

Review of the Ontario Municipal Board

CRC Rockwood Inc. Submission

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Introduction

This submission is being provided by **CRC Rockwood Inc.**, the Concerned Residents Coalition. CRC is a not-for-profit community organization that was established in 2013 to represent the interests of residents in Guelph-Eramosa Township, the Town of Milton-Nassagaweya, and the Town of Halton Hills in regard to an application by James Dick Construction Limited to establish a limestone quarry on the outskirts of Rockwood. CRC has a membership of approximately 1,200 residents in the three municipalities. As an incorporated entity, it is led by a Board of 14 Directors.

The matter included an application to rezone the subject lands from Agricultural (Hazard) to Industrial-Extractive. An application was also submitted to MNRF for a Class 1 Category 2 aggregate licence under the Aggregate Resources Act. The applicant proposes to extract gravel and dolostone from an area of approximately 39 ha by blasting approximately 25 metres below the water table in a water-filled pit. Approximately 700,000 tonnes/year of product are planned for extraction with a quarry life expectancy of 20 years.

The rezoning application was submitted to Guelph-Eramosa Township in 2012, and brought to the attention of the community in a public meeting in March 2013. In the absence of a decision on the rezoning application, JDCL appealed the matter to the OMB in May 2015. The ARA licence application and rezoning application were tied together for the OMB case which began with a pre-hearing conference in November 2015. Hearings commenced September 27 2016, with CRC and the Region of Halton representing the Towns of Milton and Halton Hills as parties opposing the applications. Guelph-Eramosa Township (GET) expressed its opposition to the application but withdrew as a party to the hearings.

As a result of the failure by JDCL to respond to the implementation by GET of a new comprehensive zoning bylaw over the period 2014-16, the OMB was faced with an appeal of a rezoning application against a bylaw that had been repealed, and a rezoning bylaw in full force against which there was no appeal. As a result, OMB Vice-Chair Steven Stefanko issued a ruling on October 13 2016 to adjourn the hearings indefinitely. This is where the matter stands at the time of writing, pending a new application by the proponent.

Informed by our experience so far at the OMB in the case of the Hidden Quarry application, CRC supports the four main objectives of the Provincial review, that is, to make changes in the scope and effectiveness of the Board:

- Allowing for more meaningful and less costly resident participation
- Giving more weight to local decisions and allowing alternative ways to settle disputes

- Bringing fewer municipal and provincial decisions to the OMB
- Supporting clearer and more predictable decision-making.

We also agree with the several Provincial priorities identified as context to land-use planning decisions, namely:

- The creation of healthy, sustainable, liveable and safe communities
- Attraction of investment and job creation
- Location of industrial operations
- Development of roads and transit
- Protection of forests, farmland, green space, ecologically sensitive lands and waters
- Management of air quality
- Protection of cultural heritage
- Mitigation of climate change impacts.

It is noteworthy that all of these priorities are relevant to the Hidden Quarry application.

While some commentators may call for the elimination of the OMB, CRC takes the view that such action would not necessarily be wise. Organizations such as CRC typically find themselves in a “David versus Goliath” situation in attempting to represent community concerns about potential land-use planning decisions. However, the same would be true were matters such as these subject to actions in courts of law. Given changes in line with the four objectives of this review, the OMB would in our view be a preferable alternative to litigation. In those cases in which citizen groups oppose decisions taken by their municipal governments, there is always political recourse to be used or threatened, but without a political tool such as the right to “recall voting”, political options may not have the power to prevent undesirable decisions from being implemented.

Our Comments

CRC’s comments pertain specifically to aggregate applications, although they may be more broadly relevant. Our main concern is that the OMB process, as we have experienced it, is not a level playing field and involves potential personal risk to members of the community who choose to be involved. The issues are:

1. The cost of participation, and the capacity of community groups and small municipalities to manage those costs compared to developers and aggregate companies for whom such expenses are a cost of doing business.
2. The threat of legal action against community groups and their leaders—so-called SLAPP suits.

CRC’s active participation in the Hidden Quarry case will have cost the community in excess of \$400,000 by the time the matter is eventually concluded. Funding has been raised entirely from donations, including three from the local municipalities, and community events. CRC’s input to the

deliberations that preceded the OMB case, and the OMB hearings themselves will have been limited not by our concerns or the importance of issues, but by our ability to meet the costs of legal representation and expert witnesses. Similarly, we believe that the position taken by Guelph-Eramosa Township has been driven significantly by costs that would inordinately affect overall operating budgets and, consequently, have a bearing on property tax rates.

While the passage of the **Protection of Public Participation Act, 2015** has reduced the risk to citizens such as those of us who lead CRC being threatened by legal action, the threat, especially in an adversarial case such as the Hidden Quarry, is not entirely without a chilling effect on citizen participation. Expediting court processes to determine whether or not a threatened legal action is a strategic lawsuit or not is small comfort when individuals are forced to bear the costs of legal representation to defend themselves and the risk that prolonged and expensive litigation will ensue.

