

ISSUE DATE:

April 28, 2014



MM120031

Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 11(5) of the *Aggregate Resources Act*, R.S.O. 1990, c. A.8, as amended

Referred by: Ministry of Natural Resources
Objector: Gerald & Janice Brown
Objector: Ministry of Natural Resources
Applicant: Preston Sand and Gravel Company Limited
Subject: Application for a Class A licence for the removal of aggregate
Property Address/Description: Part Lot 23 and 24, Concession X
Municipality: Township of North Dumfries
OMB Case No.: MM120031
OMB File No.: MM120031

IN THE MATTER OF subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: Gerry Brown, Et Al
Subject: By-law No. 2526-12
Municipality: Township of North Dumfries
OMB Case No.: MM120031
OMB File No.: PL121250

APPEARANCES:

Parties

Counsel*/Agent

Preston Sand and Gravel
Company Limited

Jeffrey Wilker*
David Germain*
M. Gerhart (student-at-law)

Concerned Residents
Association of North Dumfries

Eric Gillespie* (for Motion returnable March 25,
2014 only)
Temera Brown

Township of North Dumfries

Patrick Kraemer*

DECISION DELIVERED BY J. V. ZUIDEMA AND ORDER OF THE BOARD

[1] The reader is directed to earlier dispositions of this Board, differently constituted, to understand the background and the matters before the Board for adjudication. This decision addresses the merits of the matters before the Board as well as provides a summary of oral rulings on numerous motions raised through the course of the proceedings.

[2] My decision on the merits of the two matters before the Board are as follows:

- a) With respect to the appeal launched by Janice and Gerald Brown et al., the appeal is allowed in part only to amend Zoning By-Law No. 2526-12 of the Township of North Dumfries in the form set out as Exhibit 22 which was filed with the Board. In all other respects, this appeal is dismissed in its entirety. For ease of reference, that amended Zoning By-Law is attached to this decision and marked as Attachment 1.
- b) With respect to the referral by the Ministry of Natural Resources of the licence for aggregate extraction for the Henning Pit where the only remaining Objectors were Janice and Gerald Brown, the Board directs the Minister of Natural Resources ("MNR") to issue said licence in accordance with subsection 11(8)1 of the *Aggregate Resources Act* subject to the prescribed conditions and in accordance with the Site Plans filed with the Board as Exhibits 16(a), Revised 16(b), 16(c) and 16(d). Again for ease of reference and convenience only, those documents are appended to this decision and marked as Attachments 2(a) to 2(d) respectively.

[3] My reasons for this decision are simple: the only expert evidence proffered was that in support of the applications and brought forward by Preston Sand and Gravel Company Limited ("Preston"). Experts David Sisco - Land Use Planning, Michael LePage - Air Quality and Meteorology, and Glenn Ferguson - Human Health Assessment and Toxicology were not challenged in any way whatsoever by the Concerned Residents' Association of North Dumfries ("CRAND"). CRAND was earlier given party status to lead the case on behalf of Janice and Gerald Brown and others who signed the appeal form against the Township's Zoning By-Law and Janice and Gerald Brown, the remaining Objectors to the aggregate licence.

[4] CRAND was given every opportunity to conduct cross-examination but Temara Brown, daughter of the Appellants/Objectors and the Executive Director of CRAND who was acting as Agent, chose not to avail herself of that right. Ms. Brown was given a fair degree of latitude by the Board in order for her to fulfill her role as Agent. For examples, she was permitted, despite objection from parties opposite, to act as both witness and Agent for CRAND; she was permitted to testify from the counsel table rather than being required to stand in the "witness box"; she was offered additional time to prepare for cross-examination despite CRAND's staunch position that it would not conduct any cross-examination.

