

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: October 13, 2016

CASE NO(S):

PL150494

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

Applicant and Appellant: James Dick Construction Limited
Subject: Application to amend Zoning By-law No. 57/1999 - Refusal or neglect of Township of Guelph/Eramosa to make a decision Agriculture (A) and Hazard (H)
Existing Zoning: Agriculture (A) and Hazard (H)
Proposed Zoning: Extractive Industrial (M3) and Hazard (H)
Purpose: To permit a quarry.
Property Address/Description: Part Lot 6, Concession 1
Municipality: Guelph Eramosa
Municipality File No.: ZBA 09/12
OMB Case No.: PL150494
OMB File No.: PL150494
OMB Case Name: James Dick Construction Limited v. Guelph/Eramosa (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: Shirley Allen
Objector: Ron & Debbie Brennen
Objector: John & Ann Brophy
Objector: Dennis & Laura Campbell; and others
Applicant: James Dick Construction Limited
Subject: Application for a Class A licence for the removal of aggregate
Property Address/Description : Part Lot 6, Concession 1
Municipality: Guelph Eramosa
OMB Case No.: PL150494
OMB File No.: MM150034

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: October 6, 2016 in Guelph Eramosa Township

APPEARANCES:**Parties ("Parties")****Counsel**

James Dick Construction Ltd.
("JDCL")

David White

Township of Guelph Eramosa
("Township")

Eileen Costello and David Neligan

Town of Halton Hills and Region of
Halton (collectively "Halton")

David Germaine and Gregory Sills

CRC Rockwood Inc. ("CRC")

Chris Barnett and Laura Bissett

DECISION DELIVERED BY STEVEN STEFANKO AND ORDER OF THE BOARD**Introduction**

[1] In 2012, JDCL made two applications with respect to lands located at Part Lot 6, Concession 1, in the Township ("Subject Lands" or "Subject Property").

[2] One application related to a pit and quarry licence under the *Aggregate Resources Act* ("ARA") and the other ("Rezoning Application") was to rezone the Township's Zoning By-law No. 57/1999 ("Former By-law") so as to permit the operation of a pit and quarry on the Subject Lands.

[3] During the first day of this hearing, an issue arose (“Rezoning Issue”) as to whether the Rezoning Application was properly before the Ontario Municipal Board (“Board”). The Rezoning Issue had not been raised at any of the Prehearing Conferences conducted by the Board and no notification was given the Board, as to the provisions of the New By-law, between the date of its passage and the commencement of this Hearing.

[4] In relation to the Rezoning Issue, I directed the Parties to file materials and a date for argument was set.

[5] This Decision relates to the materials filed and arguments made.

Relevant Events

[6] For ease of reference, the relevant events leading up to this matter can be briefly summarized as follows:

- (a) On or about October 2, 2012, JDCL made an application (“Licence Application”), pursuant to the *Aggregate Resources Act*, to the Minister of Natural Resources, for a category 2, Class ‘A’ Licence for the operation of a pit and quarry on the Subject Lands which comprise 39.4 hectares.
- (b) On or about October 12, 2012, JDCL made the Rezoning Application to the Township pursuant to s. 34 of the *Planning Act* (“PA”) to rezone the Subject Property from Agricultural and Hazard Land to Extractive Industrial to permit, as mentioned above, a pit and quarry operation. The Rezoning Application was deemed complete on December 7, 2012.
- (c) On May 25, 2015, as a result of a ‘non-decision’ by Township Council concerning the Rezoning Application, JDCL appealed (“Rezoning Application Appeal”) to the Board pursuant to s. 34(11) of the PA.

- (d) On July 6, 2015, the Ministry of Natural Resources and Forestry referred the Licence Application to the Board pursuant to s. 11(5) of the ARA for a hearing to determine whether a licence should be issued for the Subject Lands.
- (e) During the 2015 calendar year, the Township began reviewing the Former By-law. In the course of that review, staff took 26 reports to Township Committees and Council, held seven public events and engaged in multiple discussions with agencies and the public.
- (f) The review process with respect to the Former By-law culminated with Township Council passing, on August 8, 2016, By-law No. 40-2016 ("New By-law") which was a "A By-law to repeal and replace" the Former By-law. The New By-law zoned the Subject Property Environmental Protection and Agricultural.
- (g) On August 12, 2016, the Township gave Notice of the Passing of the New By-law under s. 34 of the PA. The Notice in question explained that the purpose and effect of the New By-law was to adopt a new Comprehensive Zoning By-law for the Township and to repeal the Former By-law.
- (h) There were no appeals of the New By-law to the Board. Accordingly, it is in full force and effect in the Township. A copy of the New By-law is annexed hereto and marked as Attachment 1.
- (i) Out of an abundance of caution, on September 29, 2016, JDCL filed a second appeal ("September 2016 Appeal") of its Rezoning Application to the Board, but this second appeal was in specific reference to the New By-law.

Positions of the Parties

[7] JDCL argues that, pursuant to the authority conferred on me in s. 88 of the *Ontario Municipal Board Act* (“OMBA”) and based upon the transition policy being practiced by the Township for rezoning applications filed before the passing of the New By-law, I have the ability to order that the Rezoning Application applies to the New By-law.

