

ISSUE DATE:

February 1, 2013



PL110809

Ontario
Ontario Municipal Board

2167534 Ontario Inc. 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 55-86 of the Township of Woolwich to rezone lands respecting 125 Peel Street from A to E to permit an aggregate operation
OMB File No. PL110809

APPEARANCES:

Parties

Counsel

2167534 Ontario Inc. and Kuntz Topsoil, Sand & Gravel Ltd., and Preston Sand & Gravel (hereafter referred to as the "Applicant/Appellant")

J. Wilker
A. Burton

Township of Woolwich

S. Loicono
E. Costello

Region of Waterloo

F. McCrea

Participants

J. Huissoon

L. Hare

D. Strooboscher

B. Norrish

D. Joy

MEMORANDUM OF ORAL DECISION DELIVERED BY M. A. SILLS ON NOVEMBER 26, 2012, AND ORDER OF THE BOARD

[1] This matter was a settlement hearing with respect to an application to rezone the lands located at 125 Peel Street, in the Township of Woolwich ("subject lands"). The Applicant/Appellant applied for a Category 3, Class A, above water table pit license,

under the *Aggregate Resources Act* (“ARA”). The proposed Zoning By-law Amendment (“ZBA”) is required in order to permit the use on the subject lands.

[2] The purpose and effect of the proposed ZBA is to rezone the 36 hectare site from A – Agricultural to E – Extractive in order to permit an extension of an existing mineral aggregate extraction operation, and to permit a recycling operation.

[3] This file has been the subject of two case management hearings and a Procedural Order (“PO”) has been filed with the Board. Several local residents are opposed to the aggregate operation and the above-named individuals were granted participant status in the course of the prehearing conferences. Of these individuals, Bill Norrish was excused from the first hearing day and Doug Joy was not in attendance on either day.

[4] The parties subsequently engaged in intensive Board-assisted mediation in an attempt to address the nineteen issues listed in the PO (Exhibit 6). During the mediation process the parties agreed to a number of stipulations, most notably, with regard to mitigation measures to be taken to minimize visual and noise impacts and requirements for ongoing monitoring of groundwater and noise levels. All of these stipulations have been incorporated into the proposed ZBA and the site plan. The parties were successful in reaching a full resolution of the issues in dispute and have now filed duly constituted Minutes of Settlement with the Board (Exhibit 3). The Ministry of Natural Resources (“MNR”) has indicated their concurrence with the ZBA as proposed (Exhibit 4).

[5] In order to provide local residents with information regarding the terms of the settlement and related site plan revisions, and to then allow the participants time to review the settlement documents and appear before the Board to provide comment, at the request of the parties the Board agreed to a two-part hearing.

[6] The purpose of the first hearing day (November 15, 2012) was to provide the public and the Board with details the settlement agreement and to introduce the applicable modifications to the site plan. In this regard, the Applicant/Appellant's planning consultant (David Sisco) provided a meticulous overview of the terms of the proposed settlement, with a particular emphasis on the areas of concern previously identified by municipal officials and/or local residents, and the mitigation measures to be taken to address these concerns.

[7] At the conclusion of the first hearing day, the Board clarified that only the five individuals recognized as participants in the PO would be permitted to address the Board when the hearing reconvened. In accordance with the terms of the PO, the participants will be required to provide a written outline of the issues they intend to discuss to the Township by no later than November 21, 2012. The Township will then distribute these submissions to the Board and other parties in advance of the second hearing day to be held on November 26, 2012. At the request of the Board, counsel for the Township agreed to attempt to contact and provide this information to the two participants not in attendance on the first hearing day. The parties further agreed to meet with local residents immediately following these proceedings in order to respond to questions and/or clarify the terms of settlement and/or details of the site plan.