[5] In any event, because no cross-examination was undertaken, the testimonies of Messrs. Sisco and LePage and Dr. Ferguson were uncontroverted and the Board relies on their evidence to arrive at its decision on the merits. To summarize the evidence of these experts, Mr. Sisco provided opinion evidence that the proposed draft zoning by-law which he, in concert with the Planners for the Township of North Dumfries ("Township") and for CRAND, had prepared and presented to the Board represented good and proper planning, was in the public interest, and was consistent with and conformed to, as the case may be, to the 2005 Provincial Policy Statement ("PPS") as well as the Growth Plan. With the recent release of the 2014 PPS, Mr. Sisco advised the Board that his opinion did not change. He recommended Exhibit 22 for approval by the Board. Mr. Sisco was the only planning witness to testify.

[6] Concerning the matters to be considered under subsection 12(1) of the *Aggregate Resources Act*, Mr. Sisco methodically reviewed each item to provide an opinion that the proposed pit would not offend any of these considerations. In coming to his planning opinion, he had inputs from experts at the MNR who had signed off on this application [Exhibit 14(a) tabs 25, 26]. Further the Region of Waterloo was satisfied with the applications and as such, had withdrawn from the hearing. They filed correspondence to this effect [Exhibit 21].

[7] Finally Mr. Sisco relied on the technical advice he received from the experts in noise, air quality, human health, and dust impacts, all retained by Preston to ensure that the matters of consideration were properly addressed. Mr. Sisco informed the Board that measures to protect habitat of specific species found on the site were implemented. For examples, Phases 2 to 7 of the operation would be managed in a way to ensure the

habitat and life-cycle of the Bobolink were not negatively impacted. The same was true with respect to the Barn Swallow, also located on the site. These measures were determined to be adequate for the MNR and are reflected in the site plans.

[8] Concerning ground and surface water resources, Mr. Sisco provided evidence that the Region was satisfied as the delegate of the Ministry of the Environment. Hydrogeologists David Hanratty and Ken Dance had come to an agreement on this issue and as such, it was removed from the Issues List for this hearing.

[9] Concerning main haulage routes and proposed truck traffic to and from the site, a concern raised by CRAND, Mr. Sisco advised that the analysis showed that one additional truck per hour would be generated. The site is located at the corner of Dumfries Road and Cedar Creek Road, both Regional Roads in the Township of North Dumfries near Ayr. The intersection is served with traffic lights. Access to the site will be along Dumfries Road. The Browns' property is along Cedar Creek Road which runs north of the subject site and Mr. and Mrs. Matiasz' home is further north of the Browns. The interchange for Highway 401 is west of these homes. In other words, trucks coming to and going from the site would not normally drive past these homes.

[10] The Region was satisfied with the nominal increase in truck traffic on their regional roads. While Ms. Brown was not satisfied with this increase, she conceded that there was existing truck traffic from the numerous other aggregate operations surrounding her family's home, along with a Public Works Yard at the corner of Cedar Creek and Dumfries. She was not happy with the litter and noise generated by this truck traffic, and while the Board sympathizes with those concerns, what she described were existing conditions and the Board has no jurisdiction to remove or curtail them through this appeal process.

[11] Concerning the quality and quantity of aggregate on the site, the Board is satisfied from the information provided by Mr. Sisco that both are sufficient. In relation to Preston's history of compliance, the Board was provided with two recent decisions of this Board, differently constituted, wherein Preston was granted approvals.

[12] Ms. Brown raised concerns she had had with other operators in the area. She explained that when complaints had been made, no proper follow-up or satisfactory resolution had been achieved. Her statements were targeted not only to those

operators but also to MNR. Unfortunately concerns with other aggregate producers should not be used as a basis to establish doubt with Preston or its compliance history.

[13] Meetings with Preston's representatives prior to the hearing to discuss the Brown's proposal to Preston to purchase the Brown property were not fruitful. Ms. Brown testified that she and her family were told that Preston was not in the business of buying real estate. While that result is not satisfactory to Ms. Brown, it not sufficient to rely on it to undermine Preston's history of compliance.

