Ontario Municipal Board
Commission des affaires municipales
de l'Ontario

ISSUE DATE: May 17, 2017 **CASE NO(S).:** PL120363

PROCEEDING COMMENCED UNDER subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	Carlyle Development Corp.
Subject:	Request to amend the Official Plan - Refusal of request by the Township of Baldwin
Existing Designation:	Rural
Proposed Designated:	Industrial Extractive
Purpose:	To permit the development of a quarry
Property Address/Description:	Lot 8, Concession 2
Municipality:	Township of Baldwin
Approval Authority File No.:	#625203
OMB Case No.:	PL120363
OMB File No.:	PL120363
OMB Case Name:	Carlyle Development Corp. v. Baldwin (Township)

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

Applicant and Appellant:	Carlyle Development Corp.
Subject:	Application amend Zoning By-law No. 578 - Refusal of Application by the Town of Baldwin
Existing Zoning:	Rural
Proposed Zoning:	Industrial Extractive
Purpose:	To permit development of a quarry
Property Address/Description:	Lot 8, Concession 2
Municipality:	Township of Baldwin
Municipality File No.:	#625203
OMB Case No.:	PL120363
OMB File No.:	PL120364

Heard: April 11, 2017 in McKerrow, Ontario

APPEARANCES:

Parties	**Counsel**
Carlyle Development Corp.	M. Allemano
Corporation of the Township of Baldwin	P. Cassan
Texas MacDonald	Self-represented

MEMORANDUM OF ORAL DECISION DELIVERED BY HUGH S. WILKINS ON APRIL 11, 2017 AND ORDER OF THE BOARD

[1] On January 27, 2012, Carlyle Development Corp. (the "Appellant") submitted an application to the Corporation of the Township of Baldwin (the "Township") to amend the Township's Official Plan and its Zoning By-law to permit the development of a quarry on Lot 8, Concession 2.

[2] On February 13, 2012, the Township Council refused the application.

[3] On or about March 20, 2012, the Appellant appealed the Township's decision under s. 22(7) and 34(11) of the *Planning Act*. On September 21, 2012, the proceedings were adjourned to allow time for related applications under the *Aggregate Resources Act* ("ARA") to be addressed, which was done in August 2016.

[4] On February 14, 2017, the Board held the first Pre-hearing Conference ("PHC") in these proceedings at which it granted party status to Texas MacDonald and participant status to Nanette Boucher and to Kelly Scoyne. The Board also scheduled a second PHC for April 11, 2017 to hear a motion proposed by the Township for the determination of the issues to be addressed at the hearing of the appeals. The Board encouraged the parties to refine and narrow all of the proposed issues prior to the holding of the second PHC.

[5] On April 11, 2017, the Board held the second PHC at which the Board received an additional request for participant status and heard the Township's motion.

[6] This Decision addresses the matters raised at the second PHC.

MOTION FOR THE DETERMINATION OF ISSUES

[7] At the first PHC on February 14, 2017, the Township presented to the Board a draft list of 18 issues for the appeals (Exhibit 6) (the "Issues List"). Fifteen of the proposed issues were from the Township and three were issues brought by Mr. MacDonald.

[8] After discussions between the parties, the Township agreed to drop two of its issues. The Appellant agreed on consent to the hearing of all of the remaining draft issues on the list, except two. These two were Draft Issues No. 1 and 15. They are:

1. The Applicant did not apply for an amendment to the 1,000 m area of influence requirement laid out in the Baldwin Official Plan. The studies provided by the Applicant do not contemplate this area of influence nor address incompatible uses located within this area of influence. Is an amendment required? Is an amendment appropriate? Has the Applicant provided sufficient evidence to warrant an amendment to the 1,000 m area of influence?

   and

15. Is there sufficient aggregate resource development in the Municipality to provide for the aggregate demand in the Municipality?

[9] On March 30, 2017, the Township brought its motion requesting the fixing of the Issues List to include Draft Issues No. 1 and 15. As noted above, the motion was heard in McKerrow on April 11, 2017.

SUBMISSIONS OF THE TOWNSHIP AND MR. MACDONALD

[10] The Township submitted that to strike an issue from a proposed issues list, the Board must be convinced that the issue has no relevance to the hearing on the merits or has no chance of success.

