

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: December 23, 2016

CASE NO(S).: PL150119

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

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| 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

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| 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

Board Rule 107 states:

107. Effective Date of Board Decision A Board decision is effective on the date that the decision or order is issued in hard copy, unless it states otherwise.

Pursuant to Board Rule 107, this decision takes effect on the date that it is e-mailed by Board administrative staff to the clerk of the municipality where the property is located.

Heard: November 24, 2016 in Terra Nova, Ontario

APPEARANCES:

Parties

Arbour Farms Ltd.

Mulmur Township

Conserve Our Rural Environment (CORE), and Cheryl Russel

Airport Road Gravel Group (ARGG)

Counsel

Mary Bull

David Germain

Jane Pepino

Alistair Crawley

Simcoe County (limited status) Paul Peterson and Sarah Hahn

Township of Adjala-Tosoronto (no status granted) Colleen Butler

Participants

John Bowles Self-represented

Jennifer Wink Self-represented

Lisa Thompson self-represented

MEMORANDUM OF ORAL DECISION DELIVERED BY H. JACKSON ON NOVEMBER 24, 2016 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 EHS and known municipally as 938171 Airport Road (the “subject lands”), in Mulmur Township (the “Township”). The Applicant also applied for official plan and zoning by-law amendments to permit the operation. The Applicant appealed the Township’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 “MNRF”) 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] The parties entered into Board assisted mediation and came to a resolution of the issues. Minutes of Settlement were entered into between the Applicant and the Township 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 Township and Shelburne are not restricted from using this section of Airport Road. The access to the pit is now to be on Dufferin County Road 21.

[3] Today's event was a previously-scheduled Prehearing Conference ("PHC"). There is a three-week hearing currently scheduled to commence March 27, 2017. The Applicant previously requested that this PHC be converted to a settlement hearing to hear evidence in support of the planning merits of the proposal in line with the settlement reached between the parties. As was required by previous direction from the Board, the Applicant provided Notice of the request to convert the PHC to a settlement hearing.

[4] On November 24, 2016, the County of Simcoe ("Simcoe County"), served upon the parties a motion requesting limited party status in the matter. Simcoe County objects to the RRA between the Applicant and the residents' groups and the change to the proposed haul route from Airport Road to Simcoe County Roads, specifically Simcoe County Roads 12 and 13. Simcoe County indicated that they had understood, and indeed all documentation indicated, that the entrance to the proposed pit was on Airport Road and the main haul route was south on Airport Road to Highway 89. On that basis, Simcoe County states they had not participated in the appeals as there was no impact to Simcoe County.

[5] Mr. Peterson indicated that Simcoe County became aware accidentally about the settlement between the parties that now has the entrance to the pit to be north of the pit on Dufferin County Road 21 and the RRA on Airport Road that results in pit traffic to be diverted to the east onto Simcoe County roads.

[6] The Applicant and their traffic consultants met with Simcoe County prior to this PHC. The traffic consultants prepared a report that was entered into evidence as Exhibit 4, Tab 2F. This report indicated that the impact to Simcoe County Roads 12 and

13 and the communities of Lisle and Everett was minor as a result of the traffic from the pit that may go onto these roads.

[7] The Township of Adjala-Tosorontio, the municipality adjacent to Mulmur to the east and the municipality where Lisle, Everett, and Tioga are located, sent a letter to the Board indicating their intention to attend the PHC to request an adjournment of the matter. They wished an adjournment in order to obtain direction from their Township Council.

[8] In response to Simcoe County's concern that the impact to Simcoe County's roads and the many residents along the haul route had not been assessed, the Applicant agreed to place a notice in the Alliston Herald on November 17, 2016, to advise local residents of today's PHC and invite them to attend if they had a concern. The Board was aware of a small number of residents, the Mayor and the Director of Planning of Adjala-Tosorontio who attended.

Simcoe County Motion

[9] The motion is for an order granting Simcoe County limited party status for the hearing of the matter; and an order for directions from the Board based on any persons who might respond to a notice to be published regarding the hearing and a proposed change in haul route and any issues that may be raised by those persons.

[10] Mr. Peterson indicated that Simcoe County was surprised and concerned that the Applicant had changed the haul route and had not advised Simcoe County of the change as they are the road authority. He indicated that Simcoe County questions whether the change in the haul route represents 'good planning'.

