

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: April 06, 2017

CASE NO(S): PL150119

PROCEEDING COMMENCED UNDER subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: Arbour Farms Ltd.
Subject: Request to amend the Official Plan - Failure of Township of Mulmur to adopt the requested amendment
Existing Designation: Rural and Natural Area
Proposed Designated: Extractive Industrial designation
Purpose: To permit a sand and gravel pit
Property Address/Description: Lot 23, Concession 7, East of Hurontario Street
Municipality: Township of Mulmur
Approval Authority File No.: OP01/2013
OMB Case No.: PL150119
OMB File No.: PL150119
OMB Case Name: Arbour Farms Ltd. v. Mulmur (Township)

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

Referred by: Jane Ireland
Objector: John Bowles
Objector: Conserve Our Rural Environment
Objector: Gary Corlett
Objector: Carl Cosack; and others
Applicant: Arbour Farms Ltd.
Subject: Application for a Class A licence for the removal of aggregate
Property Address/Description: Part Lot 23, Concession 7
Municipality: Township of Mulmur
OMB Case No.: PL150119
OMB File No.: MM150011

PROCEEDING COMMENCED UNDER subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	Arbour Farms Ltd.
Subject:	Application to amend Zoning By-law No. 05-02 - Refusal or neglect of the Township of Mulmur to make a decision
Existing Zoning:	Rural and Environmental Protection
Proposed Zoning:	Extractive Industrial (MX)
Purpose:	To permit a sand and gravel pit
Property Address/Description:	Lot 23, Concession 7, East of Hurontario Street
Municipality:	Township of Mulmur
Municipality File No.:	ZB01/2013
OMB Case No.:	PL150119
OMB File No.:	PL150120

Heard: February 16, 2017 in Terra Nova, Ontario

APPEARANCES:

Parties

Counsel/Representative

Arbour Farms Ltd.	Mary Bull
Township of Mulmur	David Germain (not present); planner T. Atkinson*
Conserve Our Rural Environment (CORE), and Cheryl Russel	Jane Pepino
Airport Road Gravel Group (ARGG)	Alistair Crawley (not present)
County of Simcoe	Marshall Green
Township of Adjala-Tosorontio	James Feehely

MEMORANDUM OF ORAL DECISION DELIVERED BY L. M. BRUCE AND H. JACKSON ON FEBRUARY 16, 2017 AND ORDER OF THE BOARD

BACKGROUND

[1] Arbour Farms Ltd.(the “Applicant”) applied for a Class “A” licence under the *Aggregate Resources Act* (the “ARA”) to establish a sand and gravel pit operation on their lands located at Lot 23, Concession 7 and known municipally as 938171 Airport Road (the “subject lands”), in Mulmur Township (“Mulmur”) in the County of Dufferin (“Dufferin County”). The Applicant also applied for an official plan amendment (OPA) and zoning by-law amendment (ZBA) to permit the operation. The Applicant appealed Mulmur’s failure to make a decision on the applications within the requisite time frame, pursuant to s. 22(7) and 34(11) of the *Planning Act*. Pursuant to s. 11(5) of the ARA, the Ministry of Natural Resources and Forestry (the “MNR”) referred this application to the Ontario Municipal Board (the “Board”) for a hearing to determine whether a licence should be issued for the subject site.

[2] A three-week hearing was scheduled to commence March 27, 2017. This was subsequently reduced to a one-week hearing in anticipation of settlement of the majority of issues.

[3] The parties, not including the County of Simcoe (“Simcoe County”) or the Township of Adjala-Tosorontio (“Adjala-Tosorontio”), entered into Board assisted mediation and came to a resolution of the issues. Minutes of Settlement were entered into between the Applicant and Mulmur and between the Applicant and the residents’ groups Conserve Our Rural Environment (“CORE”) and Airport Road Gravel Group (“ARGG”). The settlement with CORE and ARGG depends upon the Applicant entering into a Road Restriction Agreement (“RRA”) which has the effect of limiting the use of Airport Road between Highway 89 and the pit for trucks going to and from the pit. Trucks that are delivering to Mulmur and the Town of Shelburne are not restricted from using this section of Airport Road. As part of the mediated resolution of the issues, the access to the pit was relocated from Airport Road to Dufferin County Road 21, located north of the subject lands.

[4] Simcoe County and Adjala-Tosorontio object to the settlement that includes a RRA as this has the effect of directing some portion of pit truck traffic onto Simcoe County roads and through Adjala-Tosorontio that otherwise would not use such roads or travel in such a direction.