[14] The merits of the application and the proposed draft zoning by-law were properly and adequately covered through the expert testimony presented by Preston. Ms. Brown's lay evidence was not sufficient to successfully challenge or undermine Preston's experts. I am satisfied that the public interest is met given that the public agencies involved with this matter charged with ensuring the public interest, namely the Township, the Region and the MNR either all signed off once their concerns were addressed or were in support from the outset. Further through the independent assessment conducted at this hearing through the evidence presented, I am satisfied that the applications are in the broader public interest.

[15] I would now like to address the numerous motions which were brought throughout this hearing process.

DECEMBER 13, 2013 ADJOURNMENT REQUEST OF CRAND

[16] Prior to the commencement of this hearing, the Board received a request for an adjournment from CRAND's first counsel, David Donnelly. This request was made by email on December 13, 2013, and on that occasion no reason was given to the Board for the adjournment. The parties opposite had not consented and as such, the request was denied. December 13 was the same day that pursuant to the Board's Procedural Order, witness statements from experts in air quality and health impacts were to be delivered. Given the denial of that request to adjourn, the hearing was to proceed as scheduled for January 20, 2014.

[17] No witness statement on health impacts was provided by CRAND on December 13, 2013 nor was any reason provided for this omission. Preston filed their witness

statement on health impacts but obviously, did not file a Reply, which they would have been entitled to do had CRAND filed on time.

JANUARY 20, 2014 MOTION OF CRAND

[18] On the first day of the hearing, CRAND brought a motion seeking relief to file an expert witness statement on health impacts from a toxicologist. The Township took no position but Preston objected vigorously stating that it had been denied its right of Reply. CRAND's counsel suggested Preston could be afforded additional time to file a Reply. Preston argued that it should not be required to conduct its case AND prepare such materials. CRAND said it would not oppose an adjournment to accommodate Preston. So wrapped in the request to file this witness statement was another adjournment request.

[19] CRAND's counsel explained the circumstances wherein CRAND's first toxicologist resigned without much notice in November 2013 and this second toxicologist's peer review report was filed on January 13, 2014, one week prior to the commencement of the hearing. Only through the submissions on this motion did Counsel explain that toxicology was an important element of CRAND's case. He said that Planning and Air Quality were also important and experts in those areas would testify. However, he could not provide a reasonable explanation for why CRAND did not meet the filing date requirement imposed by the Board's Procedural Order. He could not explain why he did not alert the Board or the other parties on or before December 13 when the witness statement was due that, under the circumstances, CRAND would not be filing but seeking leave to file at a later time, especially since health impacts was so critical to CRAND's case. He said he took the blame entirely.

[20] Preston objected throughout and urged the Board not to deviate from the Order already imposed by this Board, differently constituted. Preston argued serious prejudice and did not want to see the hearing delayed. The first day of the hearing was used to hear submissions on CRAND's motion.

[21] The Board returned the next day to provide its decision. The motion was dismissed and the hearing was to proceed. In coming to my decision, I weighed the prejudice to the parties and determined that the prejudice to Preston by not being able to file a Reply without having the hearing adjourned outweighed the prejudice to

CRAND given that their expert's report was a peer review and not an independent assessment. Such information could be raised through cross-examination if necessary.

[22] Further, not providing any reasonable explanation for non-compliance with the Board's Order was simply not acceptable. The Board's Rules speak to failure to comply and expects compliance [Rule 7] and specifically state that an expert may not be permitted to testify if their witness statement or report is not served on all parties and filed with the Clerk of the municipality when so directed by the Board [Rule 21]. CRAND had experienced counsel who would have or should have been aware of the consequences of not filing in accordance with the Board's Procedural Order. To simply disregard the Board's earlier Order in such a fashion brings the Board's process into question and undermines the public resources used to prepare and issue the earlier Order.

[23] The above is a summary of my earlier decision. At the time, I provided an oral disposition which addressed each heading of argument. Following the release of my oral disposition, CRAND's counsel asked to stand down that day so that he could obtain advice with respect to his potential error or omission. He said that he may not be able to continue to act for CRAND given the decision. As a courtesy to Mr. Donnelly, the Board stood down and returned the next day.