[11] Mr. Peterson indicated that Simcoe County questions the consistency of the proposal with the Provincial Policy Statement 2014 (the "PPS"), as the PPS requires aggregate extraction to minimize the "social, economic and traffic impact" and he said this aspect should be evaluated for the new haul route. Further, he questions whether

the change in haul route conforms to the County of Simcoe Official Plan, as s. 4.4.12 of the Official Plan requires that the haul route with the least impact 'shall be selected'. He submits that up until now, all the studies have been on Airport Road, and therefore the County of Simcoe and the Township of Adjala-Tosorontio has had little interest in the proposal. He submits that the planning issues have been well studied in Dufferin County in regards to this proposal, but there have been no such studies in Simcoe County. He states that Simcoe County wants the opportunity to compare and determine if the selection of the route in Simcoe County is in the public interest. Simcoe County's concerns include the change to the access to the pit, and given this, may extend to other issues on site.

[12] Mr. Peterson submits that the homeowners along the new route should have their say similar to the residents along Airport Road. Simcoe County submits that it is disturbing that a private RRA agreement between the pit operator and two residents' groups should dictate what happens to public roads. This attempt to control the flow of traffic without consulting with the affected road authority is not appropriate. He states it will be the County of Simcoe that will be responsible for the safety, maintenance, and other road aspects, and Mulmur Township residents will have no responsibilities.

[13] Mr. Peterson submits that there are reasonable grounds to add Simcoe County as a party to the official amendment and zoning by-law amendment appeals, as Simcoe County is the road authority for the proposed haul route. Similarly, he submits that it is appropriate for the Board to specify Simcoe County as a party to the ARA appeal, as the adequacy of the haul route and the trip distribution from the proposed site is not sufficiently provided.

[14] Mr. Peterson said that he is interested in the haul route and the matters directly related to the haul route, including the entrance on Dufferin County Road 21. He said that the documentation in relation to this application always showed that Airport Road was the primary haul route, and that the incursion into Simcoe County roads was not identified to the extent contended by Ms. Bull and the aligned parties.

[15] Mr. Peterson contends that Simcoe County simply wants an opportunity to review, test, and dispute if necessary, the traffic allocation that has more traffic from the pit going to the east for markets. He said that it looks like the markets have moved to accommodate the restrictions on Airport Road and maybe it is the restrictions on Airport Road that are redirecting the traffic. Mr. Peterson said Simcoe County wants to assist the Township of Adjala-Tosorontio in evaluating the concerns of their residents.

Response to the Motion

[16] The Applicant objects to Simcoe County's request for status. This position was held by Mulmur, and CORE and ARGG as well. Ms. Bull contends that through the mediation process that was assisted by the Board, the parties worked diligently and successfully agreed to a settlement between the parties. She indicated that the settlement did not result in any major change to how the pit would operate, but added a Public Liaison Committee, a well complaint protocol, and changed the entrance off of Airport Road to Dufferin County Road 21.

[17] Ms. Bull contends that it is not reasonable to request party status at this late juncture. She submits that had the County of Simcoe 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 states they should have requested status earlier to preserve their interests.

[18] Ms. Bull referred to the letter report of November 8, 2016, prepared by the Applicant's traffic consultants. She contends that this report indicates that the distribution of trucks leaving the pit would always have gone north onto Simcoe County roads to get to Wasaga and Collingwood and would always have gone east onto Simcoe County roads to serve markets to the east. She said "what is the problem to use Simcoe County roads to deliver aggregate to Simcoe County - this is what the roads are designed for." Further, the traffic consultants agree 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".

[19] She contends that the settlement reached after considerable effort does not result in any major change to the proposal before the Board and does not make a change in use of Simcoe County roads. 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.

[20] Ms. Pepino contends that what Simcoe County requests at this motion hearing is at odds with their motion record that requests limited party status with respect to persons and issues that may arise from persons who attend in response to the notice in the Alliston Herald. Ms. Pepino contends that Simcoe County has raised issues of noise, social impact, possibly an Area of Natural Science Interest, and is in effect a request for full party status.