[5] At a previous Pre-hearing Conference (“PHC”) held on November 24, 2016, Simcoe County requested and was granted limited party status in the matter for the purposes of addressing Simcoe County’s concerns at the hearing. The limitation to the status granted by the Board resulting from that motion is as follows: “any incremental impact from an increase in the number of trucks from Arbour Farms pit on Simcoe County Roads 12 and 13 in terms of operational issues and in terms of safety.” Simcoe County objects to the limitation placed on their status and have served a Notice for Motion for Leave to Appeal this Decision of the Board (issued December 23, 2016) to the Ontario Superior Court of Justice Divisional Court.

[6] At the PHC of November 24, 2016, Adjala-Tosorontio, a constituent municipality of Simcoe County, indicated that they also may wish to request limited party status in the matter. On December 9, 2016, Adjala-Tosorontio served upon the parties a motion requesting limited party status for the hearing of this matter and directions from the Board as to the extent of the limited party status based on Adjala-Tosorontio’s issues.

[7] Upon consent, the parties and Adjala-Tosorontio requested that Adjala-Tosorontio’s motion for status be heard in person. The PHC of today, February 16, 2017, was held for that purpose before a differently constituted panel of the Board.

Adjala-Tosorontio Submissions

[8] James Feehely stated that at the July 8, 2015 PHC, Adjala-Tosorontio, represented by Jackie Tschekalin, did not seek Party or Participant status at that time because the entrance to the pit was identified to be on Dufferin County Road 18 (Airport Road) and the haul route was southerly on Airport Road to Highway 89, and as such,

the proposal posed no concern for their municipality. He said that Adjala-Tosorontio only became aware of the relocation of the haul route as set out in the RRA in a meeting with Simcoe County on November 10, 2016, even though Ms. Tschekalin had requested to be on a mailing list at the July 8, 2015 meeting.

[9] Adjala-Tosorontio is concerned that as a result of the RRA, trucks that would have used Mulmur roads will now pass through the Township's settlement areas of Everett and Lisle, the residential area of Tioga and will pass by the Tosorontio Central Public School when travelling along Simcoe County Roads 12 and 13. Adjala-Tosorontio is concerned about the impacts of increased truck traffic along these routes and the potential impact on their residents.

[10] Although the assumption is that Simcoe County Roads 12 and 13 will be used by trucks entering or leaving Arbour pit, Adjala-Tosorontio submits there is nothing to prevent the use of other roads which are not designed to meet this type of heavy traffic. For example, Mr. Feehely suggested that truck drivers may choose to take the Township's Concession 2 and Concession 3 Roads to bypass the communities of Everett, Lisle and Tioga, and these roads are not designed for such traffic. He indicated that Adjala-Tosorontio would get no compensation for the use of their roads as they are not the host municipality, even though their roads would be used.

[11] Mr. Feehely indicated that Adjala-Tosorontio is not opposed to the aggregate operation, however, Adjala-Tosorontio has not had the opportunity to assess the potential impacts arising from the changes to the haul route resulting from the RRA, and as such, they should have party status to assess the potential impacts on their community.

[12] Following the November 24, 2016 PHC where Simcoe County was granted limited party status, Adjala-Tosorontio retained R.J. Burnside and Associates ("Burnside") in order to identify potential issues resulting from the RRA on Adjala-Tosorontio. As submitted by Mr. Feehely, this was done promptly in order to not

obstruct or delay the hearing process. Burnside concluded that a 'haul route study' comparing haul route options should be undertaken to confirm the preferred haul route. Adjala-Tosorontio submits that they are seeking party status in order to address this haul route issue, and that this is clearly in the public interest.

[13] Adjala-Tosorontio submits that s. 4.4.12 of the Simcoe County Official Plan requires that the haul route with the least impact 'shall be selected' and as such, there is a need to compare the alternative haul routes. It was also Adjala-Tosorontio's submission that under s. 12.1 of the ARA, the Board 'shall have regard to' the effect of the operation on nearby communities, as well as the haul route.

[14] Further, it was Adjala-Tosorontio submission that s. 2.5.2.2 of the Provincial Policy Statement 2014 (the "PPS") requires aggregate extraction to minimize the "social, economic and environmental impact" and that it is the social and economic impact of the new haul route that Adjala-Tosorontio is most concerned about.

