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Commission des affaires municipales de l'Ontario

PL050088

1497039 Ontario Limited has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 86-50 of the Township of Lake of Bays to rezone lands respecting Part of Lot 18, Concession 14 (Franklin Ward) from "Rural" (Ru) to "Extractive Industrial with an Exemption" [MX-E(674)] and "Rural with an Exemption" [Ru-E(675)] to permit a dimensional stone quarry and a landscaping business  
O.M.B. File No. Z050019

1497039 Ontario Limited has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to Zoning By-law 86-50 of the Township of Lake of Bays to rezone lands respecting Part of Lot 18, Concession 14 from "Rural (Ru)" and Environmental Protection (EP) to "Restricted Rural with Exception" (RU2-Eaa), "Restricted Rural with Exception" (RU2-Ebb), "Environmental Protection with Exception" (EP-Ecc), "Environmental Protection" (EP), and "Extractive Industrial" (EI), and to permit a rock quarry and related uses  
O.M.B. File No. Z050194

1497039 Ontario Limited has referred to the Ontario Municipal Board under subsection 41(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, determination and settlement of details of a site plan for lands composed of Part of Lot 18, Concessions 14 (Franklin Ward) in the Township of Lake of Bays  
O.M.B. File No. M050016

1497039 Ontario Limited has applied to the Ontario Municipal board under section 43 of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, for a review of the Board's decision and order made on February 14, 2007 numbered 0400

## APPEARANCES:

### Parties

Huntsville Granite Supply Inc. (formerly  
1497039 Ontario Limited) ("Huntsville  
Granite")

Township of Lake of Bays (the "Township")

Peninsula Lake Association (the  
"Association")

David and Janet Walker (the "Walkers")

### Counsel

David S. White

M.E. Fitton

B.H. Kussner

**DECISION DELIVERED BY H. GOLDKIND AND ORDER OF THE BOARD**

1. NATURE OF MOTION

The Appellant, Huntsville Granite, has brought this motion pursuant to Section 43 of the *Ontario Municipal Board Act* ("Section 43 Motion") requesting review and a change to the Board Decision No. 0400 issued on February 14, 2007. The Board Decision was issued, following 13 days of hearing by Member, Ms K.J. Hussey.

The hearing and impugned Decision dealt with the appeal by Huntsville Granite of the Township's refusal of applications to rezone and give site plan approval for development of a stone quarry on the appellant's land located at 2480 Highway 60, in the Township of Lake of Bays. The Board turned down the appeal.

2. BACKGROUND

The Huntsville Granite property is a 33.26 hectare site on the south side of Highway 60, overlooking but not adjacent to Peninsula Lake. Huntsville Granite proposes to develop 6.17 hectares of this site as a quarry for the extraction and cutting of dimensional stone into slabs of varying sizes. Much of the stone would be used for exterior stone steps and landscaping purposes. The extraction and processing involves the use of explosives, a rock drill, loaders, trucks, dozers and an excavator. Generally the hours of operation are from 6:00 a.m. to 9:00 p.m., from May to the end of October, Monday to Saturday. Blasting would occur on weekdays from 8:00 a.m. to 5:00 p.m.

The proposed quarry is situate on the knob of a hill, overlooking Peninsula Lake. There is a 60-year supply of granite for extraction.

The scope of the proposed development was reduced, prior to the hearing, from 50,000 to 18,000 tonnes per annum and the extraction area was reduced from 11 hectares to 6.17 hectares. There was also a reduction in the size of the processing



area and the elimination of the use of a guillotine and crusher, which would reduce the noise from the proposed quarry.

Around the early part of 2002, Huntsville Granite constructed access into the site and began quarrying operations without obtaining a licence or permit from the Township. The Township's Zoning By-law does not permit quarrying on this site. By the end of August 2002, the Township obtained an interlocutory injunction requiring the appellant to cease this activity which had been ongoing for several months. Neighbours in the area complained of a great deal of noise from constructing access to the site, quarrying and stone-cutting activity. The appellant submits that noise will be reduced to be within Ministry of Environment guideline levels now that access has been constructed into the quarry. After the injunction was obtained, the appellant applied to the Township for rezoning of the property to permit the operation of a quarry.