[8] The hearing reconvened on November 26, 2012, for the purpose of presenting planning evidence in support of the settlement proposal and to allow the participants to make submissions

SUBMISSIONS BY THE PARTICIPANTS

[9] Mr. Norrish told the Board that he is representing residents of Golf Course Road. Their concerns are, among other things, related to visual impact, air quality and noise and dust emanating from the site and re-cycling operation. He contended that the proposed berm will not mitigate the visual impacts and the recycling operation will result

in increased noise and dust levels. Mr. Norrish expressed frustration with the manner in which council has dealt with this matter, stating that “it took 2 years to get Council to come to Golf Course Road to look at the situation”; the problem is that “the people in the community have no voice”.

[10] Lynn Hare contended that the Applicant/Appellant has failed to prove their operation will be consistent with provincial and municipal legislation; specifically, with respect to safeguarding the health and welfare of residents and the environment. Similarly, the Township has failed in its duty to ensure that all policies are addressed, and that the mitigation proposed is feasible and enforceable.

[11] Ms. Hare was particularly concerned with Council’s handling of the re-cycling operation and takes issue with the appropriateness of the procedural process by which this matter resulted in a mediated settlement. At the urging of local residents, Council originally voted to not allow a recycling operation on the site, but later rescinded that decision during the mediation session. She contended that the recycling operation does not comply with the Provincial Policy Statement (“PPS”), or the Township Official Plan (“OP”) and Zoning By-law (“ZBL”), and the hydrological study does not address the possibility of contaminants leaching from recycled materials. Moreover, “there has been no attention paid to storm water management and the control of contaminated materials from flowing into the Grand River”.

[12] Ms. Hare claimed there is no supportive information on the effect that drawing water from an onsite well for dust mitigation will have on local wells or who and/or how the daily allowed consumption will be regulated. There are no procedures in place to ensure that qualified personnel are on site to ensure recycling materials are free from contamination and no transparency in the established reporting process to ensure that the recycling does not exceed 40 percent of the aggregate production. It was her view that the proposed operation does not represent good planning.

[13] Under cross-examination, Ms. Hare confirmed that she has been provided with information/reports and received responses to her questions; however, she does not accept the answers and/or agree with the information provided her.

[14] Della Strooboscher is a resident of Golf Course Road, and operates a business from her home. She also feels that the Applicant/Appellant has failed to provide the required information and science to support approval of the application. She pointed out that she is not opposed to gravel pits or recycling operations as she understands the necessity of these. However, she does object to these operations being located in close proximity to residences and schools, and when they take away prime farm land.

[15] Ms. Strooboscher told the Board that her central concern is noise, as this will interfere with her work and the conduct her business and diminish her family's ability to enjoy their home and yard. She takes issue with the accuracy of the Applicant/Appellant's noise study and contended that "the OMB should not support an application or Mediation Settlement when provincial directions have not been followed in establishing the classification of sensitive receivers".

[16] Ms. Strooboscher conceded that while she can agree that the relevant studies have been undertaken and that information has been made available to the public, she also simply "does not accept the answers" provided.

[17] Jan Huissoon takes issue with what he perceives to be the adverse visual impact that the proposed gravel pit will have on the prevailing rural landscape views of the Winterbourne Valley, the Grant Grand River and the Winterbourne Bridge. He rejects the findings of the proponent's visual impact assessment (Ferris report) which concluded that any visual impacts would be negligible to non-existent. In this regard, he alluded to the fact that "their" visual impact expert, Professor John Lewis (Planning School - University of Waterloo) and Mr. Kennaley (Township's Director of Planning),

have expressed various degrees of concern that the visual impact created by the pit would not be acceptable.

[18] Mr. Huissoon suggested that a computer visualization of the valley and the pit providing realistic views of the landscape should have been prepared by the proponent's experts. He submitted simulated photos which he maintains is representative of the visual effect of the gravel pit stockpiles on the landscape. In his view, the berm itself is an unacceptable visual intrusion and "a row of 1m shrubs will do nothing to mitigate the visual impacts of the gravel pit". The visual impacts of this pit on the Winterbourne valley and local communities have not been openly demonstrated to be acceptable. Moreover, a cultural heritage study should be undertaken before this pit goes ahead.