[21] Ms. Pepino was clear to clarify that there never was a 'Haul Route Agreement', nor was there a previous haul route. She was at pains to clarify the difference between a Haul Route Agreement and the Road Restriction Agreement. She indicated that the RRA arose due to the public concern regarding the potential for collision on Airport Road, due to the substandard geometry of this road. She adds that anyone who attended previous public events would have known that the concern of the residents is traffic safety on Airport Road.

[22] She says that when Simcoe County became aware of the RRA at the end of October, their only interest was the haul route. However, their transportation engineer agrees that any impact to Simcoe County Roads 12 and 13 is minor. Therefore, when balanced with the fairness and procedural respect to the Board and Board mediation and the participation of the parties, Simcoe County has not met the requirement to be granted status.

[23] Mr. Crawley supports the submissions of Ms. Pepino.

[24] Ms. Bull referred to a case by Vice Chair Zuidema (OMB File No. PL090829). In this case, the Ministry of Municipal Affairs and Housing ("MMAH") attended the sixth

PHC and requested party status. Vice Chair Zuidema determined that it was too late at that stage to allow MMAH party status. Ms. Bull contends that, similarly in this case, to open up this matter and let in a new party will cause considerable concern. Mr. Peterson said that there is nothing in the Zuidema case that is parallel to this matter. He instead referred to a case that is more responsive to the facts of this matter, being an OMB case ([1997] O.M.B.D. No. 61) where the owner of a shopping centre wished to be added as a party to the appeal of a Regional Official Plan. In this case, Vice Chair Fish granted limited party status to the owner to the proceedings.

Ruling – Simcoe County Party Status

[25] This panel of the Board recognizes the considerable effort and resources that have been expended by the parties and the Board to reach a mediated settlement in this matter, and the Board commends the parties for reaching a settlement. However, a key part of the settlement is a RRA that limits some traffic on Airport Road. As a result of that limitation, a certain amount of traffic, though acknowledged as minor, will now use County of Simcoe roads rather than Dufferin County roads.

[26] The Board finds that Simcoe County is entitled to have the opportunity to evaluate the impact to their roads as a result of the RRA. It is reasonable that neither Simcoe County nor the Township of Adjala-Tosorontio requested status previously, given the understanding that the main traffic route was Airport Road and alternatives to that route were not under consideration.

[27] The County of Simcoe raised this as an issue when they first became aware of the change that restricted some of the traffic from travel on a section of Airport Road and thereby allocating some traffic to Simcoe County roads. The Board finds that Simcoe County raised this issue with the Applicant in a timely manner. Simcoe County has not had the opportunity to assess the impacts to their roads as a result of the restriction on Airport Road, and should have the opportunity to do so.

[28] On balance, the prejudice to the parties who have settled is less, as this is a PHC, and there is a scheduled hearing in March, the date of which is not to change, by adding the County, on a limited party basis, to the hearing.

[29] The Board finds that there are reasonable grounds to add Simcoe County as a party as they are the road authority for the road network where some portion of the trucks from the proposed gravel pit will travel and, on that basis, the Board grants limited party status to the County of Simcoe.

[30] I have reviewed the cases put before me in coming to this Decision.

Limitation to Simcoe County Party Status

[31] The Board heard submissions on the limits to the party status granted to Simcoe County. Ms. Bull contends that a reasonable limitation would be to limit the status to: “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.”

[32] Ms. Bull states that we are here because of the RRA that has resulted in an impact to Simcoe County roads, and that the roads identified to be impacted are Simcoe County roads 12 and 13, and that these roads are intended to carry trucks. She and Ms. Pepino contend that it is not appropriate to expand the scope beyond these roads or by considering all traffic leaving the pit.

[33] Mr. Crawley expressed concern that there is a mischaracterization of the RRA. He said the settlement resolution was a compromise and went some way to resolve the concerns about safety on this section of Airport Road. He said that it is not a sufficient reason to reject the RRA because it is a private agreement.

[34] Mr. Peterson objects to the limitation proposed by Ms. Bull. He states that Simcoe County requests party status in order to determine whether the proposal is in conformity with the requisite planning documents, and that is the principal basis of being present and requesting status. He contends that it is important to Simcoe County and the Township of Adjala-Tosorontio to examine the trip allocations, particularly where the trucks enter Simcoe County at the east.

[35] Mr. Peterson states that private agreements entered into by parties other than a road authority to determine pit traffic route selection is an issue for Simcoe County. He says a private agreement should not be determinative of planning issues. He wishes to look at the alternative routes, and contends that this is only fair, as this opportunity was afforded Dufferin County.