[15] Mr. Feehely submits that Rule 3 of the Board's *Rules of Practice and Procedure* (the "Rules") clearly allow for the liberal interpretation of the rules 'to secure the just, most expeditious and cost-effective determination of every proceeding on its merits.' He contends that Adjala-Tosorontio is entitled to status and their concerns have merit. Further, Rule 4 directs the Board to follow the *Rules of Civil Procedure* where appropriate; and in this case, Rule 5.04(2) provides direction for adding a party. In this situation, Adjala-Tosorontio submits that there is no prejudice to the Applicant for the Township to be added as a party.

[16] Adjala-Tosorontio state they wish to compare the available haul routes to confirm the preferred one in the context of the legislative and policy regime for an aggregate operation which include the social and economic impact of a haul route.

[17] In contrast to the limitation placed on Simcoe County's party status, Adjala-Tosorontio request the following limitation on their party status:

The ability to compare available haul routes for this aggregate operation and to confirm which is the preferred one in the context of the social and economic impacts.

Adjala-Tosorontio submit they have the right to “be at the table” since their citizens are affected.

Simcoe County Submissions

[18] Simcoe County supports Adjala-Tosorontio in their request for party status, as this would allow Adjala-Tosorontio the opportunity to raise social issues related to the proposed haul route and the RRA. Marshall Green echoed Mr. Feehly’s submissions on the process that occurred which lead to Adjala-Tosorontio not requesting status at the earlier public information meeting.

[19] Mr. Green characterized this as a ‘fairness’ issue. He submits that no professional report has been provided to-date that compares the Simcoe County route to the Dufferin County route relative to engineering, land use planning, or social impact. He submits that because the RRA removes consideration of the Dufferin County haul route along Airport Road, the evidence at the hearing will be limited to the consideration of whether the route through Simcoe County and Adjala-Tosorontio is adequate, not whether it is the best route. He stated that unless Adjala-Tosorontio is permitted to freely address the social issues that arise when a road becomes a haul route, there will be no government body able to speak on behalf of residents along the Simcoe County route.

[20] It was Mr. Green’s submission that the hearing is still one month away and that there is still time for the comparative analysis of the haul routes to be undertaken. Mr. Green echoed Mr. Feehly submissions regarding the rules for adding a party, and stated that there is no prejudice to the Applicant that cannot be mitigated. Mr. Green submits that parties to a tribunal hearing should have full rights to present evidence and

cross-examine witnesses, particularly as the issues for the hearing have not yet been defined.

[21] Mr. Green requested the Board clarify its prior ruling which placed the limitation on Simcoe County's status. He asked: "Can the County support the Township's case fully or do the limitations from the previous ruling still hold?"

Response to the Motion

[22] In the Applicant's response to Adjala-Tosorontio's request for limited party status, Mary Bull reiterated many of the submissions that were provided in the response to Simcoe County's request for limited party status. The Applicant's position then was that Simcoe County should not be granted party status. However, as stated by Ms. Bull, the Applicant respects the Board's previous decision with respect to the status granted to Simcoe County, and therefore consents to Adjala-Tosorontio being granted party status with the same limitations that were placed on Simcoe County.

[23] Ms. Bull submits that the Adjala-Tosorontio's request for party status has arisen only because of the change to truck traffic as a result of the RRA. She submits that the issue in relation to the use of Simcoe County roads has already been decided in the previous Board decision of December 23, 2016, and nothing has changed since then. The Board ruled, in paragraph [39] of that decision, as follows:

The Board rules that the limitation on Party status is as proposed by the Applicant/Appellant and is: "any incremental impact from an increase in the number of trucks from Arbour Farms pit on Simcoe County Roads 12 and 13 in terms of operational issues and in terms of safety."

[24] As stated in paragraph [41] of that decision, the Township indicated that should they request status, they "...would request the same limited party status as has been granted to Simcoe County."

[25] Ms. Bull submits that what Adjala-Tosorontio is requesting now is much greater status than what they indicated previously and greater than what was granted to Simcoe County.

[26] Similar to the Applicant's opposition to Simcoe County's request for party status, the Applicant opposes Adjala-Tosorontio's request for party status as it is not reasonable to request status at this late juncture. Ms. Bull submits that had Adjala-Tosorontio followed the matter properly they would have been aware that truck traffic was a key issue, and that there could be changes, even minor, to the transportation network. She contends that the settlement was reached after considerable effort and that it is simply too late to intervene, and it is prejudicial to those who have participated diligently with the Board process and it would stifle the motivation of parties to reach a settlement.