EVIDENCE OF THE EXPERTS

[19] The Board heard expert opinion evidence from Paul Ferris and David Sisco in support of the application and proposed settlement. Mr. Ferris was qualified by the Board to give expert opinion evidence in landscape architecture with a specialty in visual impact analysis. Mr. Sisco is a registered professional planner and a Full Member of Canadian Institute of Planners and the Ontario Professional Planners Institute. He was qualified by the Board to provide opinion evidence with respect to land use planning.

[20] The Board was advised that as a part of the mediation process, the Township's planning staff and the respective visual impact consultants (Paul Ferris and Bob Dragicevic) conducted a further field review of the areas identified as being within the vicinity of the gravel pit (Golf Course Road, Sunset Drive, Peel Street and the Winterbourne Bridge), for the purpose of identifying and examining view sheds and significant viewpoints. The findings are included in a supplementary report that was prepared for mediation purposes (Exhibit 10). As the result of a request, and with the

consent of the parties, that document was released to members of the public in advance of the second day of this hearing.

[21] Mr. Ferris told the Board that the Golf Club Road residence closest to the pit is at a viewing distance of approximately 0.5 kilometres. With the exception of one property where the owner has removed all of the trees, the backyards of the properties they were permitted to access contain mature trees and very dense underbrush (photographs provided). For most of the year, this vegetation would screen the view of the pit from these backyards to the extent that it would be almost impossible to see it. It was his opinion that with the exception of the property where the trees have been removed, there is no visual impact to any of the homes along this road. Similarly, the photograph from the Winterbourne Bridge confirms that at most, there is negligible visual impact to the view shed. That aside, enhancements have been made to the site plan, including moving the weigh station back from the road by about 50 metres and establishing a vegetation screening buffer (evergreen hedgerow) on the perimeter berm. A landscape plan has been agreed to by the experts and is shown and detailed on the site plan. The Applicant/Appellant has further agreed to secure the implementation of the final landscape plan as a condition of site plan approval.

[22] In summary, it was his professional opinion that all issues with respect to visual impact have been dealt with by the site plan and are being satisfactorily addressed.

[23] Mr. Sisco again provided details of the terms and conditions of the proposed settlement with a particular emphasis on the numerous study findings and the specific mitigation measures that will be required to address the impact concerns expressed by the Township Council and local residents. These include, but are not limited to, the requirement for ongoing noise and ground water monitoring, and the measures to be utilized for on-site dust suppression and the mitigation of visual impacts.

[24] Mr. Sisco submitted that the proposed ZBA has been prepared in conformity with the PPS. An aggregate extraction operation is a permitted use in prime agricultural areas provided that the site is rehabilitated (s. 2.4.4.1); the site will ultimately revert back to agricultural lands. The application is consistent with the PPS with respect to the management and use of resources (s. 1.1.4.1 a)) and the site has been appropriately designed to prevent adverse effects related to odour, noise and other contaminants. As such, the potential risk to public health and safety is being minimized (s. 1.7.1 e)).

[25] The requirements of the Regional OP with respect to Mineral Aggregate Resources (s. 5.3) have all been satisfied, including the requisite reports/studies related to noise, vibration, dust-related concerns, hydrogeology, transportation impacts, and archaeological assessment (s. 5.3.14). In the same vein, the criteria set out in s. 11.7.3 of the Township OP have been satisfied and all required studies have been conducted in accordance with the standards established by s. 11.11.6.

[26] In view of the foregoing, it was Mr. Cisco's opinion that the proposed ZBA is in conformity with Provincial and local planning policies and represents good land use planning.

FINDINGS

[27] Based on the evidence before me, the Board accepts and adopts the uncontradicted expert opinion evidence of Mr. Ferris and Mr. Cisco to find that the proposed ZBA is appropriate and should be approved.

