

Ontario Municipal Board
Commission des affaires municipales
de l'Ontario



ISSUE DATE: June 24, 2016

CASE NO(S): PL130785

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

Applicant and Appellant: Miller Paving Ltd.
Subject: Request to amend the Official Plan – Refusal of request by Township of McNab-Braeside Mineral Aggregate
Existing Designation: Mineral Aggregate
Proposed Designation: Mineral Aggregate – Exception One
Purpose: To permit a permanent asphalt plant as an additional use
Property Address/Description: Part Lot 16 & 17, Conc A, Usborne St
Municipality: Township of McNab-Braeside
Approval Authority File No.: OPA 2
OMB Case No.: PL130785
OMB File No.: PL130785
OMB Case Name: Miller Paving Ltd. v. McNab-Braeside (Township)

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: FACT-MB Inc.
Appellant: David Simek
Appellant (jointly): John Kerr, And Others
Subject: By-law No. 2013-31
Municipality: Township of McNab-Braeside
OMB Case No.: PL130785
OMB File No.: PL130786

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: FACT-MB Inc.
Appellant: Miller Paving Ltd.
Subject: By-law No. 2015-03

Municipality:	Township of McNab-Braeside
OMB Case No.:	PL130785
OMB File No.:	PL150073

Heard: June 1, 2016 by telephone conference call

APPEARANCES:

<u>Parties</u>	<u>Counsel/Representative*</u>
Miller Paving Ltd	J. Ewart
Town of McNab-Braeside	J. Bradley
Friends Addressing Concerns Together in McNab/Braeside Inc	R. Lindgren
John Kerr and David Simek	Self-represented

DECISION DELIVERED BY M. C. DENHEZ AND AMENDING ORDER OF THE BOARD

1. INTRODUCTION

[1] This proceeding of the Ontario Municipal Board (the "Board") is the second follow-up to a Board decision involving Site Plan Notes for a quarry.

[2] The current proceeding stems from a request to clarify aspects of the Board's 58-page decision, issued in this file on October 27, 2015 (the "October Decision"). Miller Paving Ltd. (the "applicant") had applied for (i) expansion of its quarry under the *Aggregate Resources Act* ("ARA"), (ii) an Official Plan Amendment ("OPA") to permit a permanent asphalt plant, and (iii) rezoning.

[3] These were opposed by the Township of McNab/Braeside (the "Township"), along with an organization of neighbours, Friends Addressing Concerns Together in McNab/Braeside Inc. ("FACT-MB"), and two individual neighbours, John Kerr and David

Simek. In 2015, the Township adopted Zoning By-law No. 2015-03, which agreed with only some of the applicant's proposed rezoning.

[4] In its October Decision, the Board directed the Minister to issue the ARA Licence, subject to adjustments, notably for boundaries. However, the Board withheld its Order, pending a revised Site Plan and Site Plan Notes. The Board did not approve the applicant's proposed OPA for a permanent asphalt plant. The Board also amended part of By-law No. 2015-03.

[5] In November 2015, counsel for the applicant made a written request for two "clarifications" of that decision. The Board ultimately issued an Amending Order on December 18, 2015 ("December Amending Order"). In particular, it provided more specificity to the zoning boundaries in By-law No. 2015-03.

[6] The Board has now been asked for clarifications on two other points, namely:

- testing for Polycyclic Aromatic Hydrocarbons ("PAH's")
- the location of a berm (along with the uses located around it)

[7] In summary, the Board indicated what it expected on the subject of PAH's, notably information on standard approved practice. Counsel for the applicant and FACT-MB undertook to provide the Board with written submissions, at a later date to be agreed.

[8] Concerning the berm location and nearby uses, the Board is guided by the Zoning By-law, which it upheld (with only technical modifications) in the October Decision, and further mapped in the December Amending Order. Industrial uses are permitted where the By-law map so provides, and not otherwise. In the area zoned for a "reserve", there had never been any evidence that this area was intended for de-vegetation and stripping. The Board was shown no ground on which to authorize it now, subject only to the exception below.