[24] On day three of this hearing, Mr. Donnelly advised that he would be resigning as Counsel for CRAND. He brought a motion to be released from the hearing which was granted. He believed that the Board had lost confidence in him and this was a reason for having to remove himself as solicitor of record.

[25] He also expressed reservation for the possibility of being liable for a motion for costs, should one be made, against himself personally. He cited another OMB decision [*Kimvar v. Innisfil District Association* also known as "Big Bay Point"] wherein a motion for costs was brought against Mr. Donnelly's firm.

[26] The Board conveyed on a number of occasions that it had not lost confidence in CRAND's counsel and if Mr. Donnelly had come to that conclusion, it was unfortunate but simply not the case. Despite those repeated assurances, Mr. Donnelly wished to be removed and his request was obliged.

[27] Because of these circumstances, CRAND needed time to find a new lawyer. This meant an adjournment. Parties opposite were opposed to having this hearing delayed given that the first three days were taken up with CRAND's various procedural motions. Mr. Donnelly expressed concern that if CRAND was required to proceed without Counsel, it would be a serious miscarriage of justice.

[28] The Board stood down until the following week and arranged for a mediation session with another Vice Chair in the hopes of finding some resolution. The break also provided time for CRAND to make inquiries with respect to retaining new Counsel.

[29] The Board returned the following week. The mediation session was not successful. CRAND had not been able to locate a new lawyer and needed more time. Temara Brown, the Executive Director of CRAND was now speaking for that organization. She first questioned Mr. Donnelly's ability to even engage CRAND in mediation. The Board asked if Mr. Donnelly had acted without instructions. Ms. Brown said she wouldn't say that but she could not explain why she didn't say something when Mr. Donnelly raised the possibility of mediation. Ms. Brown was sitting in the room during this entire exchange.

[30] She then made a motion for an adjournment and asked for three to five months. Parties opposite once again reiterated their objection to having the hearing delayed and said three to five months was excessive, particularly when all of the witness statement filings pursuant to the earlier Board Order were already in place.

[31] Preston expressed reservation stating that it did not want to see a lengthy delay as its client had a right to a timely hearing and that CRAND was the only party to oppose Preston's applications. It wanted to have the witness list fixed so that the issues determined by this Panel could not be re-argued before another Panel in future and asked that if an adjournment is granted, it be marked peremptory.

[32] Preston and the Township were amenable to a reasonable adjournment given that there was no possibility of completing this matter in the hearing time remaining in any event.

[33] Ms. Brown objected to the requirements suggested by Preston and said that if the matter was marked peremptory, it would be prejudicial to CRAND should something

unusual occur, such as their next lawyer decides to resign also. She was not content with having the witness list fixed either and she stated that she didn't think CRAND would be treated fairly by me. She made an allegation of bias against me given my earlier ruling. When asked if a motion for recusal was now before me, she stated that it was not.

[34] In trying to understand exactly who CRAND was, the Board asked Ms. Brown of the membership. She responded to say that her mother, Janice Brown was the CAO, Mr. Matiasz was the Treasurer, her father Gerry Brown was a Member and she was the Executive Director but she "couldn't tell me how many members because they are from all across the Township." This point is pertinent because upon the resumption of the hearing, the Board finally received confirmation of the Membership which consisted of seven people from three families: four from the Brown family (parents Janice and Gerald, brother Christopher and Temara); two from the Houston family (Brian and Diane); and one from Matiasz family (Richard earlier said to be Treasurer).

[35] The Board granted an adjournment of two months and marked the return date peremptory with the witness list fixed. The Board allocated another three weeks in its calendar for this hearing. The hearing would resume March 25, 2014.

MARCH 25, 2014 MOTION OF CRAND

[36] Upon the resumption of this hearing, the first day was used for another motion brought by CRAND. The motion sought to have me removed on the basis of an allegation of bias given my earlier procedural ruling. It also sought to re-open and reverse my earlier ruling on allowing CRAND's toxicologist to file a late witness statement, and it sought an adjournment if necessary.