[27] Ms. Bull submits that the intent has always been to use arterial and county roads. If Adjala-Tosorontio is concerned that pit truck traffic will use local roads that are not designed for such use, there are mechanisms for preventing such use. Further, she states that the Adjala-Tosorontio misunderstands the proposal, as there is no established haul route and there never has been. It has always been acknowledged that the pit truck traffic would leave the pit and disperse on to surrounding county roads.

[28] Ms. Bull reiterated that this is a small pit serving a local area with a total of 16 trucks per peak hour (32 trips) dispersing in all directions. She questions that in the requested comparative analysis of haul routes, what is there to compare? She states that if the issue is impact from the trucks, this will be assessed in the absolute by the Board.

[29] Ms. Bull referred to the letter report of November 8, 2016, prepared by the Applicant's traffic consultants and provided in evidence at Exhibit 4. She contends that this report indicates that the additional traffic on Simcoe County Roads 12 and 13 due to

the change in traffic patterns resulting from the RRA would result in “little or no impact on the communities of Lisle or Everett”.

[30] Referring to Mr. Green’s submission that Simcoe County OP policies require consideration of alternatives, she submits that the Simcoe County OP does not apply to development in adjacent townships and there is no similar provision in Dufferin County or Mulmur’s OPs.

[31] Ms. Bull questioned why Adjala-Tosorontio would distinguish between trucks from the pit using County roads which are designed for truck traffic, and any other trucks using these roads.

[32] Jane Pepino read a written submission from Alistair Crawley on behalf of the ARGG. Their position is that Adjala-Tosorontio should be granted the same status with the same limitation as was given to Simcoe County. ARGG contends that because the issues of Simcoe County and Adjala-Tosorontio are so closely aligned, and because Paul Peterson addressed the concerns of Adjala-Tosorontio in his submissions of November 24, 2016 when addressing the motion by Simcoe County for limited party status, these issues have already been adjudicated by the Board and ruled upon as provided in the Board’s decision of December 23, 2016. Hence, it is the position of ARGG that the principle of *res judicata* applies, and there is no need to further adjudicate this motion. ARGG further contends that this is an improper collateral attack of the Board’s decision of December 23, 2016.

[33] Ms. Pepino, speaking on behalf of CORE, adopts and supports the submissions of the Applicant and ARGG. CORE’s position is that Adjala-Tosorontio does not require separate party status (from Simcoe County), but if it is granted party status, it should have a similar and parallel limitation placed upon it. CORE contends that if the Board allows a ‘comparison of routes’ that would become a new issue and would be prejudicial to the Applicant, as it would be impossible to prepare for the scheduled hearing date of March 23, 2016.

[34] Ms. Pepino contends that it is not logical for the County and the Township to have differing limitations on their status. This would place unworkable limits on the tendering of evidence and cross-examination during a hearing.

[35] Ms. Pepino contends that Mr. Green is effectively requesting a “backdoor Section 43” of the Board’s December 23, 2016 decision when he asks the Board to clarify the limitation on the County’s status, and should not be countenanced.

ANALYSIS AND CONCLUSIONS

[36] In this motion hearing, Adjala-Tosorontio has requested party status beyond what was granted to Simcoe County in an earlier motion hearing. Adjala-Tosorontio wish: “The ability to compare available haul routes for this aggregate operation and to confirm which is the preferred one in the context of the social and economic impacts.” Simcoe County supports this request as they say it provides Adjala-Tosorontio the opportunity to raise social issues related to the proposed haul route and the RRA.

[37] The Board has considered the evidence provided at this motion hearing, the submissions of the parties, and the Decision of the previous motion hearing of November 24, 2016, and can see no reason to expand the status for Adjala-Tosorontio beyond what was granted to Simcoe County. Adjala-Tosorontio is not the road authority; it is Simcoe County who are responsible for the roads in question. Nevertheless, the Board is prepared to grant the same status to Adjala-Tosorontio as was granted to Simcoe County. The Board’s reasons follow.

[38] Adjala-Tosorontio argued that ‘alternative haul routes’ must be assessed and in support of this position, pointed to official plan policies that require the consideration of alternative haul routes. However, as submitted by Ms. Bull, Simcoe County OP policies do not apply in an adjacent municipality, and neither Dufferin County nor Mulmur Township, where the pit is located, require an assessment of alternative routes.