[28] The Board acknowledges that there has been and continues to be a great deal of opposition to what is known as the "Jigs Hollow gravel pit". Local residents have been unflagging in their protests against this and other pending aggregate operations in this part of the Province. Their commitment to this cause was evident by the attendee numbers on both days of this hearing, and the positive audience responses to the eloquent presentations of the participants, not to mention the initial disparaging

responses from some members of the audience to the cross-examination of opposing counsel.

[29] Principally, the Board can appreciate that local residents are concerned about the possible adverse impacts that the gravel pit and associated recycling operation will have on the environment, the public health and safety and their quality of life. The Board agrees that while aggregate extraction is an important and necessary commodity, protecting the environment and the public health and safety is paramount. It is for this reason that Provincial Ministries, the Region and the Township have established extensive standards for licensing of aggregate operations. These standards are manifest through the regulations for the licensing and operation of aggregate operations; specifically, the requisite scientific and technical reports/studies that have to be undertaken as part of the license approval process, and the requirements relative to the ongoing monitoring of the operation to ensure the regulations are being met.

[30] It is also important to recognize that the only approval which is before the Board is the zoning to permit an extension of the existing operation; the license approval and site plan are not before this panel. That being said, the findings of the requisite studies, the terms of the Settlement Agreement, and the site plan were of significant influence in the Board's disposition with respect to the ZBA. For the reasons that follow, the Board is satisfied that the proposed ZBA is consistent with the PPS and conforms to the local OP's. The principles of good land use planning have been applied and the public interest has been considered and is being protected; the impact concerns of local residents have been fully vetted and are being appropriately addressed by the terms of the Settlement Agreement and the site plan. Albeit, many local residents would disagree with these findings, there was no scientific, technical or land use planning evidence provided to the Board which could hope to challenge the various study outcomes or the opinions of the proponent's expert witnesses.

[31] The PPS promotes the protection of mineral resources for the long-term (s. 2.4.14). Mineral extraction operations are permitted in prime agricultural areas, provided that the site is rehabilitated (s. 2.4.4.1). There is an existing aggregate operation site at this location and an approved plan of rehabilitation is a requirement of license approval. The Board finds that the proposed ZBA supports and encourages the policies of the PPS.

[32] The Regional OP clearly recognizes “all existing licensed pits and quarries as legal uses” and “endeavors through the policies of this Plan to ensure their continued viability and use for extractive purposes” (s. 5.3.4). As such, area municipalities are directed to establish policies in their OP’s and regulations in the ZBL to protect mineral aggregate resource areas and permit associated uses including recycling operations (s. 5.3.3). Moreover, new mineral aggregate extraction on prime agricultural lands may be permitted as an interim use provided the lands are rehabilitated (s. 5.3.11). The Region will only approve a zone change to permit a new or expanding extraction operation provided the criteria in s. 5.3.14 is satisfied. The Board finds that the criteria have been met and the proposed ZBA conforms to the Regional OP.

[33] The Township OP “recognizes the value of aggregate resources and provides policies relative to the need to assure the availability and proper utilization of these resources (s. 6.1.3). The requisite reports/studies (including specific study methodology) for zoning approval to permit a new or expanded mineral aggregate operation are detailed in s. 11.11. These studies have all been completed to the satisfaction of the Township, and are favourable to the application. The Board finds that the proposed ZBA is in conformity with the Township OP.

[34] It was apparent that many local residents have taken issue with the actions of the Township Council with respect to this application. The decision-making authority of a municipal council is established by the *Planning Act*. Moreover, the Act requires the Board to give regard to the decision of a municipal council. In doing so, the Board must

examine any supporting information that was considered in making that decision (s. 2.1). The Board has done so, and finds that in this instance, Township officials and council have been vigilant in their pursuit of technical and scientific evidence, and as a result, the Applicant/Appellant has responded favourably by making every effort to respond to the concerns of local residents. In my view, the Township has acted in the best interest of the residents by having secured concessions which might not otherwise have been gained. The admitted unwillingness on the part of some local residents to accept the technical report/study findings and/or the opinions of various experts is simply not enough to justify refusal of the application, either by the Township Council or the Board.