There are a variety of uses in the area including permanent and seasonal residences, tourist resorts and various commercial uses.

Immediately to the west of the proposed quarry is a horse farm. There are residential homes and tourist facilities to the south of the subject site, near and on the shore of Peninsula Lake. There are also residences in the area to the northeast and northwest. There are two existing active legal non-conforming quarries in the area, which do not create a noise and sight problem for the area residents.

### 3. RECENT CHANGE IN JURISDICTION

At the time of the Board hearing, the *Aggregate Resources Act* did not apply to control quarrying operations in the Township. As a result of Section 6(4) of Ontario Regulation 244/92 under the *Aggregate Resources Act*, this *Act* was extended to apply to private land in the Township as of January 1, 2007. Prior to January 1, 2007, the Township regulated quarrying.

The appellant submits that the regulation of quarrying by the Ontario Government will remove this obligation from the Township and alleviate its concern about its limited ability to control this activity.

#### 4. APPLICABLE LEGISLATION

The statutory provisions central to the matters before the review Panel on this motion are section 43 of the *Ontario Municipal Board Act* and Rules 112 and 115 of the Board's Rules of Practice and Procedure:

Section 43:

The Board may re-hear any application before deciding it or may review, rescind, change, alter or vary any decision, approval or order made by it.

Rule 112:

The Board may re-hear any application before deciding it or may review, rescind, change, alter or vary any decision, approval or order. It may order a re-hearing of the whole or part of the matter before a different Member.

Rule 115:

The Board will hear a motion to review a decision only if the reasons provided in the request raise an arguable case that the Board:

- a) Acted outside its jurisdiction;
- b) Violated the rules of natural justice or procedural fairness including those against bias;
- c) Made an error of law or fact such that the Board would likely have reached a different decision;
- d) Heard false or misleading evidence from a party or witness, which was discovered only after the hearing and could have affected the result; or
- e) Should consider evidence which was not available at the time of the hearing, but that is credible and could have affected the result.

5. ISSUES

The issues before this Panel for adjudication are the following:

- A. In relation to the Section 43 Motion, have one or more of the matters set out in Rule 115 been established?
- B. If the answer to A is yes, what relief should be granted by this Panel?

6. POSITION OF THE PARTIES AND ANALYSIS

The appellant's grounds for the motion are:

- Mistakes of law or fact, under Rule 115(c).
- New evidence, under Rule 115(e).

**A. RULE 115 (C): DID THE BOARD MAKE AN ERROR IN LAW?**

- (i) The appellant submits that the Board's Decision does not respect the importance of aggregate extraction and protection as reflected in the Provincial Policy Statement, 2005 (P.P.S.).

The appellant contends that Section 1.1.4.1(a) of the P.P.S. sets out that in rural areas permitted uses shall "relate to the management or use of resources," such as aggregate extraction, and Section 2.5.2.1 of the P.P.S. provides for acquiring aggregate "as close to the market as possible", without any demonstration of need. The appellant submitted that there is a demand for its proposed product from the private and public sectors within the Township and elsewhere, and the granite in its quarry is unique in its nature for dimensional stone (a consolidated aggregate).



### Panel's Analysis

The appellant's submissions and documents do not convince this Panel that the impugned Decision is not consistent with the P.P.S. in relation to the importance of aggregate to the health and welfare of the Province. Sections 1.1.4.1(a), and 2.5.2.1 of the P.P.S. speak to the importance of aggregate. Also, section 1.7.1(a) refers to optimizing the long-term availability and use of resources. However, the P.P.S. also addresses the importance of other uses. Section 1.1.4(g) provides that in rural areas, "recreational, tourism and other economic opportunities shall be promoted", and section 1.7.1(f) refers to "providing opportunities for sustainable tourism development" in support of the Province's long-term economic prosperity.

