within the terminology of the EPA. An initial appeal by the Crown by stated case was also dismissed. On further appeal, the Divisional Court convicted the accused and found that the sand, in its natural state, would have been covered by topsoil and therefore would not have blown away. The contaminant was "exposed sand" and had been exposed due to the accused's actions. The accused was convicted under both the EPA, and S. 6(b) of R.R.O. 1970, Reg. 15. A final appeal by the accused was dismissed without giving reasons by the Court of Appeal on December 7, 1977. The case has been remitted to the Trial Judge for sentencing, and final sentence is pending.

3) R. v. Chinook Chemicals Ltd.

9 January 1974 Cit.:
Provincial Court, County of Lambton (1974) 3 OR(2d) 768
Fowler, Co. Ct. J.

The accused was charged with causing the unlawful emission of an odour, causing loss of enjoyment of normal use of property, contrary to S. 6(b), R.R.O. 1970, Reg. 15, the General (Air Pollution) Regulation made pursuant to the Environmental Protection Act, 1971. The odour, complained of by local residents, was Trimethylamine. The accused company was found also to have violated the Environmental Control Board requirements in 1971, giving an unacceptable defence of impossibility to comply. Similar fact evidence of odour on other days was admitted. The accused was convicted and fined $900.00.

4) Rockcliffe Park Reality Ltd. and Director of Ministry of Environment

3 June 1975 — Cit.:
Court of Appeal, Supreme Court of Ontario — (1976) 10 OR(2d)1
Jessup, Arnup and Dublin, J.J.A.

A developer was accused of dumping clean fill into marshland to develop it for housing. The Ontario Ministry of Environment, Waste Management Branch, issued a Control Order and a Stop Order on the grounds of contravention of S. 14, Environmental Protection Act, 1971. In an appeal to the Environmental Appeal Board, the orders were upheld, and the developer further ordered to provide landscaping. On appeal to the County Court, the orders were both set aside. A further appeal by the Ministry of the Environment was dismissed on the grounds that no contamination was proved contrary to S. 14 and that the Environmental Appeal Board had exceeded its authority in ordering landscaping.

5) R. v. B.L.S. Sanitation Ltd.

8 September 1976 — Cit.:
District of Sudbury — (1977) 6 CELN 13
Loukidelis, Co. Ct. J.

The accused was convicted of a violation of S. 43 of the Environmental Protection Act, 1971, in failing to comply with an order to provide adequate cover for a landfill site. The penalty initially imposed was a $500 fine. The Crown appealed the sentence and the District Court Judge found that the penalty must be a deterrent, and also reflect the cost to the public resulting from non-compliance. The fine should not relate to the profit gleaned from non-compliance. The fine was increased to $10,000.

6) Re. Starr and Township of Puslinch et al.

31 May 1977 — Cit.:
High Court of Justice (Divisional Court) — (1977) 16 OR(2d) 316
Galligan, Reid and Maloney, J.J.

This case involves the application by a resident of Puslinch Township, a Mr. Paul Starr, for judicial review and an order declaring the Guelph and Suburban Planning Area's Official Plan relating to Puslinch Township, null and void; or at least the setting aside of gravel pit designations as null and void. The respondents were: Corporation of the Township of Puslinch; TCG Properties Limited; TCG Materials Limited; Custom Concrete Limited; Minister of Housing; and the City of Guelph.

By the time this case came to court, an injunction had been obtained by the applicant restraining activities in the gravel extraction industry in the Township, based on Official Plan designations, until the judicial review could be conducted.

Grounds for the application for judicial review were:

a) that the approval of the Official Plan had been obtained by fraud and misrepresentation on the part of Puslinch Township;

b) that the Township of Puslinch, and the Guelph and Suburban Planning Board had failed to comply with the Planning Act, RSO 1970, C.349, especially S. 12;

c) that at the time of the deliberations, a conflict of interest existed among members of the Town council within the meaning of the Municipal Act, RSO 1970, C.284.

In 1971, the Guelph and Suburban Planning Board hired a professional planning consultant to draft an Official Plan for the Guelph and Suburban Planning Area, which included the Township of Puslinch. In December 1972, the Board began a series of public meetings to acquaint residents with the draft Plan, and to explain it to them. Objections and other input received at those meetings were to be incorporated into the final Plan, which was eventurally approved by the Minister of Housing, after some modification, on December 31st, 1973. It was the contention of the applicant that the policy on the future of the extractive industry in Puslinch Township was represented in one way at the public meetings, and changed substantially before being approved by the Minister. No further recourse to the public was taken after this change, even though local opposition to growth in the extractive industry was known to exist. No reference was made by the Minister of any part of the Plan to the Ontario Municipal Board, because the Minister was not informed that local opposition existed. The applicant did not discover until Fall 1975 that such widespread changes had occurred in the Plan. He had been assured that he would be informed when the final plan was approved, and that he would be notified of the OMB hearing at which to voice his objections. This had not occurred.

The Court found that:

a) The only statutory power of decision reviewable in court was that of the Minister. As no power is conferred on either the Township or the Guelph and Suburban Planning Board to make decisions, no power existed to be reviewed in court. There were no grounds to suspect that the Minister's duties had been carried out other than within the terms of his jurisdiction.

b) Since the Township is not called upon to comply with the Planning Act, it cannot be charged with failure to do so; the facts indicate that the Guelph and Suburban Planning Board did comply with the requirements of the Planning Act as it affected them. There was no legal obligation to submit changes to the draft Official Plan to the public for review, although the Board risks subjecting itself to severe criticism by failing to follow the dictates of natural justice.

c) Unless charges of fraud can be substantiated, conflict of interest charges are irrelevant. The court found that there was no deliberate scheme to mislead the public concerning extractive policies. The Township influenced the Guelph and Suburban Planning Board to change its proposed policies, but was entitled to do so under the procedures in force for preparing an Official Plan.

Although the Court dismissed the application for judicial review, and suggested that the applicant had been wrong to assume that a draft policy would necessarily be reflected in the final Plan, the Court criticised both the Board and the Township. The Township erred in notifying the applicant that he would be informed of the OMB hearing, when none was forthcoming; and in assuring him that he would be notified of the approval of the final plan, when he was not. The Board should have heeded the advice of its Secretary and its Planner and submitted the substantially changed policy to the public, to enable opposition to be voiced.

In the matter of relief for the applicant, the Court suggested that S. 17(3) of the Planning Act might give any opposition the chance to raise the whole matter again. The applicant should seek amendment to the Official Plan to reverse the extractive areas. If council fails to propose such an amendment, or does not do so within 30 days, the matter may be referred to the Ontario Municipal Board, who would undoubtedly consider all the previous facts of the case. In the matter of costs, the Court found that although the grounds for application for judicial review were unsubstantiated, there were circumstances that could cause a reasonable person to suspect that serious misconduct might have occurred. Therefore costs were not assessed against the applicant.