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Orica wins right to remain in Dufferin

By WES KELLER Freelance Reporter

A Superior Court judge has ruled that the Orica Canada explosives facility may continue to operate near Luther Marsh, at least until a zoning issue has been resolved at the Ontario Municipal Board.

The federally licensed facility has been functioning on temporary zoning since 2007. Last month, following massive public opposition to the operation, East Luther Grand Valley council voted not to extend the zoning, nor to grant an Official Plan amendment and permanent zoning, which would have voided Orica's license as of June 12.

In response, Orica unsuccessfully sought to have an emergency OMB hearing and then applied to the court for an "interlocutory injunction" to afford sufficient time to have the issue heard by the Board at a regularly scheduled hearing.

The court hearing was on June 25. Madame Justice Janice Jane Milanetti released her decision Monday, ruling in favour of Orica.

Principal among her reasons, she noted that Orica and its predecessor companies had been operating at the Luther Marsh site for about 15 years without adverse incidents. As well, she noted a lack of evidence that any public opposition to the facility had occurred until recently.

"The Township has had Orica and a company of a similar nature in their community for almost 15 years. The only complaints appear to have emerged most recently. I was not provided evidence to justify this marked change of public opinion," the judge's decision reads in part. "When weighing both side of the argument, I fail to see how an extension of the temporary bylaw for the time until the issue can be formally decided by the OMB at the appeal will cause undue harm to (the township)."

"It is clear that success by Orica at appeal may do so. I am not to decide that ultimate issue. I am only asked to allow Orica the time and latitude to have the appeal formally decided. It has been launched; it will be heard in the not too distant future. I am certain the public response will be considered by that body," she said in her decision.

The Township was represented in court by Jeff Wilker and Stephen D'Agostino of Thomson Rogers, and Orica by John Doherty, Ron Craigen and David Sunday of Gowling Lafleur Henderson.

Justice Milanetti noted that the Township argued that the Courts had no jurisdiction over a matter that, they said, was "more appropriately heard by the OMB."

Further, that lawyers for the township argued that Orica was a victim of its own lack of diligence in not having sought permanent zoning earlier on, and that "as a result of the failure of this multi-national corporation to act with dispatch, they are seeking extra equitable relief...."

Justice Milanetti did agree "that Orica could have acted sooner than they did to firm up the (bylaw) they were operating under (but) they did not. I understand that they may have been lulled into a false sense of security as a result of" the 15 years of the site's operations, and by the representations of former township planner Jack Cruttenden on June 12, 2007.

The judge included minutes from that meeting in her decision, indicating that Mr. Cruttenden said permanent zoning could not be approved at that time because that temporary use had not been approved in the (East Luther) OP but would be in the new ELGV OP.

According to the minutes, Deputy Mayor John Ince said he favoured a two-year temporary zoning "with the understanding that it would be rezoned permanently in that time frame." The judge also noted that the planner had been in error in stating that the new OP recognized the explosives use. But, she said, Orica did not discover the error until October 2008.

In considering the evidence before her, the judge ruled that Orica's application meets the criteria of case law (R-J-R MacDonald) in that "there is a serious issue to be tried; the moving party will suffer irreparable harm if the relief is not granted; and the balance of convenience is such that the moving party (Orica) will suffer greater harm if the injunction is not granted than (the Township) will suffer if it is."

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