The P.P.S. recognizes the importance of a variety of land uses which support the economic prosperity and health of the Province and the importance of these uses existing in harmony. Section 1.7.1(e) of the P.P.S. provides for coordinating various uses to prevent adverse effects. This policy sets out that resource extraction and Sensitive Land Uses are to be "appropriately designed, buffered and/or separated from each other to prevent adverse effects from odour, noise and other contaminants". In the P.P.S., residential buildings, hotels and motels are included in the definition of Sensitive Land Uses.

Section (F) of the Official Plan of the Township also reflects the importance of aggregate extraction and encourages it under Section F.23, where "compatible with the existing community and surrounding land uses".

This Panel finds that the Board Decision recognizes the importance coordinating in harmony the existing recreational, tourism and residential uses in the area with the proposed quarry use. The Decision does not diminish the importance of aggregate as reflected in the P.P.S.

The Decision, in denying the proposed quarry, gives as a reason, that the location of the proposed quarry is not appropriate with respect to preserving the character of the area. This reason is consistent with the referenced policies in the P.P.S. and the Official Plan. It is supportive of P.P.S. policy to coordinate various uses

in order to prevent adverse effects by appropriately separating resource extraction from the existing Sensitive Land Uses.

- (ii) The appellant submits that the Board erred by attempting to distinguish between essential and non-essential aggregate whereas there is no such distinction in the P.P.S. and the *Aggregate Resources Act*. The appellant contends that the Decision refers to the appellant's proposed product, dimensional stone, as a non-essential form of aggregate. The appellant maintains that this alleged error reduces the importance of its product and the weight given to it in determining whether the quarry should be approved.

### Panel's Analysis

Although the Board's Decision does refer to giving consideration to "the nature of the resource" in attempting to balance competing uses and determining whether they can exist in harmony within the area, this Panel finds that such consideration should not be looked at in isolation of the Board's other findings in relation to the lack of appropriateness of the proposed use on this site.

The Decision is correctly founded on the Board's finding that the location of the quarry is not appropriate since it would conflict with and adversely affect existing residential and tourism uses with respect to sound and vision. After considering and analysing evidence in relation to sounds, vision and the planning documents, the Board finds, on page 18 of the Decision:

Having considered all the evidence, the Board finds that the Applicant is unable to overcome the constraints that the location imposes. The site, which is in close proximity to and overlooking Peninsula Lake, creates an additional burden for the Applicant to satisfy those clearly articulated Official Plan policies with respect to preserving the character of that area. In a different location the Application might have met and exceeded the requirements necessary to permit the use sought.

However, the Board finds that a quarry in this particular location would directly conflict with the policies set out in the Official Plan for the Township of the Lake of Bays and especially the principles that guide growth.

The Board's Decision is consistent with the PPS and the Township's Official Plan as it recognizes the importance of coordinating in harmony competing uses in the area when introducing a new use or change into the area.



This Panel finds that if the Board was incorrect in accepting and relying upon the concept of the importance of different kinds of aggregate in reaching its Decision, this is not such an error that the Board would likely have reached a different Decision had it not made such an error. This concept is superfluous to the Decision which is correctly founded on other reason in the decision.

The Board's findings with respect to the quarry site location being inappropriate in the area is a sufficient basis for not approving the quarry.

- (iii) The appellant contends that the Board in its Decision ignored the expert evidence of the appellant's witnesses with respect to aggregate resources, noise, visual impact and land use planning, and accepted the evidence of lay witnesses over that of expert witnesses.

#### Panel's Analysis

The Board, in its Decision, sets out that the hearing consumed 13 days, along with site visits to the subject property and two residences on the shore of Peninsula Lake. The Board heard evidence of 36 witnesses and received 76 exhibits. Evidence was given by a variety of experts for opposing parties and lay persons.

This Panel is not satisfied that the Board Member ignored the expert evidence of the appellant's witnesses. The Board Member heard evidence on these issues from expert and lay witnesses in favour of and in opposition to the proposal, and generally the position of the parties on these issues is reviewed in the Decision. For example, the appellant's noise expert witness said that the noise levels will comply with Ministry of Environment guidelines. The noise expert for the opposing party did not agree. The Board chose to accept the evidence of residents who actually experienced the noise over several months and concluded that even if the noise met Ministry Guidelines it would adversely alter the character of the lake and its surroundings. The Board Member states that she considered all the evidence in her findings and there is no evidence that the Member improperly ignored the evidence of the appellant's expert witnesses. The Panel is satisfied that the Decision reflects the analysis of all relevant evidence and that the acceptance and use of lay evidence is appropriate in the circumstance.