[9] The October Decision had allowed the berm inside the "reserve" area. The berm's footprint may be de-vegetated and stripped. Portions of the berm inside the "reserve" area would nonetheless be expected to abut the boundary with the industrial zone.

[10] The details and reasons are outlined below.

2. BACKGROUND

[11] The December Amending Order described the geographic context:

[9] ...To the north and northwest of the applicant's property, there are rural residential properties. The question of setbacks and separation distances, between the extraction zone and those rural residential properties, was central to the hearing...

[10] ...The Township argued that its rezoning (Zoning By-law No. 2015-03) should provide for a 300 metre ("m") setback, between the new extraction zone and the rural residential lands there...

[12] By-law No. 2015-03 applied two zoning categories to that area:

- One zone allowed a variety of aggregate-related uses, not only in the active extraction area, but also a surrounding industrial periphery. This zone was called "Extractive Industrial" ("EM").
- The other zone was not for currently-active industrial uses, but was instead a "reserve". Accordingly, it was called "Extractive Industrial Reserve" ("EMR"). The October Decision referred repeatedly to "the EMR buffer".

[13] The Board added the following:

[254] The Board will withhold its order, pertaining to the ARA Licence, until the applicant submits an updated version of the Site Plan and Site Plan Notes, consistent with this decision. The Board expects the applicant to circulate its draft to the other parties.

[255] In the event that there are difficulties pertaining to that draft, from the perspective of any of the parties, the Board may be spoken to. However, this is not an invitation to reopen the Site Plan Notes at random. The Board will not entertain discussion of issues that failed to be flagged at the hearing.

[14] As mentioned, there were indeed difficulties pertaining to that draft, resulting in the December Amending Order, clarifying zoning boundaries. In the Spring of 2016, it became apparent that the parties were again unable to reach consensus on two other important questions. The parties again sought clarification from the Board.

[15] The PAH question involved mainly two parties, the applicant and FACT-MB. The others were less involved in that discussion.

[16] Before the hearing on the merits, the applicant and FACT-MB had already discussed testing for PAH's. It now appeared, however, that even if the parties were of a similar view at that time, they were not so now, notably on the standard to be applied to PAH testing (and possibly other related matters).

[17] The Board advised that it would adjudicate that question only if there were proper information about standard practices, as recommended by the relevant Provincial agencies, applicable to quarries in essentially identical circumstances.

[18] The Board would expect submissions on same, based on whatever evidence was considered necessary.

[19] Counsel for the applicant and for FACT-MB undertook to arrange, with each other, to proceed accordingly, and to so advise the Board. The Board expects to hear from them in due course.

3. THE NORTH-NORTHWEST BERM

[20] The parties disagreed over the location of the berm, including nearby uses. The October Decision had said two key things about the quarry boundary on the north and northwest sides:

- It provided a 300 metres (“m”) setback between the property line and the *extraction*: “The boundaries of the extraction area shall be revised, to provide a minimum setback of 300 m from neighbouring properties” [para. 260(2)(a)].
- It allowed berms to be inside the "reserve" buffer area: “The applicant proposed that much of (the berm) be outside the extraction zone, and inside the EMR buffer area... The applicant's planner said that berms outside an extraction area were "typical". For the same reasons as those outlined above, the Board finds nothing incongruous with that approach” [para. 222].

[21] The "clarification" now sought by the parties was as follows. The applicant's proposed location of the berm had been devised at a time when the applicant anticipated a 180 m separation between neighbouring properties and the extraction zone; however, under the October Decision, that distance had now been increased to 300 m. The question was what this meant for the berm.