[8] In the alternative, JDCL submits that I should recognize the September 2016 Appeal as a valid appeal which properly brings the New By-law before the Board.

[9] The Township, Halton and CRC (collectively the “Parties in Opposition”) on the other hand, contend that the Township was well within its legal authority to pass the New By-law and because the Former By-law has been repealed, I do not have the authority to grant the By-law relief which JDCL is seeking. Without the authority to amend the zoning for the Subject Property, I also cannot, based on the provisions of the ARA, deal with the Licence Application.

[10] Accordingly, the Parties in Opposition argue that this hearing should be adjourned on a *sine die* basis until JDCL has made the necessary PA applications, including a possible Official Plan Amendment application, the required public processes mandated by the PA have taken place and the requisite appeals have been filed by JDCL. The Parties in Opposition contend that only after these matters have been completed, will I have the ability to deal with the zoning for the Subject Lands and the Licence Application.

Issues

[11] The issues to be determined in this matter can be summarized as follows:

- (a) Did the Township have the authority to pass the New By-law and repeal a By-law which was before the Board as a result of the Rezoning Application Appeal?
- (b) Should this Hearing be adjourned *sine die*?

Analysis and Discussion

(i) Township Authority

[11] The answer to the question posed by the first issue has been, in my view, clearly and decisively given by the Ontario Superior Court in *Cadillac Development Corp. v. Toronto (City)* 1973 CarswellOnt 271.

[13] In that case, the Applicants owned certain lands in an area previously zoned for low density residential use. An Official Plan and Zoning By-law ("By-law 239-71") passed by the City subsequently permitted the area to be zoned for high density residential use. That by-law however was then referred to the Board for approval.

[14] After a municipal election was held and before the Board had disposed of its consideration of By-law 239-71, the new municipal council repealed it and then advised the Board of the repeal.

[15] In determining whether the new municipal council was acting within its authority when it repealed By-law 239-71, Henry, J. referred to s. 35(1) of the then *Planning Act*. This section specified what By-laws may be passed by councils of municipalities. According to Justice Henry, none of the provisions of s. 35(1) "provide in clear terms or by plain implication that a municipal council may not repeal or amend its own by-law before it has been approved by the Ontario Municipal Board," and that "To hold otherwise would place in the hands of the Ontario Municipal Board a control over the legislative process beyond that intended by the Legislature of the Province."

[16] In this case therefore, the repeal of the Former By-law by the New By-law was well within the authority and purview of Township Council and the requisite notice thereof, as required by the PA, was also given.

(ii) Impact of New By-law

[17] JDCL argues that by virtue of the language of s. 88 of the OMBA, I have the authority to order that the Rezoning Application can apply to the New By-law and that the New By-law is properly before me. In support of that position, JDCL points out that there is no material difference between the Former By-law and the New By-law with respect to the Subject Lands and that significant prejudice will be suffered by JDCL if this proceeding is adjourned at this time.

[18] The Board is a statutory body that derives its powers from express statutory language. In my opinion, those powers, based on the statute in question and the language used, can be either specific on the one hand or ancillary or general on the other.

[19] Since the Rezoning Application Appeal was made pursuant to s. 34(11) of the PA, the powers of the Board for purposes of that appeal are set out and detailed in s. 34(11.0.2) of the PA. The explicit and precise language used in s. 34(11.0.2) establishes, in my opinion, that the powers therein contained are indeed specific in nature.

[20] Subsection 34(11.0.2) allows me to do *only* one of three things; I can dismiss the appeal, I can amend the Former By-law in such manner as I may determine or I can direct that the Former By-law be amended in accordance with my order. (Board emphasis in italics)

[21] The specific powers enumerated in s. 34(11.0.2) however, do not allow or permit me to amend or otherwise deal with the New By-law. It is impossible therefore, based

on the provisions of this subsection, for me to grant the approval now requested by JDCL.

[22] JDCL also submits that, notwithstanding the specific powers of the Board in s. 34 (11.0.2), s. 88 of the OMBA allows me to essentially change the nature of the Rezoning Application Appeal so that it can now apply to the New By-law. I am not persuaded.

[23] Section 88 is set out in Part VI of the OMBA headed 'Practice And Procedure' and within a sub heading of Part VI entitled 'Terms Of Orders'. When I read this section, which is couched in very general language, I cannot help but interpret it as being ancillary to specific powers otherwise given the Board, as in s. 34(11.0.2).

[24] One of the principles in statutory interpretation is that when there are two competing provisions, the specific overrides the general - *generalia specialibus non derogant*. Here, the general or ancillary language of s. 88, based upon a fundamental statutory interpretation principle, is superseded by the specific powers set out in s. 34 (11.0.2). As a result, I am unable to grant the relief sought by JDCL. In short, I cannot cure, using s. 88, that which I cannot do, under s. 34(11.0.2).