[11] Regarding Draft Issue No. 1, the Township submitted that para. E.10.2 of the Township Official Plan (the "Official Plan") contemplates an influence area of 1,000 metres ("m") surrounding quarries to avoid conflicts with neighbouring incompatible land uses. Paragraph E.10.2 of the Official Plan states:

> … the concept of an influence area is recognized as a means of protecting against incompatible land uses in the vicinity of industrial-extractive designations. It is a policy of Council to discourage incompatible land uses in areas surrounding industrial-extractive designations. For the purposes of this Plan, the influence area shall be considered to be 1000 metres (3,280 feet) for quarries and 300 metres (984 feet) for pits. The extent of the influence area may be modified in accordance with the Ministry of the Environment's Guideline D-1 on land use compatibility and Guideline D-6 on compatibility between industrial facilities and sensitive land uses, without amendment to this Plan.
>
> Incompatible land uses, such as residential uses, are not supported within the influence area. Mitigative measures may be necessary to buffer the sensitive land uses from aggregate operations.

[12] The Township argued that this paragraph requires incompatible land uses in the vicinity of the proposed quarry site to be addressed. It submitted that the Appellant neither applied for an official plan amendment to reduce the influence area associated with the proposed quarry nor studied nor addressed incompatible uses within the area in question. It submitted that sensitive uses, including residential homes, a subdivision and a commercial area, exist within 1,000 m of the proposed quarry site.

[13] The Township argued that s. 66(1) of the ARA allows for the coexistence of the ARA, its regulations and the provisions of licences and site plans with municipal by-laws or official plans, unless they deal with the same subject matter. In this regard, it noted that policies 2.2.6 and 2.2.7 of the *Aggregate Resources of Ontario, Provincial*

Standards Version 1.0 (the “Provincial Standards”) require that technical reports on noise and blast design be submitted with applications for aggregates licences under the ARA where proposed extraction activities will be within 500 m of a receptor. The Township argued that the 500 m buffer areas in the Provincial Standards address a separate issue from that addressed by the 1,000 m area of influence in the Official Plan. The Township submitted that the subject matter of these Provincial Standards provisions is noise assessment and blast design for the purposes of aggregates licences, while the subject matter of para. E.10.2 of the Official Plan concerns incompatible land uses in areas surrounding industrial-extractive designations for the purposes of land-use planning and does not address aggregates licensing issues.

[14] The Township argued that s. 66(1), in any event, only applies where an aggregates licence has already been issued and not to situations like the present case where no licence has yet been granted. It referred to correspondence from the Ministry of Natural Resources and Forestry (“MNRF”) District Office to the Appellant, dated August 8, 2016 (attached as Exhibit A to the Affidavit of Brandon Wright, dated April 3, 2017, found in Board Exhibit 5), which states that MNRF will not make a recommendation to the Minister regarding the Appellant’s aggregates licence application until it has proof of proper zoning at the site.

[15] Regarding whether para. E.10.2 of the Official Plan applies to the zoning of lands for new quarries, the Township argued that the object and intent of the Official Plan is to protect against incompatible land uses and that para. E.10.2 should apply both to applications for zoning near existing quarries and to applications for new proposed quarries near existing sensitive land uses. It referred to *Capital Paving Inc. v. Wellington (County)*, [2010] O.M.B.D. No. 9 in which the Board addressed the application of what is now para. 1.2 of the Provincial Policy Statement, 2014 (the “PPS”) on the buffering of resource extraction activities and sensitive land uses from each other and coordination of uses to prevent adverse effects. The Board stated at para. 16 that:

> While residential sensitive uses would be restricted in locating near to existing or expanding aggregate operations and in the area of known

> deposits, the PPS also provides protection in buffering or separation when the residential use is in place first … It is fair to say that the PPS speaks to the incompatibility of sensitive residential use with earlier aggregate operations and the reverse is also true that a proposed pit may be incompatible with the prior residential use.

The Township argued that similar reasoning should be applied in the present case with regard to the application of para. E.10.2.