[22] The applicant proposed to keep the berm in exactly the same location. The area behind the berm (i.e. to the south of it – called "the grubbing area"), which had originally been targeted for e.g. the asphalt plant, would be reassigned to other quarry-related industrial uses, like storage. Indeed, the applicant said the grubbing area would be restricted to tree clearing, berm-building, an internal access route, and rehabilitation. The applicant formally disavowed any intent to use it for a haul route, long-term storage of stumps, or temporary storage of equipment; the applicant volunteered to insert Site Plan Notes to that effect.

[23] Furthermore, said the applicant, it had little choice. It had undertaken to erect a berm of a certain height and volume. Its Site Plan Notes said it would use only materials from on-site. Although its active industrial area would increase by dozens of hectares, the applicant said it would not have enough overburden and topsoil on-site to erect the berm – *unless* it also scraped this grubbing area.

[24] The other parties responded in unison. They said they expected the "setback" to the extraction zone to be vegetated. The applicant's proposal was not like any "setback" that they were familiar with. Although the berm could be inside the EMR buffer area, they expected it close to the perimeter of the extraction zone, not some huge distance further north. Finally, if the applicant had trouble obtaining all the necessary materials on-site, then the preferable solution would be to waive the prohibition on bringing clean fill from elsewhere.

[25] Parenthetically, the Board was never told why that prohibition was there in the first place.

[26] The applicant responded that, even if the berm retained its original location – and was hence closer to the neighbours than they had presumed – there would still be an ample vegetative buffer, and the berm would still be well out of sight of neighbours.

4. ANALYSIS AND ORDER

[27] Under the Board's *Rules of Practice and Procedure*, the Board may make technical corrections to clarify a decision or order. However, the Board has two preliminary observations.

[28] First, at the hearing, the debate over separation distances was exclusively focused on the *extraction* zone. There was essentially no evidence or submission about distances separating residential properties from *other* (not directly extractive) industrial uses, uninvolved with excavation or asphalt – notably storage or internal roads.

[29] Second, the Board was shown no reason why the determination of uses should not proceed in the normal course – i.e. in accordance with the approved zoning. The mapping for that approved zoning was attached to the December Amending Order as “Attachment A”. For ease of reference, the same map is also attached to the current decision.

[30] On consideration, the Board has an interest in the finality of its decisions. It also has an interest in the implementation of approved planning documents.

[31] Although there had been no evidence or submissions, at the hearing, on the best location for the berm (other than the question of whether or not it could be located inside the "EMR buffer"), the Board did address and uphold By-law No 2015-03 – not once, but twice. In the Board's view, and as described in the Board's conclusions below, that By-law provides a sufficient answer.

[32] The Board disposes of this matter as follows:

1. In the absence of evidence supporting a change in the boundaries between the EM and EMR zones, the Board makes no change herein to those boundaries.
2. The area for quarry-related industrial activities, including storage and internal roads, is the area zoned for same – "EM" on the approved zoning map, attached to the December Amending Order (and hereto) as “Attachment A”. The EM zone may be used for those uses, as permitted in the relevant Township by-laws.
3. The area zoned EMR was zoned as a "reserve", not an active industrial area. Subject to paragraph (4) below, the uses permitted there are those permitted in the Township's by-laws addressing the EMR zone.

4. In addition to the uses permitted in the EMR zone by the relevant by-laws, the October Decision specified that deployment of the berm could be within the EMR area. That was not to suggest that such deployment would be random. The evidence at the hearing was unequivocal: a berm loses its effectiveness, the farther it is located from the extraction zone. It follows that, even if the berm is permitted within the EMR zone, a location within that zone should nonetheless be as close to the extraction zone as possible, i.e. the berm may be within the EMR buffer, in a location which essentially abuts the EM zoning boundary, but not further north or northwest inside the EMR zone.
5. Expressed another way, there was no intent that there should be a stretch of “EMR buffer” lands visibly separating the berm from the EM zone.
6. There had been no indication, at the hearing, that the EMR buffer would be de-vegetated and scraped. That is not hereby authorized, except for the footprint of the berm.
7. In the event that the applicant cannot obtain sufficient topsoil and overburden on-site to create the berm, according to the agreed specifications, then the applicant may bring clean fill on-site for that purpose. The Site Plan Notes shall be amended accordingly.
8. Notwithstanding para. 260(a) of the October Decision, the applicant shall, within six months of the date of issue of this Decision, file with the Board a revised Site Plan and revised Site Plan Notes, in accordance with the October Decision, the December Amending Order, and this Decision.