**B. RULE 115 (C) DID THE BOARD MAKE AN ERROR IN FACT?**

The appellant contends that the Board incorrectly concluded that the quarry is visible from the homes of two lakeside residents during leaf-off conditions, based on the evidence of these two lakeside residents, and that the vista of the property was changed and visible during leaf-off conditions in violation of Official Plan policy to preserve vistas and panoramas.

Panel's Analysis

In arriving at the Board's finding on the visibility of the quarry during leaf-off conditions, the Member accepted the empirical evidence of two lakeside residents that the site is clearly visible from their homes. The Member also visited the site and noted that the quarry is located on the knob of a hill and accepted evidence that its visual impact cannot be mitigated, because of its location, and would conflict with Official Plan policies dealing with the preservation of vistas and panoramas.

The appellant's counsel submits that the area will be covered in snow during winter months and will not be distinguishable from other vistas. From the Decision, it appears that this submission conflicts with the actual experience of the two lakeside residents. It appears from the Board's Decision that a ridgeline has already been altered by the appellant in 2002 by clearance of a triangular notch to accommodate quarrying activity, and that more trees would need to be cut to accommodate further quarrying.

This Panel finds that the Board was entitled to come to these findings on the issue of visibility based on the evidence referred to in the Decision.

**CONCLUSION**

This Panel finds that the Board did not make an error of fact or law such that the Board would likely have reached a different decision had it not made such an error.

**C. RULE 115(E) – SHOULD THE BOARD CONSIDER EVIDENCE WHICH**

**WAS NOT AVAILABLE AT THE TIME OF THE HEARING, BUT THAT IS CREDITABLE AND COULD AFFECT THE RESULT?**

Effective as of January 1, 2007, the regulations under the *Aggregate Resources Act* were amended to include the Township under the jurisdiction of this *Act*. At the Board hearing, the Township had expressed concern about its limited ability to monitor and regulate the method of operation of the proposed quarry and to respond to potential complaints from ratepayers.

The appellant contends that the Province of Ontario will now regulate the licensing and operation of the quarry.

Under the *Aggregate Resources Act (ARA)*, the quarrying activity must first be approved of by an enabling by-law. The applicant must then apply to the Province in order to be licensed under the *ARA*. Counsel for the appellant submitted that the applicant would be subject to strict performance standards for licensing and operation as well as government control of its activities, and these strict terms will ensure that the quarry operation will operate in harmony with the neighbourhood and relieve the Township of supervision duties. However, there was no evidence produced as to the conditions for obtaining a licence, the standards of operation or the supervision and enforcement mechanism by the Province for the proposed quarry, and how this change in jurisdiction would affect existing uses.

This Panel finds that the change of jurisdiction may be considered new evidence, but without a hearing on and full understanding of the legal and practical meaning and effect of the change in jurisdiction, the Board cannot determine whether this change could have affected the result of the Board Decision. It may be new evidence, but it has little, if any, probative value or weight for satisfying Rule 115(e).

As a matter of good planning, it would be in the best interest of the parties and the public that the full implications of the change in jurisdiction be reviewed at a public forum such as a new application for rezoning.

This Panel finds that the appellant has not satisfied the terms of Rule 115(e) for the purpose of a change to the Order of the Board or a new hearing.



CONCLUSION

Based on all of the foregoing, this Panel finds that there is no violation of Rule 115(c) of the Ontario Municipal Board Rules of Practice and that the requirements of Rule 115(e) have not been satisfied. The Decision is reasonable and provides sufficient analysis and reasons. The important issues have been identified, examined and dealt with.

If there are errors they are of a minor nature and would not have affected the Decision.

The Motion under s.43 of the *Ontario Municipal Board Act* is therefore dismissed.

It is so ordered.

"H. Goldkind"

H. GOLDKIND  
MEMBER