PUBLIC CONTROL OF PITS AND QUARRIES IN ONTARIO

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This note deals with the law of public control of pits and quarries in Ontario.

Traditionally, any control that was attempted was exercised by municipalities. The province entered the field in a limited way with The Niagara Escarpment Protection Act, 1970 and then on July 28, 1971, The Pits and Quarries Control Act, 1971 was passed.

The first part of this note deals with the recent legal history of control by municipalities; it is meant only to be a summary of the law and does not purport to evaluate the degree of success that has been attained by the municipalities.

The second part comprises a tabulation of some shortcomings of the new Act.

I

The power of Ontario municipalities to regulate the establishment and operation of pits and quarries has been largely curtailed by decisions of the courts and, perhaps unwittingly, by the legislature.

The authority vested in municipal councils by section 30(1) of The Planning Act and its predecessors to pass restricted area (or "zoning") by-laws would seem at first blush to provide ample power for municipalities to prevent the establishment of pits and quarries within their boundaries. The first paragraph of the subsection provides

> By-laws may be passed by the councils of municipalities:
> 1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law

> within the municipality or within any defined area or areas or upon land abutting on any defined highway or part of a highway.

But the singular decision of the Ontario Court of Appeal in Pickering Twp. v. Godfrey [1958] O.R. 429, 14 D.L.R. (2d) 520 determined otherwise. The court ruled that "the making of pits and quarries is not a 'use of land' within the meaning of [section 30] and it therefore follows that a by-law passed under it cannot prevent a landowner from digging and removing gravel or other substances from his lands." The court was of the opinion that such operations were more in the nature of a sale of land than a use of land.

The provincial legislature moved apparently to close the loophole opened by the court and in 1959 enacted what is now paragraph 6 of section 30(1). By-laws may be passed

> For prohibiting the making or establishment of pits and quarries within the municipality or within any defined area or areas thereof.

But by-laws passed pursuant to paragraph 6 are subject to a limitation that is shared by all zoning by-laws in Ontario. Section 30(7)(a) of The Planning Act provides

> No by-law passed under this section applies, to prevent the use of any land, building or structure for any purpose prohibited by the by-law if such land, building or structure was lawfully used for such purpose on the day of the passing of the by-law, so long as it continues to be used for that purpose.

Thus subsection establishes what is called a "non-conforming use" whereby an owner who, before the passing of a by-law was using his land for a purpose contrary to the terms of the by-law is protected

so long as it continues to be used for that same purpose. Operators of pits and quarries were quick to realize the possibilities of this provision. The classic illustration is recorded in the recent case of Whitchurch Twp. v. McGuffin [1970] 2 O.R. 181 (H.C.). There, a sand and gravel operator obtained the beneficial interest in certain land in 1956. Although he did not apparently have need of material from this site until twelve years later, he began in 1957 and continued every year to 1968 faithfully to remove small amounts from the property. This was stockpiled at his main premises. The admitted purpose of this maneuver was, of course, to enable the operator to invoke the "non-conforming use" protection should the township ever pass a by-law prohibiting the establishment of new pits or quarries. The foresight of the operator was confirmed in 1963 when the township did enact a by-law pursuant to paragraph 6 and in 1970 when the township's action to obtain an injunction restraining the operation was dismissed by the court because a non-conforming use had been established and continued.

The Ontario government did not in 1959 restrict its authorization of the prohibition of pits andquarries by municipalities to the zoning power. What is now s. 379(1) paragraph 118 of The Municipal Act was also passed. It provides

> By-laws may be passed by the councils of local municipalities [i.e., cities, towns, villages and townships]:
> ...
> For prohibiting the carrying on or operation of a pit or quarry in any area in which the use of land is restricted to residential or commercial use by a by-law passed, or an official plan adopted,

> before the 1st day of January, 1959, provided no by-law passed under this paragraph shall come into force until approved by the Municipal Board or shall apply to a pit or quarry made or established before the 1st day of January, 1959, except to prohibit the enlargement or extension of any such pit or quarry beyond the limits of the land owned and used in connection therewith on the 1st day of January, 1959.