[16] On matters to be considered by the Minister of Natural Resources and Forestry (the "Minister") when deciding whether to issue an aggregates licence, the Township submitted that s. 12(1) of the ARA requires the Minister to have regard to planning and land-use considerations, but it does not give the Minister absolute planning control. The Township added that s. 12.1(1) of the ARA states that no licence shall be issued if a zoning by-law prohibits the site from being used for the making, establishment or operation of a quarry. It argued that these provisions are to work in conjunction with local planning.

[17] With respect to Issue No. 15, the Township submitted that the Official Plan seeks to ensure that the Township reserves sufficient aggregate supply for local use. It referenced para. 2.5.2.1 of the PPS, which states:

> As much of the mineral aggregate resources as is realistically possible shall be made available as close to markets as possible.
>
> Demonstration of need for mineral aggregate resources, including any type of supply/demand analysis, shall not be required, notwithstanding the availability, designation or licensing for extraction of mineral resources locally or elsewhere.

[18] The Township referred to *2220243 Ontario Inc. v. Halton (Regional Municipality)*, [2015] O.M.B.D. No. 418 ("*2220243 Ontario*"), where the Board interpreted para. 2.5.2.1 of the PPS. The Board stated at para. 41:

> The "as is realistically possible" approach means addressing competing interests of many stakeholders, one of which is the aggregate industry. With respect, it would be an over-simplification of the policy and an error of interpretation in my estimation to suggest that "as is realistically possible" only includes the physical existence of the aggregate resource.

[19] The Township submitted that it must balance the interests of the Appellant, the aggregate industry and the local community when determining whether a quarry proposal represents good planning. The Township argued that the *2220243 Ontario* decision goes on to state that municipalities have the flexibility to develop official plan policies on the use of aggregate resources that address local circumstances. It submitted that under para. E.10.2 of the Official Plan, the Township "shall ensure that adequate aggregate supplies are identified and reserved for its own use" and that there is a public interest in ensuring that adequate aggregate is reserved.

[20] The Township argued that Draft Issues Nos. 1 and 15 are relevant to the hearing on the merits and each has a chance of success. It argued that these are triable issues that are within the Board's jurisdiction to adjudicate and that they should be included in the Issues List.

[21] Mr. MacDonald supported the Township's motion.

SUBMISSIONS OF THE APPELLANT

[22] The Appellant argued that Draft Issues Nos. 1 and 15 should be struck. It submitted that in the present case, the provisions in para. E.10.2 of the Official Plan have been superseded by the application of s. 66(1) the ARA and are therefore inapplicable and unnecessary. It referred in this regard to *Mono (Township) Old Walker Farm Redesignation Official Plan Amendment (Re)*, [1994] O.M.B.D. No. 655 ("*Old Walker Farm*") where the Board found that "setbacks in official plans and zoning by-laws as they apply to pits are unnecessary" and to *Wessell v. Victoria (County)*, [1995] O.M.B.D. No. 1379 ("*Wessell*").

[23] The Appellant argued that under para. E.10.2(3) of the Official Plan, the establishment or licencing of a new pit or quarry "shall be permitted subject to the requirements of the ARA", suggesting that the Township has a limited role in the process. The Appellant submitted that s. 12(1) of the ARA further addresses this by setting out matters to be considered by the Minister in deciding whether to issue a

license, including “the effect of the operation of the pit or quarry on nearby communities” and “planning and land use considerations”.

[24] The Appellant also argued that policy E.10.2 applies only to situations where there is a development proposal for a sensitive use, such as a residential development, near an existing quarry and that presently there are no proposals for the development of any sensitive uses in the area of the proposed quarry site.

[25] Regarding Issue No. 15, the Appellant referred to para. 2.5.1 of the PPS, which states that “[m]ineral aggregate resources shall be protected for long-term use”. It also referred to the objectives of the Official Plan’s industrial-extraction designation in para. E.10.1(2), which include:

> To oversee the long-term social interest of the area by protecting legally existing extraction operations and to protect potential sources of aggregate resources from potential incompatible land uses, to ensure a sustainable supply of resources.

[26] The Appellant submitted that these provisions promote the use and extraction of aggregate resources and that the Appellant is not required to establish aggregate demand pursuant to the PPS or the Official Plan. It argued that the Board should not adjudicate market place matters.