ORDER

[35] The Board orders that the appeal is allowed in part, and Zoning By-law No. 55-86 is amended as set out in Attachment "1" to this Order.

"M. A. Sills"

M. A. SILLS
MEMBER

ATTACHMENT 1

D R A F T

TOWNSHIP OF WOOLWICH BY-LAW NO.

**Being a By-Law to amend By-Law No. 55-86,
insofar as it relates to the lands located at
Part of Lot 3, Crooks Tract, West of Grand River
Woolwich Township, Region of Waterloo.**

(125 Peel Street – 2167534 Ontario Inc.)

WHEREAS the Council of The Corporation of the Township of Woolwich deems it advisable to amend By-Law No. 55-86 as amended;

NOW THEREFORE the Council of The Corporation of the Township of Woolwich hereby enacts as follows:

1. That the Plan forming Schedule 'B; attached to this By-law be added immediately following Part 28 of Schedule 'C' of By-law 55-86, as amended to rezone a property of approximately 36 hectares, those lands as outlined in heavy solid lines, located at 125 Peel Street West (being Part of Lots 3, Crooks Tract West of Grand River, Woolwich Township, Region of Waterloo) from Agriculture (A) to Agriculture (A) with site specific provisions including uses ancillary to the adjoining Extractive (E) Zone; and Extractive (E) with Holding Zone Provisions and site specific provisions to allow a gravel pit operation on a portion of the lands subject also to Temporary Use provisions.

2. That immediately after Section 26.1.3___ of By-law 55-86, as amended, the following Section and corresponding Schedule 'A' be added to only allow the following uses within the lands zoned Extractive (E):

26.1.3___ Notwithstanding any other provisions of this By-law, the lands (being those lands described as Part of Lot 3, Crooks Tract, West of Grand River, Woolwich Township, Region of Waterloo) illustrated on the plan forming Section 26.1.3___ of Schedule "A" to this By-law (the "Plan") only the following uses are permitted:

A. Extractive Zone Provisions

- (i) Notwithstanding any other provisions of this By-law, the 17.5 hectare eastern portion of the lands labeled as (E) Extractive may be used for the following specific uses:

- (a) the making, establishment or operation of a gravel pit;
- (b) those uses found in subsections 25.2.2 and 25.2.3;
- (c) the importation of clean material only for the purposes of backfilling for final rehabilitation slopes and any other required earthworks.

B. HOLDING PROVISIONS

(i) Notwithstanding any other provision of this By-law, extraction, other than above the water table extraction, shall not be permitted on the lands on the Plan identified with an H Symbol, corresponding with the lands zoned Extractive (E) until such time as:

- (a) the appropriate studies have been completed to the satisfaction of the Regional Municipality of Waterloo and the Township of Woolwich, in accordance with the Regional Official Plan and Township of Woolwich Official Plan policies regarding mineral aggregate resource extraction below the water table in force and effect at the time of an application for the lifting of the Holding Provision (H) symbol; or
- (b) A decision by Council to lift the Holding Provision (H) symbol from the Zoning Schedules subsequent to a determination by the Ontario Municipal Board that vertical zoning as a general principle is not permissible; and
- (c) A By-law has been passed removing the Holding Provision (H) symbol from the Zoning Schedules pursuant Section 36 of the *Planning Act*, RSO, 1990.

(ii) The following definitions apply for the purposes of Subsection B of this By-law:

- (a) "above the water table extraction" means extraction a minimum of 1.5 meters above the seasonally high water table identified in the report entitled "Summary of Technical Review of Hydrogeologic Information, Proposed Jigs Hollow Pit, Woolwich Township Class A Category 3 ARA Licence and Zone Change Applications" prepared by Groundwater Science Corp. and dated September 4, 2012 or the water table levels identified in on-going groundwater monitoring undertaken in accordance with the requirements of the Region of Waterloo, whichever is higher.