[39] Additionally, as was explained by the Applicant, there is no 'preferred haul route', and there has been no comparison of 'alternatives' as there was no need to do so. The traffic from the pit is intended to disperse directly onto both Dufferin and Simcoe County roads that are designed to handle this type of truck traffic. As well, the evidence, as acknowledged by Simcoe County's road expert, is that the increase in traffic to Simcoe County Roads 12 and 13 is minor resulting from the RRA. The contention that Simcoe County roads in the Township of Adjala-Tosorontio are to be used without previous permission or consultation is not sufficiently compelling to grant the expanded status that is requested. County roads are designed for truck traffic. The request to undertake an alternative haul route study raises issues that are well beyond the scope of issues that the parties to this dispute have. The Board can see no compelling reason, given these facts, to expand Adjala-Tosorontio's status to address items that have no apparent bearing on the application. That is not at all a reasonable request, and there is no valid ground for such a request.

[40] The proposed pit is in a neighbouring municipality, and it is to be expected that Simcoe County roads would be used to get the product to market. The only factor that is different and could not have been anticipated was the RRA, a private agreement, which neither Simcoe County nor Adjala-Tosorontio were aware of. However, as was determined in the previous decision, it is only the incremental difference that the Board will consider, as this is the only factor that is different and which may have some (the degree not determined) impact to Simcoe County and Adjala-Tosorontio and is relevant for the Board to address in a hearing on this matter.

[41] If either Simcoe County or Adjala-Tosorontio had wanted to protect their roads and community from any use by trucks coming or going to this pit, or if they wished to delve into the planning matters of this application, they should have requested status at the first opportunity, being at the first PHC for this matter. They did not. There is no compelling reason to now expand Adjala-Tosorontio's status to include social impact or planning matters beyond the stated limitation. The prejudice to the Applicant in

expanding the scope of issues for the hearing is significant. Both Simcoe County and Adjala-Tosorontio argued that their request for status placed no prejudice on the Applicant, however; the effect of their request and subsequent appeal to the courts has been to adjourn the hearing of this matter *sine die*.

[42] The submissions of Adjala-Tosorontio in this motion align closely with the submissions of Simcoe County in the earlier motion hearing of November 24, 2016 where Simcoe County requested party status. There are no substantive differences that would lead this panel of the Board to conclude any differently than the conclusion that was reached at the motion hearing of November 24, 2016, and elucidated in the Board decision of December 23, 2016 and expanded upon herein. Without evaluating whether *res judicata* applies, as has been submitted by CORE, ARGG, and the Applicant, the Board notes that it has previously ruled on this issue, and to provide a different ruling for Adjala-Tosorontio's request for status is illogical, and would not be workable in a hearing, and has no merit.

[43] As stated in the previous decision, the presence of the RRA was unknown to Simcoe County and Adjala-Tosorontio prior to November 2016. The Board is satisfied that once these two entities became aware of the RRA and that they concluded that this resulted in some impact to their municipalities, they asked for status in a timely manner. The Board finds that the Township meets the threshold requirement for party status, as it is within their municipality that additional trucks from the pit will travel as a result of the RRA. The Board concludes that Adjala-Tosorontio is entitled to have the opportunity to evaluate the operational and safety impact that may occur as a result of the roads within their Township being used as a result of the RRA. The Board grants limited party status in this matter with that limitation.

[44] The Board rules that the limitation on Party status for the Township of Adjala-Tosorontio is: "any incremental impact from an increase in the number of trucks from Arbour Farms pit on roads within the Township of Adjala-Tosorontio in terms of operational issues and in terms of safety."

[45] Adjala-Tosorontio has indicated that should they not be successful in this motion request they will join Simcoe County in their request for leave to appeal from this ruling to the court. Therefore, as was agreed during a previous telephone conference call, the parties now request that the Board adjourn the hearing on the merits of this application until after the County and the Township's intended motion for leave to appeal are resolved by the court.

[46] As a result, Simcoe County's motion to adjourn the hearing that was previously adjourned *sine die* is now withdrawn, and the hearing in this matter, scheduled for March 27 to 31, 2017, by previous Board order, is also adjourned *sine die*. The Board orders the dates of March 27 to 31, 2017, are hereby released from the Board's calendar.

[47] These Members are not seized.

"L. M. Bruce"

L. M. BRUCE
MEMBER

"H. Jackson"

H. JACKSON
MEMBER

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

Ontario Municipal Board

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