The major limitation of this provision is, of course, that a municipality can prohibit the operation only with respect to land zoned residential or commercial (or subject to an official plan that indicated these conditions were to prevail) prior to 1959. But although so limited, the last clause did seem to give real teeth to the provision. It gave to any by-law passed thereunder retroactive effect in that the by-law could "prohibit the enlargement or extension of any such pit or quarry beyond the limits of the land owned and used in connection therewith on the 1st day of January, 1959." A reader of the provision would have probably inferred from it that if appropriate zoning had been in force prior to January 1, 1959, the municipality could thereafter pass a by-law prohibiting the enlargement or extension of any pit or quarry. But the High Court did not accede to this view. In the unreported 1960 decision in Toronto Twp. v. Newman it was decided that "the word 'limits' in the statute is synonomous with the word 'boundaries'" and hence in the absence of any "ditches, fences, fields, natural or artificial boundaries within the whole area of the defendants' lands," it was impossible to fix the location of

> the limits of the land owned and used in connection therewith on the 1st day of January, 1959.

Thus, the by-law could in effect only prohibit enlargement or extension beyond the legal limits of the particular piece of land.

This interpretation mades a virtual mockery of a provision solemnly enacted by the legislature.

One year earlier, in 1958, the legislature enacted what is now paragraph 119 of s. 379(1) of The Municipal Act. It provides that by-laws may be passed

> For regulating the operation of pits and quarries within the municipality and for requiring the owners of pits and quarries that are located within 300 feet of a road and that have not been in operation for a period of twelve consecutive months to level and grade the floor and sides thereof and the area within 300 feet of their edge or rim so that they will not be dangerous or unsightly to the public.

The authority given to municipalities to require levelling and grading is restricted to certain excavations but the general power "[f]or regulating the operation of pits and quarries within the municipality" appears to give to municipal councils broad power over the day-to-day operation of excavations. But, as will be seen, the new Act may extinguish this power and vest it in the province.

II

The central device instituted by The Pits and Quarries Control Act, 1971 to effect "control" is set out in s. 4(1).

> No person shall open, establish or operate a pit or quarry except under the authority of a licence issued by the Minister to the operator.

There are several shortcomings in the scheme propounded by the Act.

First, in view of the fact that the object of legislation to

"control" pits and quarries is largely to ensure that their operation results in as little damage to the national environment as possible, there seem to be cogent reasons for providing that the Act is to be administered by the Department of the Environment rather than, as is now the case, by the Department of Mines and Northern Affairs. The divergent perspectives of the two departments would seem to ensure that the objects of the legislation would have a greater chance of being attained under the former.

Secondly, the onus must be on the government to demonstrate why "This Act applies only in such parts of Ontario as are designated by the Lieutenant Governor in Council by regulation." (s. 2)

Thirdly, there are other areas in Ontario that should be accorded the blanket prohibition of quarrying operations that apply to the Niagara escarpment region. (s. 10) (The word "quarry" in s. 10(1) should be deleted and replaced by the words "operate a pit or quarry" and the words "on the Niagara escarpment or" should be inserted after the word "point" in s. 10(1)).

Fourthly, the provision in s. 20(1) that

> This Act does not apply to operators of pits and quarries operating in a part of Ontario immediately before it is designated under section 2 until six months after the designation.

should apply, if at all, only in respect of operations being carries on at the time of the enactment. New (and prospective) openings and operations should be subject to the Act immediately. (s. 20(2), dealing with "wayside pits or quarries," gives a similar grace period of <u>one</u> month after designation and is subject to the same objection as s. 20(1)).