- (b) "below the water table extraction" means extraction below 1.5 meters above the seasonally high water table identified in the report entitled "Summary of Technical Review of Hydrogeologic Information, Proposed Jigs Hollow Pit, Woolwich Township Class A Category 3 ARA Licence and Zone Change Applications" prepared by Groundwater Science Corp. and dated September 4, 2012 or the water table levels identified in on-going groundwater monitoring undertaken in accordance with the requirements of the Region of Waterloo, whichever is higher.

C. AGRICULTURAL PROVISIONS

Notwithstanding any other provisions of this By-law, the approximately 18.5 hectare western portion of the lands labeled and zoned as Agricultural (A) (being -- --) shall be developed in accordance with the following provisions in addition to those uses permitted in the zone within which the lands lie:

- (i) The construction, erection and use of a pit haul road, weigh scale, scale house and refueling storage area together with tree planting/screening as uses ancillary to the primary permitted Extractive uses on the site in the adjoining Extractive (E) zone;
- (ii) Within the area labeled "heritage overlay" on the Plan attached as Schedule "B" to this By-law, the following shall apply:
 - a. The use of the existing farmhouse for office uses accessory to the extractive uses permitted on the eastern portion of the lands in the adjoining Extractive (E) zone;
 - b. Notwithstanding the foregoing, any development activities requiring a building or demolition permit in respect of the existing farmhouse or associated farm buildings and contextual landscape within the area labeled "heritage overlay" shall not be processed by the Township unless such application is accompanied by a built heritage assessment satisfactory to the Township of Woolwich; and,
- (iii) No new residential dwelling shall be permitted in addition to the existing dwelling on the property, regardless of whether the existing dwelling is used as an office as per (ii) a., above,

- (iv) For greater certainty, no extraction of mineral aggregates is permitted to occur within this zone,
- (v) In compliance with all other applicable regulations of Sections 6 and 7 of By-law 55-86, as amended.

D. Temporary Use Provisions

- (i) Notwithstanding any other provisions of this By-law, the approximately 17.5 hectare eastern portion of the lands labeled and zoned as (E) Extractive Uses (being the eastern portion of those lands described as Part of Lot 3, Crooks Tract, West of Grand River, Woolwich Township, Region of Waterloo) illustrated on the plan forming Section 26.X.X. of Schedule "X" to By-law XX (hereinafter the "Plan") may be used for the following specific uses which are permitted only as secondary uses to the primary use of the lands for a mineral aggregate extraction operation:
 - a. the importation and processing of clean and uncontaminated topsoil; and
 - b. the importation and processing of recycling material.
 - i. Subject to the following:
 - (ii) That the importation and processing of clean and uncontaminated topsoil is approved under the provisions of Section 39 of the *Planning Act* R.S.O. 1990, and amendments thereto, Temporary Use By-laws, and shall be in effect only for a period no greater than 3 years from the date of the issuance of the OMB Order approving this By-law;
 - (iii) That the importation and processing of clean and uncontaminated topsoil shall be limited to the importation of clean topsoil and screening for resale only
 - (iv) That the importation and processing of recycling material is approved under the provisions of Section 39 of the *Planning Act* R.S.O. 1990, and amendments thereto, Temporary Use By-laws, and shall be in effect only for a period no greater than 3 years from the date of the issuance of the OMB Order approving this By-law;
 - (v) That the importation and processing of recycling material shall be limited to the importation of concrete and asphalt as per the definition of "recycling material" in this section;
 - (vi) That the total amount of imported clean and uncontaminated topsoil and