[37] The motion for recusal on the allegation of bias was hinged on the assumed use of the term "blatant disregard" of the Board's earlier Procedural Order. CRAND's new lawyer, Mr. Eric Gillespie also argued that my earlier ruling on the toxicologist resulted in significant consequences to CRAND which reflected bias on my part. When I asked for clarification from Mr. Gillespie on whether the bias stemmed from "blatant" or "disregard" or both words used together, he said he could not say as he was not present when such words were used.

[38] The Township opposed the motion stating once again that it wanted to see this hearing concluded in a timely manner. It also expressed concern with the costs which the Township would bear as this hearing was further dragged along. The Township found no bias on my part and pointed to remedies to which CRAND could have availed itself but did not (i.e. Divisional Court or Section 43 review of my earlier procedural ruling if CRAND found it so egregious).

[39] Preston vigorously opposed CRAND's motion once again stating that it was just another attempt to delay the proceedings. It adopted the Township's arguments and found no bias in my earlier ruling or conduct of the proceedings. Preston expressed that CRAND's actions were audacious and the parties needed certainty of the process. What CRAND was attempting to do was to re-argue the first motion and use the complaint of bias as a mechanism to delay. Preston argued that CRAND's actions on this motion were clearly an abuse of the process and to permit it would bring the administration of justice into disrepute.

[40] Following hearing all of the submissions, the Board provided an oral ruling dismissing the motion stating that a motion for recusal is an extraordinary remedy and not one embarked upon lightly. The test for such an allegation is high and a procedural ruling not in one's favour does not automatically establish bias on the part of a decision maker.

[41] The allegation of bias is a serious one and must be supported with significant evidence. Simply being dissatisfied with an earlier procedural ruling does not mean bias exists.

[42] No instance of breach of procedural fairness or natural justice was provided. The only reference to what CRAND believed was bias on my part was the use of the term "blatant disregard" – a term attributed to me when providing my earlier procedural ruling.

[43] The Board, through its own Rules and the *Statutory Powers Procedure Act*, controls its process. The process would have had to have been manifestly unjust to support an allegation of bias. In this case, CRAND was unsuccessful on one procedural matter but successful on others, namely to have their first Counsel released and an adjournment to seek new Counsel.

[44] CRAND's allegation of the lack of impartiality was unsupported and unjustified as both Preston and CRAND each have had rulings upon which they might be dissatisfied. That does not equate to bias on my part. For a party unhappy with a procedural decision to bring a successful motion on the allegation of bias would have the effect of seriously undermining the integrity of not only this process but also of the Board's administration itself.

[45] Concerning the allegation that my earlier ruling on the toxicologist was disproportionate given its consequences, I found this was an attempt to re-litigate the first motion. I made a ruling on that earlier motion and I would not revisit it. The parties were given ample time to provide evidence and submissions on that motion and nothing new had transpired since. Back then I relied on the Board's Rules to arrive at my decision.

[46] If CRAND believed my decision was wrong, it had Counsel to advise it on options. The Board does not provide parties with legal advice. No formal Section 43 was initiated. No application for judicial review was initiated. At the last sitting, I made it clear and I repeated it once again that the fact that CRAND's first lawyer chose to withdraw following my procedural ruling was a decision of that Counsel and not the Board's doing.

[47] CRAND sought and was given time to obtain new Counsel and that was provided despite objections from Preston. It was marked peremptory to all parties so that all parties were given certainty of the process. In balancing competing interests and achieving a fair and timely hearing, I was cognizant of the number of days spent on CRAND's motions. Fairness is a concept to be applied to all parties. CRAND received additional time to get a new lawyer – that was fair. Having the matter marked peremptory was fair to all parties. Having the matter proceed without further delay was both fair and timely.

[48] Following the delivery of that oral disposition, Mr. Gillespie, CRAND's second lawyer asked to be released. He explained that his retainer was only for the Motion. The Board inquired further given that CRAND had been given time to obtain new Counsel for the hearing, not just a Motion. Mr. Gillespie explained that because of the outcome of this latest Motion, CRAND would continue with Temara Brown as their

Agent as technically his retainer was for the Motion and he was instructed not to continue with the hearing.