Fifthly, the provision in s. 22 that

> This Act comes into force on a day to be named by the Lieutenant Governor by his proclamation.

is conducive to unnecessary delay in implementation of the scheme of the Act. The Act should have come into force on the day it received Royal Assent. The combined effect of sections 2, 20 and 22 is that we have an Act passed on July 28, 1971 but which does not come into force until the government decides to proclaim it; when it finally comes into force it applies only in such parts of Ontario as are designated by the government and there is, of course, no indication as to when such designations will be made if at all; if and when the designations are made, there is a further period of grace of six months before the Act applies. On top of this

> The Minister may, where in his opinion to do so would not be against the public interest, in writing relieve a licensee or permittee from strict compliance with any provision of the regulations subject to such terms and conditions as the Minister may impose. (s. 19(2))

Among other things, these regulations, relief from strict compliance with which the Minister can grant, can be made

> governing the management and operation of pits and quarries
> ...
> governing the rehabilitation of pits and quarries
> ...

and

> respecting any matter considered necessary or advisable to carry out the intent and purpose of this Act.

These would seem to be fairly crucial items in any scheme to "control" pits and quarries.

Sixthly, the language of s. 11(3) should be amended so as to make clear the responsibility of an operator for the cost of any

work performed by the government or its agents "to complete the rehabilitation requirements" even if the money spent exceeds the amount of the security deposited pursuant to s. 11(1).

Seventhly, the legislation inspires several questions, notably regarding control of pits and quarries by municipalities. For example, section 5(2) provides that

> No licence shall be issued in respect of a pit or quarry where the location is in contravention of an official plan or by-law of the municipality in which it is located.

Does this mean that no licence shall be issued for an excavation that operates legally only because it is a non-conforming use under s. 30(7)(a) of The Planning Act? It is certainly arguable that such an operation is "in contravention" of a zoning by-law and hence the Minister cannot issue a licence in respect of it notwithstanding that under The Planning Act it can be carried on with impunity despite the by-law. It is a principle of statutory interpretation that where the provisions of a general and a specific statute are in conflict, those of the specific one prevail. The provision in s. 17(2) that

> Where there is conflict between any provision of this Act or the regulations and any municipal by-law, the provision of this Act or the regulations prevails.

is of no assistance here because the conflict is not between a provision of the Act and a by-law.

The question is an important one and the answer should be forthcoming from the Act because if a pit or quarry that operates as a non-conforming use is still protected even under this Act, a

municipality that desired to influence the location of such operations would appear to be in a better position were it to repeal all by-laws on its books that related to the subject. This follows from s. 6(3):

> Where a local municipality does not have an official plan or by-law governing the location of pits and quarries, the Minister shall give the municipal council notice of the filing of the application [for a licence] and if the council objects to the location of the pit or quarry within forty-five days after receiving the notice, the Minister shall not issue the licence...

If the municipality does have "an official plan or by-law governing the location of pits and quarries" it does not even have the right to receive notice of applications for licences to establish or operate on land within its jurisdiction and it misses out on the apparent opportunity to require, in effect, the Minister not to issue the licence. The latter right would appear to enable a municipality to block the issue of a licence in respect of an excavation that had been operating as a non-conforming use, but where a by-law "governing the location" of such excavations is in effect, the municipality is limited, when the operator makes application for a licence, to invoking section 5 and requiring a hearing by the Ontario Municipal Board. Unlike the situation of the Minister under the s. 6(3) procedure, the Board need not accede to the objections of the municipality and, even if it did agree with them, the Minister is under no duty to implement the Board's recommendations. (s. 9(4)). This anomaly of a municipality that had not attempted previously to control the location of excavations being in a stronger position than one that had is itself very questionable.