[25] As for the similarity between the provisions of the Former By-law and the New By-law with respect to the Subject Lands, let me say simply and briefly, that such similarity, in my estimation, has no bearing on the powers of the Board as set out in s. 34(11.0.2).

[26] In relation to the matter of prejudice, it is an argument which does, occasionally, come into play in a legal context. However, in the circumstances of this case, such an argument, no matter how inviting, cannot clothe me with powers, which by the provisions of the PA, I do not have.

[27] JDCL also contends that the decision of the Board in *Darling v. Brockville (City) Committee of Adjustment* 1994 CarswellOnt 5647, is authority for the proposition that s. 88 of the OMBA should be invoked in this case. I disagree.

[28] Although the Board in *Darling* did refer to s. 88 in its disposition, the facts in that case were materially different than what is before me and therefore, readily distinguishable.

[29] In *Darling*, the Applicant sought a number of variances to the in force by-law but was unsuccessful before the Committee of Adjustment. He then appealed the Committee's decision to the Board. However when his appeal ultimately came before the Board, a new by-law was in place. The question therefore which the Board had to answer was whether the old by-law or the new by-law applied.

[30] Former Member Melling, in concluding that the new by-law applied, referred to the specific power of the Board set out in s. 45(18.1) of the PA. This provision enables the Board to make a decision on an application which has been amended from the original application. Simply put, a specific Board amending power which existed in s. 45(18.1) of the PA was implemented so that the appeal of the Committee's decision regarding the variance relief sought could be applied to the new by-law. In this case, no such amending power exists under the PA with respect to the Rezoning Application Appeal and, as a result, the *Darling* decision does not assist JDCL.

[31] JDCL also suggests that, based on the transitional practice which has been adopted by the Township for applications filed under the Former By-law by Charleston Homes Ltd. and Nicklin Auto Parts and Recyclers, I should order that such practice be imposed in this case.

[32] According to JDCL, the Township has continued to process applications for each of these companies under the New By-law even though the applications were submitted prior to August 8, 2016 when the Former By-law was repealed by the New By-law. Again, I am not persuaded.

[33] In my view, the practice of a municipality in a planning file is not a legal basis upon which planning determinations should be made by this Board. Furthermore, and perhaps more importantly, neither the Charleston Homes nor the Nicklin applications

involve, at this time, an appeal to the Board. This glaring distinction is not only significant, but determinative.

Disposition

[35] Although it is arguable as to whether the passage of the New By-law and its repeal of the Former By-law have resulted in unintended consequences, such consequences, to the extent they may have occurred, cannot, in law, override the express language of the PA and the specific powers conferred therein.

[36] Accordingly, for all the reasons expressed above, it is ordered that this Hearing is adjourned *sine die*, to be reconvened at a date to be determined following receipt by the Board of the requisite appeals related to the Subject Property pursuant to s. 22 (if applicable) and 34 of the PA, and those appeals will then be heard along with the Licence Application.

[37] I remain seized of this matter.

"Steven Stefanko"

STEVEN STEFANKO
VICE CHAIR

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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**The Corporation of the Township of
Guelph/Eramosa**

By-law Number 40/2016

**A By-Law to repeal and replace
By-law 57/1999 Comprehensive Zoning By-law**

WHEREAS the Council of the Corporation of the Township of Guelph/Eramosa deems it expedient to repeal all Zoning By-laws currently in force and to replace them with a single new comprehensive Zoning By-law of the Township of Guelph/Eramosa;

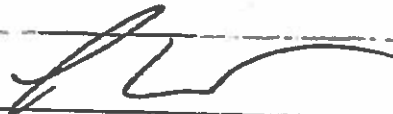
AND WHEREAS the Official Plan of the County of Wellington provides for the lands affected by this By-law to be used in accordance with the provisions of this By-law,

WHEREAS As a result of the public circulation of the proposed By-law and the Public Meetings on May 16, 2016 and July 11, 2016 respecting the proposed by-law, changes have been made to the By-law based on the comments received from the public, agencies and stakeholders, and Council has determined, that in accordance with Section 34 Subsection 17 of the Planning Act, R.S.O. 1990 no further notice need be given with respect to this By-law, and;

NOW THEREFORE, the Council of the Township of Guelph/Eramosa hereby enacts as follows:

1. That the Zoning Regulations, Provisions Schedule A (Maps 1-60), Schedule B (Maps 1 & 2) and Schedule C (Map 1), attached to and forming part of this By-law, are hereby adopted pursuant to Section 34 of the Planning Act, R.S.O. 1990, c.P.13, as amended, and may be cited as the "Zoning By-law of the Township of Guelph/Eramosa."
2. That Zoning By-law 57/1999 of the Township of Guelph/Eramosa, and all amendments thereto, insofar as they affect lands within the Township of Guelph/Eramosa are hereby repealed.
3. Notwithstanding Section 2, By-law 34-95 of the former Township of Eramosa is not repealed.
4. That subject to the provisions of Section 34(21) of the Planning Act, R.S.O. 1990, c.P.13, as amended, this By-law shall come into force as of the day it is passed.

READ three times and finally passed
this 8th day of August, 2016.



Chris White, Mayor