[27] The Appellant referred to *Seipt v. Caledon (Town)*, [2015] O.M.B.D. No. 1, in which the Board stated at para 15:

> In order for an issue to be “triable” and “capable of adjudication within the jurisdiction of the Board”, there must be a reasonable possibility that based upon evidence to be brought forward at a hearing that the Board could make a determination that favours either the applicant or the opposing parties regarding the issue, or that the issue would elicit evidence that could be relevant in the context of the Board’s jurisdiction related to the relevant statutes applicable to the hearing.

[28] The Appellant argued that in this case Draft Issues Nos. 1 and No. 15 are neither triable nor capable of adjudication within the jurisdiction of the Board. It argued that the ARA supersedes the Official Plan provisions and that these are not proper land-use

planning issues to be adjudicated by the Board. It submitted that neither Draft Issues Nos. 1 nor 15 should be included in the Issues List.

ANALYSIS AND FINDINGS

[29] In *840966 Ontario Ltd. v. Peel (Region)*, [2007] O.M.B.D. No. 342 ("*840966 Ontario*"), the Board stated at para. 8:

> … the Board will not, as part of the pre-hearing process, strike an issue raised by the Appellant in circumstances where there is relevance to the matter before the Board. … [A] motion to strike an issue is similar to a motion to dismiss. The Board will not remove the rights of an Appellant, or any party, lightly. To strike [an issue] the Board would have to be convinced that it has no relevance to the main hearing or that regardless of the evidence, the issue has no chance of success. Alternatively, the Board would have to conclude that it has no jurisdiction to deal with the issue.

[30] In *Spring Village Inc. v. Waterloo (City)*, [2009] O.M.B.D. No. 582, the Board stated at para. 5:

> In considering the appropriateness of issues to be placed on the Issues List, the Board must be satisfied that the issues are genuine, triable, possess a clear nexus to the matters before the Board, be capable of adjudication within the jurisdiction of the Board, and for land use planning matters, rest within the relevant planning framework.

[31] For the reasons set out below, the Board finds that Draft Issues Nos. 1 and 15 meet these requirements and are appropriate issues to be adjudicated at the main hearing of the appeals.

Issue No. 1

[32] Under s. 66(1) of the ARA, the Act, its regulations and the provisions of licenses and site plans may supersede the application of an official plan to the extent that they deal with the same subject matter. In the present case, the Board finds that the subject matter of s. 2.2.6 and 2.2.7 of the Provincial Standards is distinct from the land-use planning issues addressed in policy E.10.2 of the Official Plan. Sections 2.2.6 and 2.2.7

of the Provincial Standards address issues for the Minister to consider on an application for an aggregates licence, while para. E.20.2 addresses incompatible uses in the context of land-use planning. The Board finds that the subject matters of these provisions are distinct and that s. 66(1) of the ARA does not apply.

[33] The Board also notes that it was not presented with argument or evidence that the Provincial Standards itself is an instrument to which s. 66(1) applies.

[34] Furthermore, *Wessell* and *Old Walker Farm* indicate that under s. 66(1) the Minister may *choose* to supersede local planning regulations. In the present case, the MNRF has indicated in its correspondence to the Appellant, dated August 8, 2016 that:

> [u]nder Section 12(1) of the [ARA], an aggregate licence cannot be issued until such time as appropriate zoning has been confirmed. The District office is unable to recommend approval to the Minister until such time as a proof of proper zoning is produced.

The Board finds that, even if s. 66(1) did apply, this evidence demonstrates that in the present case MNRF has chosen not to supersede the Official Plan and in fact is awaiting Council to make a land-use planning decision before the MNRF will make a recommendation to the Minister.

[35] Section 12(1) of the ARA sets out matters to be considered by the Minister in deciding whether to issue an aggregates license, including the effect of the operation of a proposed quarry on nearby communities and planning and land-use considerations. Also, the Provincial Standards require that a license application provide information on “any planning and land use considerations”. The Board finds that these provisions do not displace a municipality’s role or jurisdiction in determining zoning issues. They reinforce the point that MNRF considers a municipality’s land-use planning decisions associated with proposed quarry sites when deciding whether or not to issue a licence, thus highlighting a municipality’s role in this regard.