The Act also seems to severely restrict the legal competence of municipalities to regulate the actual operation of pits and quarries as distinct from their establishment and location. As indicated above, s. 379(1) paragraph 119 authorizes local municipalities to pass by-laws "[f]or regulating the operation of pits and quarries within the municipality." The new act provides in s. 19(1) that

> The Lieutenant Governor in Council may make regulations,
> ...
> (e) governing the management and operation of pits and quarries
> ...including,
> (i) the use that shall be made of land set aside for the purpose,
> (ii) the location construction and use of buildings on lands set aside for the purpose,
> (iii) prescribing the hours during which any class or classes of activity may be carried on, on lands set aside for the purpose,
> (iv) prescribing the sound levels permissible in their operation,
> (v) governing final slopes, excavation set backs, fencing, tree screeing and berming, warning signs; blasting requirements, roads and exits.

Thus, there is ample legal authority for the provincial government to regulate all aspects of the operation of pits and quarries. And, given the provision of s. 17(2) that

> Where there is a conflict between any provision of this Act or the regulations and any municipal by-law, the provision of this Act or the regulations prevails,

municipalities would no longer be competent to regulate the operation of pits and quarries. Perhaps this role should be taken over by the province, but not clandestinely without an opportunity for

public discussion and expression of opinion by the municipalities.

But perhaps the most glaring shortcoming of the Act is the fact that members of the public are effectively excluded from having their interests represented or their views expressed in the matter of the control of pits and quarries in Ontario. This is illustrated by s. 18. Subsection 1 provides that it is an offence to contravene any provision of the Act or the regulations or to breach any term or condition of a licence and that on summary conviction there is a fine of up to $5,000 each day on which the offence occurs or continues. But subsection 2 provides that

> No proceedings under subsection 1 shall be instituted except with the consent or under the direction of the Minister.

Thus, private prosecutions under the Act are not available unless the Department of Mines agrees to their being brought. If an operator of a pit or quarry is in violation of a provision of the Act or regulations or if an administrative action or hearing has been or not been carried out according to the Act, members of the public should have the right to challenge the illegal act in court. Because of lack of money, time, personnel or other resource or because of the special perspectives and propensity to compromise that civil servants necessarily bring to their work, an illegal act or circumstance must often be prosecuted only where the public can do so as a matter of right. The courts are perhaps not the most salutary forum for the discussion of questions of public policy but surely they should be accessible to those who would challenge an apparent violation of a substantive enactment of the

Ontario legislature. The principle was acknowledged recently by the legislature when a similar impediment to private prosecutions that was included in the first reading of The Environmental Protection Act, 1971 (s. 102(3)) was deleted from the final version of that Act.

There are several other amendments that should be made in order that the administration of the scheme be subject to public scrutiny.

S. 4(4) provides that

> Every operator shall carry on his operations in accordance with the site plan upon which his licence is based and the operator may amend the site plan with the consent of the Minister.

It should be expressly provided that these site plans are to be available for public scrutiny and that a member of the public should be, upon posting costs, enabled to require a hearing at which any proposed amendment can be challenged.

S. 5(1) provides that

> Upon the receipt of an application, the Minister shall fix a day as the last day upon which written objections may be filed with him by the municipal council or any other authority having an interest or any person directly affected by the issuing of a licence.

Any such person can then by notice in writing to the Minister require a hearing before the Ontario Municipal Board. (s. 5(3)) This should be amended so that any person, upon posting costs, is enabled to require a hearing and adequate provision should be made for publishing notice of all applications for licences.

S. 6(4) provides that

> The Minister may issue the licence subject to such terms and conditions as the Minister, in

his discretion, considers advisable.

These terms and conditions should be a matter of public record so that members of the public can, where necessary, see that they are enforced by private prosecution.

Sections 7 and 8 deal with revocation or refusal of a licence by the Minister. There is provision whereby the agrieved operator can require a hearing but there is no provision for the public to rebut the operator's arguments or to show cause why the Minister's original decision should stand. There should be such provision.

Section 9 should be amended so that when a matter is referred to the O.M.B., any person has a right to be heard.

Section 19(2) should be amended so that where the Minister desires to "relieve" a licensee "from strict compliance with any provision of the regulation," he can do so only after a public hearing or, at the very least, all such exemptions should be expressly provided to be matters of public record.