9. In all other respects, the Board's Decision remains the same.

"M. C. Denhez"

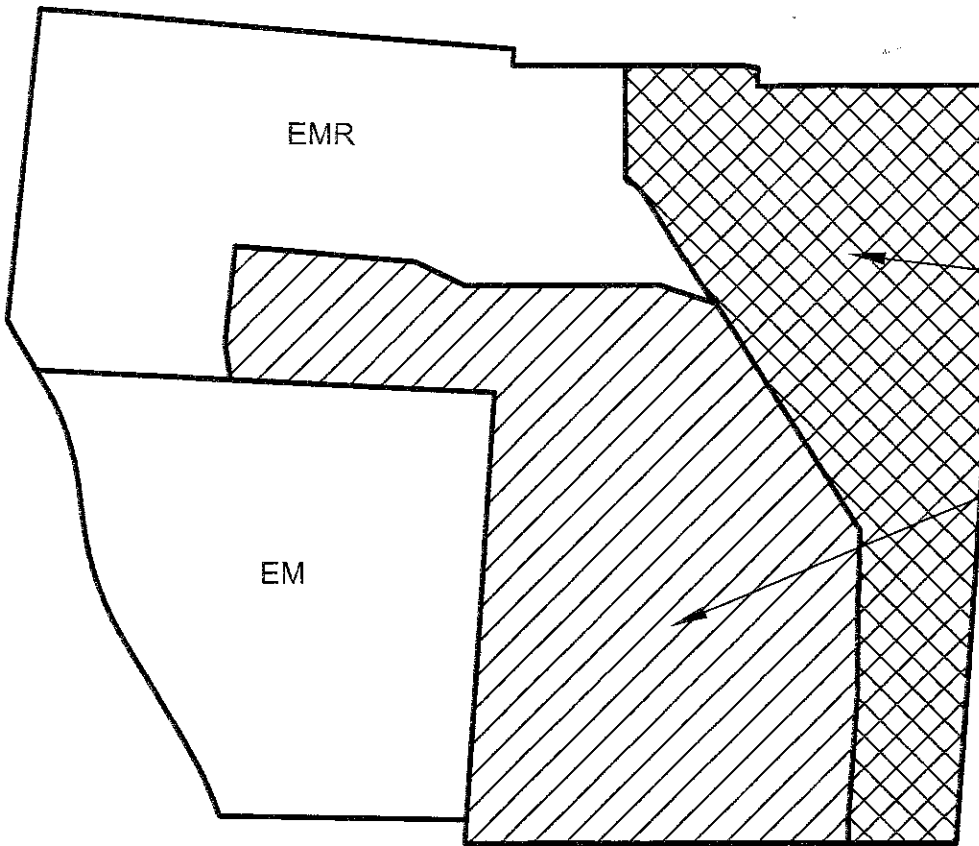
M. C. DENHEZ
MEMBER

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Ontario Municipal Board

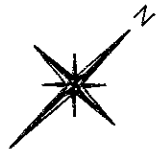
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ATTACHMENT A



Item 1:
From EMR
to EMR-E1

Item 2:
From EMR
to EM



1:10,000

Corporation of The Township of McNab/Braeside

This is Schedule 'A' to the By-law Number _____.
Passed the ____ day of _____ 20____.
Signature of Signing Officers

Mayor

CAO/Clerk