[49] Mr. Gillespie then left the room and the hearing continued.

[50] It should be noted that the Board had granted CRAND time to locate a new lawyer for the hearing based on the vigorous submissions of their first lawyer wherein he stated that to have CRAND proceed with the hearing without counsel would be a terrible miscarriage of justice.

[51] The next day the Board recognized Ms. Brown as Agent but because she was also listed as one of the witnesses for CRAND, there were objections from parties opposite concerning her dual role. The Board ruled that it would permit Ms. Brown to act as Agent and if and when her testimony was needed, given her position as a layperson, the Board would hear further submissions. The Board inquired as to whether another witness, for example her mother Janice Brown who was also on the witness list, could cover the same evidence thereby avoiding the objections associated with her dual role.

[52] It was only at this occasion, the sixth hearing date, that Ms. Brown stated that CRAND would not be calling any other witnesses and she would be its sole witness. The Board asked for clarification given that experts in air quality and planning were listed on CRAND's witness list and no leave had been sought to have them removed. Ms. Brown pointed the finger at Mr. Gillespie stating that he should have made this clear. The Township and Preston were equally surprised as this was the first time they also learned that CRAND would not be calling anyone other than Ms. Brown.

[53] It was at this point that the Township asked for clarification of who exactly CRAND was. Earlier in this decision I set out how Ms. Brown explained the CRAND membership. In January she had left me with the impression that CRAND consisted of a great many people throughout the Township. When I had pressed her to provide a ball-park figure, she could not, stating there were too many. With the greatest of respect, a group of seven members does not fit that description, especially when the individuals are from only three households. It became clear as the hearing proceeded that CRAND was a hollow organization with no credible case to continue with the

appeal or objection. The responses from Ms. Brown in addressing the Board's questions on CRAND's membership were cagey at best and misleading at worst.

[54] It should be made clear that this was not a circumstance where a party was not given every opportunity to prepare and present its case. In fact, it was just the opposite. Ms. Brown as Agent for the three families of CRAND knowingly chose not to cross-examine and consciously decided to not call her expert witnesses. It was only in her closing argument that she stated the reason CRAND did not withdraw but continued through to the end of the case -- it was so it would be able to launch an appeal of this decision. This was so without knowing the outcome of my decision.

[55] The Board was advised that Preston would seek instructions to pursue a motion for costs against CRAND. Should that motion be initiated, the parties are to comply with the following directions for such a motion. Specifically, such a motion should be brought within 30 days of the issuance of this decision. The responding parties will be given 10 business days upon receipt of these motion materials to file their Response. The Moving Party will be given three business days upon receipt of the Response to file its Reply. Hard copies shall be provided to the Board. Should it be necessary, the Board may require the parties to attend in person to address their materials.

BOARD ORDERS

[56] Therefore the Board orders that the appeal of Janice and Gerald Brown et al. is allowed in part only to amend Zoning By-Law No. 2526-12 of the Township of North Dumfries in the form set out as Exhibit 22 which was filed with the Board. In all other respects, this appeal is dismissed in its entirety. For reference, that amended Zoning By-Law is attached to this decision and marked as "Attachment 1."

[57] With respect to the referral by the MNR of the licence for aggregate extraction for the Henning Pit wherein the only remaining Objectors were Janice and Gerald Brown, the Board directs the Minister of Natural Resources to issue said licence in accordance with subsection 11(8) 1 of the *Aggregate Resources Act* subject to the prescribed conditions and in accordance with the Site Plans filed with the Board as Exhibits 16(a), Revised 16(b), 16(c) and 16(d). For reference, those documents are appended to this decision and marked as "Attachments 2(a) to 2(d)" respectively.

[58] The Board provides directions as noted above concerning any Motion for Costs to be brought by any of the Parties.

“J. V. Zuidema”

J. V. ZUIDEMA
VICE-CHAIR