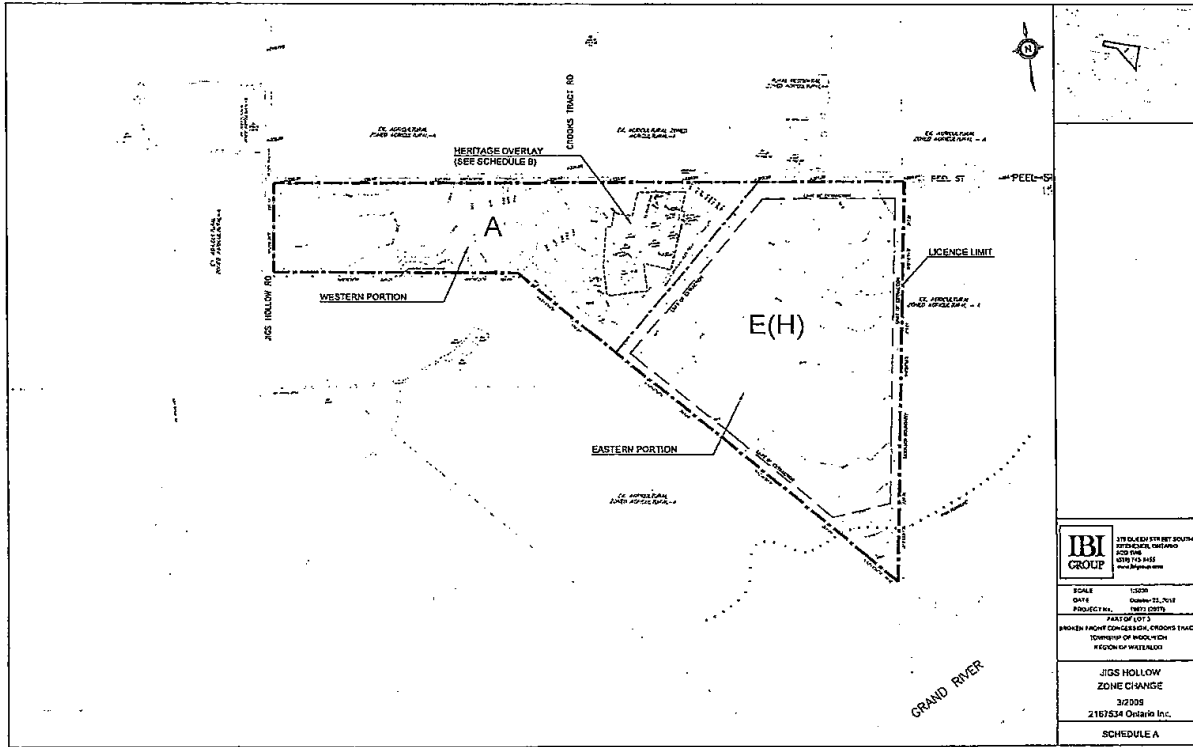
recycling material shall not exceed a maximum of 40% of the total aggregate produced on site calculated annually;

- (vii) That the total amount of imported clean and uncontaminated topsoil and recycling material shall not exceed a combined 30,000 tonnes annually;
- (viii) That the total amount of stockpiled imported clean and uncontaminated topsoil and recycling material shall not exceed a combined 30,000 tonnes annually;
- (ix) The annual amounts of aggregate production shall be reported to the Township on an annual basis and no later than March 30th of each year by providing the Township with a complete copy of the operator's annual report to the Ontario Aggregate Resources Corporation, which shall be provided to the Township on a confidential basis;
- (x) The annual amounts of imported recycling material and imported clean and uncontaminated topsoil shall also be reported to the Township on an annual basis and no later than March 30th of each year by providing the Township with the same level of detailed reporting as is required in respect of aggregate production in clause (ix) above. This information shall be provided to the Township on a confidential basis.
- (xi) The following definition shall apply for the purposes of Subsection D:
 - a. "recycling material" means – the re-use in aggregate processing of any concrete or road/pavement asphalt material which material is at the end of its usable life and is suitable, clean and uncontaminated;

3. That the Key Map which forms part of By-law 55-86, as amended, be amended accordingly to recognize the site-specific zoning amendment.
4. That this By-law shall come into effect upon the date of the issuance of the Order of the Ontario Municipal Board approving the By-law.

Schedule "A"

Subject Lands



Schedule "B"
Heritage Overlay