[36] He contends that it is more appropriate to assess the impact of aggregate traffic not the “incremental change to traffic”. Mr. Peterson proposes that the limitation be: “County of Simcoe Party status limited to consideration of the impacts and identification of issues arising from pit traffic entering and leaving Simcoe County via Dufferin County Road 21.”

Ruling – Limitation to Simcoe County Party Status

[37] In the previous ruling in which limited party status was granted to Simcoe County, as stated, it was on the basis that the County became aware of the RRA that has the result of adding traffic to Simcoe County roads that otherwise may not have used these roads. All parties have acknowledged that the amount of traffic is minor.

[38] As the Board stated in the previous ruling, Simcoe County is entitled to have the opportunity to evaluate the impact to their roads as a result of the RRA. The impact of the RRA is to Simcoe County Roads 12 and 13, being the Simcoe County roads that are now brought into this matter by virtue of the RRA. Consistent with the previous ruling that ties the granting of party status to the presence of the RRA, the Board rules

therefore that the limitation to party status is limited to the impact to Simcoe County Roads 12 and 13.

[39] 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."

[40] The Board will not enter into adjudication of the appropriateness of the RRA between the parties.

Township of Adjala-Tosorontio Requested Adjournment

[41] The Township of Adjala-Tosorontio is concerned because the communities of Lisle, Everett and Tioga are along the truck route. The Township of Adjala-Tosorontio states they only became aware of the situation on November 10, 2016, with insufficient time to obtain direction from Township Council regarding whether or not Council would wish status in this proceeding. Ms. Butler indicated that at the December 12, 2016, County Council meeting she would be in a position to obtain direction from Council, and would request the same limited party status as has been granted to Simcoe County. The Township of Adjala-Tosorontio indicated that if they wish to request party status they would serve motion material in December to that effect. The determination as to whether the Township of Adjala-Tosorontio would oppose the settlement at a hearing would then be made in January.

Procedural Issues

[42] Ms. Bull indicated that a draft Procedural Order was approved at the May 26, 2016 PHC. This draft Procedural Order set dates in preparation for the hearing, including the meeting of expert witnesses. She suggests that the experts continue to share information so that they can assist in the delivery of an issue list, and assist Simcoe County to determine the extent of their concerns. The parties agreed that the

experts shall meet on or before January 6, 2017. Ms. Bull indicated that she would revise the draft Procedural Order and circulate it to the parties.

[43] Ms. Bull requests that Simcoe County advise the Board and the other parties by January 16, 2017, whether the county intends to proceed to a hearing and if so what the specific issues are that they intend to raise at the hearing in the context of the limited party status. Similarly, the Township of Adjala-Tosoronto would be able to advise the parties at the January 16, 2017, deadline as to their intention.

[44] Ms. Bull and the County request an in-person PHC in January or February 2017. This PHC could be used as a settlement hearing if Simcoe County and the Township of Adjala-Tosoronto have no issues or, the PHC could be used to identify issues and resolve procedural matters for the March hearing.

[45] Jennifer Wink and John Bowles clarified that they wished to have Participant status in the matter rather than Party status. The Board conferred Participant status as requested. Mr. Bowles and Ms. Wink provided a statement of their concerns, entered into evidence as Exhibits 5 and 6 respectively.

[46] Andrew and Sarah Gunn attended the PHC and advised Jacquie Tschekalin that they were interested in this matter but did not clarify if they would like to have status. Ms. Tschekalin indicated she would contact the Gunns to determine if they wish participant status in this matter and would advise the Board.

Conclusion

[47] The Board has scheduled a status update Telephone Conference Call ("TCC") to be held on **Thursday, January 19, 2017, at 9 a.m. The call-in numbers are: (416) 212-8012 or Toll Free 1(866) 633-0848** at the correct time. When prompted, please enter the **code 4779874#** to be connected to the call.

[48] An in-person PHC is to be scheduled in late February 2017. The parties are directed to coordinate with the case coordinator to schedule a date for the in-person PHC.

[49] This member is seized of the TCC but not of the PHC.

[50] No further notice will be provided.

"Helen Jackson"

HELEN JACKSON
MEMBER

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

Ontario Municipal Board

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