OMB's Jurisdiction and Powers

1. There needs to be a more specific and transparent connection between provincial priorities and OMB decisions, whether or not those priorities have been captured in legislation and regulations. In a rapidly evolving environment such as climate change mitigation, OMB decisions may be in conflict with real time thinking on impacts such as water conservation needs, habitat preservation, and so on, even though provincial legislation has not caught up with the need for a legal framework to guide such decisions. The OMB needs to be instructed to give due weight to arguments that draw on scientific evidence about environmental management priorities even in the absence of the legislative framework.
2. Communities, both through their elected officials as well as community organizations and stakeholders, need to have a stronger voice in directing development decisions. External parties such as aggregate companies must bear the burden of proving that community concerns will be protected, rather than the other way around as sometimes seems to be the case.
3. Limitations on OMB authority identified in paragraph 3 (Give communities a stronger voice), in our view, have merit.
4. In the particular case of aggregate applications, *de novo* hearings place an additional burden on community organizations when precedents dealing with the same recurring issues can and should eliminate unnecessary and costly efforts to repeatedly make the same arguments. Our recommendation is that the OMB move away from *de novo* hearings and give weight to relevant precedents established in other cases.
5. Planning decisions should be made on the most up-to-date planning documents. In the Hidden Quarry case, had adjournment not been ruled, important amendments to the Wellington County Official Plan that provide better protection to important water resources would not have applied since the amendments were enacted after the original application was made. With the rapid evolution of environmental and climate management principles, developers such as aggregate companies should be compelled to adjust to those new realities in spite of their having applied in a more permissive context.

Citizen Participation and Local Perspective

Our concern about the cost of participating in OMB cases is made in the introduction to this section. It follows that a funding mechanism needs to be made available to community groups and municipalities to enable them to retain the required legal and technical experts. This needs to be regarded as a cost of maintaining a vital and fair democracy. Clearly an application process needs to be designed to, among other things, ensure relevance of the proposed involvement to a fair and efficient resolution of the matter, and to avoid unnecessary duplication of effort when multiple parties are involved. However, it is also clear that the public purse cannot support the costs of participation—CRC’s \$400,000 for example—in the number of cases adjudicated by the OMB, as many as 1,500 per year according to the Public Consultation Document. Efforts to substantially reduce the cost and number of hearings, such as by reducing the scope of allowable appeals, need to accompany a funding mechanism.

Clear and Predictable Decision-Making

Public perception, rightly or wrongly, is that the outcome of an OMB case depends to a large degree on the choice of member to hear the case. In technically complex cases such as aggregate applications, the ability of the OMB member to understand technically sophisticated arguments is a concern to groups such as CRC. Increasing the number of OMB members and ensuring that the skills and knowledge possessed by the panel—for example, environmental management expertise in those cases that involve environmental concerns—match the scope of cases heard by the Board can help to alleviate this concern. We also support a move to use multi-member panels to ensure that the knowledge base is relevant to the full scope of the case being heard. Discretion could be applied by the OMB as to the use of multi-member panels, allowing single-member hearings in relatively simple or narrow cases.

Modern Procedures and Faster Decisions

CRC supports any steps the Province may take to create a less formal and less adversarial culture at OMB hearings. However, we have concerns in general regarding timelines that apply to both pre-OMB steps for responding to aggregate zoning and licence applications, as well as what is proposed for the commencement of hearings following receipt of an appeal. While it is often in the interest of developer appellants to set short time-lines, the constraints of volunteer community organizations to put their cases together need to be given full consideration by the OMB.

First, the time permitted to respond to applications puts community groups such as CRC, which are organized and run by volunteers, at a distinct disadvantage when the facts of applications need to be fully considered and expertise secured to provide credible responses. Further, when an appeal has been made to the OMB, such groups are forced to raise funds and determine to what extent they can participate in the hearings. Typically the extent of participation is determined both by the funds that can be raised and the ability to identify and retain legal support and expert witnesses. All of this takes considerable time.

Laudable though it is to reduce the time from appeal to decision—and this does benefit parties to the hearings by possibly reducing the overall cost of participation—unless the Province provides funding support so that community groups are not forced to undertake onerous and time-consuming fund-raising activities, the overall impact of reducing the time frame will be to disadvantage community participation.

Alternative Dispute Resolution and Fewer Hearings

In the case of aggregate applications, our view is that a more important consideration than alternative dispute resolution is the method by which such applications are assessed. In many instances, aggregate applications—as typified by the Hidden Quarry application by James Dick Construction Limited—are extremely adversarial. Evidence both in support and in opposition to the applications pit one expert against another. While not within the purview of the OMB *per se*, CRC recommends that a standardized, collaborative assessment mechanism be applied to such applications. For example, the use of the Joint Agency Review Team (JART) or a similar process for the assessment of aggregate applications, given that it enables citizen groups to fully participate, has the potential to resolve disputed issues and thereby either avoid cases being referred to the OMB or reduce the number of outstanding issues to be adjudicated. It is also possible that the use of JART can lead to more effective mediation by clarifying the disputed issues and producing a more extensive base of agreed facts.

Final Comments

CRC is grateful for the opportunity to provide these comments on the OMB review, and we hope that they are helpful in shedding some light on the concerns of citizen groups such as ours.

In light of our experience to date with the Hidden Quarry application and its appeal to the OMB, CRC recommends that the balance between local authority on planning decisions and the rights of aggregate companies needs to be shifted towards the local municipality. While we accept that there are matters of provincial interest that may need to be asserted, it is in our view fundamentally undemocratic to enable well-resourced developers to run roughshod over the planning decisions of elected local authorities by means of an appointed, quasi-judicial OMB when those decisions are consistent with law, sound planning principles, and local official plans. The fact that there are so many aggregate applications in dispute in Ontario indicates that the root of the problem isn't so much the OMB itself, but the policy framework that applies to the management of these resources.

We encourage the Province to assess the role of the OMB in full view of the underlying issues that give rise to OMB cases.