[36] Given the Board's findings that paragraph E.10.2 of the Official Plan addresses land-use issues, that s. 66(1) of the ARA does not apply in this situation and that s. 12(1) complements paragraph E.10.2, the Board finds that Issue No. 1 is a genuine, triable and relevant land-use issue, which is within the Board's jurisdiction to adjudicate at the hearing on the merits.

Issue No. 15

[37] Both para. 2.5.1 of the PPS and para. E.10.1(2) of the Official Plan call for the protection of sources of aggregate resources from incompatible land uses. However, based on para. 2.5.2.1 of the PPS, municipalities have the flexibility to develop official plan policies on aggregate resource use that address local circumstances. The Board finds that these considerations must be taken into account when determining official plan and zoning issues where potential conflicts between sensitive and extractive land uses exist. The Board finds that the issue of whether there is sufficient aggregate resource development in the Township to provide for local aggregate demand is therefore a genuine, relevant and triable land-use issue, which is within the Board's jurisdiction to adjudicate.

Conclusions on Issues Nos. 1 and 15

[38] The Board agrees with the reasoning in *840966 Ontario* that it should not remove an issue from an issues list unless it is convinced that the issue is not relevant, has no chance of success, or lies outside the Board's jurisdiction to adjudicate. In the present case, although the Township may or may not necessarily be successful on them at the hearing, the Board finds that both Draft Issues Nos. 1 and 15 are relevant and triable. It finds that they are land use issues within the Board's jurisdiction to adjudicate and there is a reasonable possibility that, based upon evidence to be brought at the hearing, the Board could make a determination that favours the Township regarding these issues.

[39] The Board therefore orders that Draft Issues Nos. 1 and 15 are included in the Issues List.

Draft Issues Nos. 4, 6, 8 and 9

[40] As noted above, at the first PHC, the Board encouraged the parties to refine and narrow the proposed issues. With regard to the Township's Draft Issues Nos. 4, 6, 8, and 9, the Board finds that these draft issues as currently framed continue to be overly general in nature and that more particulars are required to better define the extent and areas of evidence to be called. These draft issues currently read:

> 4. Should the Proposed Development be granted all necessary approval within the jurisdiction of the Ontario Municipal Board?
>
> 6. Would approval of the Proposed Development be consistent with the applicable Provincial Policy Statement?
>
> 8. Would approval of the Proposed Development have appropriate regard to the applicable matters listed in the *Planning Act*?
>
> 9. Would approval of the Proposed Development be consistent with good planning principles and practice and be in the public interest?

The Board directs the Township to define these issues in greater detail to allow for the evidence at the hearing to be focused and the extent of opinion evidence to be called to be made clear.

OTHER PROCEDURAL ISSUES

[41] At the PHC on April 11, 2017, Mitch Brault, a resident of McKerrow, requested, and was granted participant status on consent.

[42] The parties requested on consent at that PHC that the Board schedule a further PHC, to be held by telephone conference call ("TCC") at which the scheduling of due dates for the exchange of documents and the setting of hearing dates could be addressed. After consultation with the parties, the Board scheduled the continuation of the PHC by TCC on **Thursday, May 18, 2017 commencing at 1 p.m**. The call-in details for the TCC will be provided to the parties by the Board case coordinator.

ORDER

Motion

[43] The Board orders that:

a. Issues Nos. 1 and 15 are included in the Issues List in their entireties.

b. The Township shall provide further details to the other parties regarding Draft Issues Nos. 4, 6, 8 and 9 within 30 days of the issuance of this decision. If there is no consent on the final Issues List, the parties are to contact the Board to schedule another further PHC to resolve any outstanding matters in accordance with the Board's *Rules of Practice and Procedure*.

Other Procedural Issues

[44] The Board orders that:

a. Mitch Brault is a participant to these proceedings.

b. a TCC is scheduled for **Thursday, May 18, 2017** at **1 p.m**. at which the scheduling of procedural due dates and the setting of hearing dates for the hearing of the appeals will be addressed.

[45] This Member of the Board is not seized.

"Hugh S. Wilkins"

HUGH S. WILKINS
MEMBER