Ontario Municipal Board
Commission des affaires municipales
de l'Ontario

ISSUE DATE: October 27, 2015 **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
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

PROCEEDING COMMENCED UNDER subsection 11(5) of the *Aggregate Resources Act*, R.S.O. 1990, c. A.8, as amended

Referred by:	Jane Ireland
Objector:	Mike Battiston
Objector:	Ingrid Berndt
Objector:	Jeff Burns
Objector:	Robert/Gail Campbell/Anderson; and others
Applicant:	Miller Paving Limited
Subject:	Application for a Class A licence for the removal of aggregate
Property Address/Description:	Part Lot 16 & 17, Conc. A,
Municipality:	Township of McNab / Braeside
OMB Case No.:	PL130785
OMB File No.:	MM150013

Heard:	March 2 to 27, 2015 in McNab / Braeside, Ontario

APPEARANCES:

Parties	**Counsel**
Miller Paving Ltd.	J. Ewart
Township of McNab / Braeside	J. Bradley
Friends Addressing Concerns Together in McNab / Braeside Incorporated	R**.** Nadarajah, R. Lindgren, and E. Stahl (student-at-law)
John Kerr	Self-represented
David Simek	Self-represented

DECISION BY M. C. DENHEZ AND PARTIAL ORDER OF THE BOARD

1. INTRODUCTION

[1] This dispute was about proposed quarry expansion – to unfold over a timespan of 187 years, extending into the 23rd century.

[2] The dispute originally involved three distinct positions – those of the quarry operator, the local municipality, and neighbours – though some positions eventually converged. For reasons to be outlined, the Board finds mainly in favour of the municipality, with some exceptions.

[3] Miller Paving Ltd. ("the applicant") operated a gravel quarry in the Township of McNab / Braeside ("the Township"), in the County of Renfrew ("the County"). The quarry had been in operation for a half century, near rural residential properties. For a few years recently, it also had a portable asphalt plant on site.

[4] In 2007, the applicant proposed:

- To almost triple the footprint of the extraction zone, and
- to build a permanent asphalt plant.

[5] Studies ensued, to satisfy what is now the Ministry of Natural Resources and Forestry (“MNRF”, formerly "MNR"), and the Ministry of Environment and Climate Change (“MOECC”, formerly “MOE"), in order to meet the requirements of the *Aggregate Resources Act* ("ARA") and obtain the desired ARA Licencing.

[6] There would also need to be amendments to documents under the *Planning Act*. The Township's Official Plan ("OP") would not permit a permanent asphalt plant without an Official Plan Amendment ("OPA") and rezoning. Expansion of the quarry itself, and related measures, would also require rezoning. The applicant applied for an OPA and rezoning accordingly.

[7] The Township obtained advice from the County. In this County, planning advisory services are provided to local municipalities by County planning staff.

[8] Neighbours objected to the project. They had obtained one Court Order about blasting, and another declaring the former portable asphalt plant a nuisance (for noise and odour).

[9] However, after years of peer reviews etc., the applicant's proposal (including a new permanent asphalt plant) was approved by Provincial Ministries and County planning staff. In 2013, the then Township Council:

- adopted By-law No. 2013-31 (“the 2013 By-law”), permitting the quarry expansion,
- but it still turned down the OPA for the new permanent asphalt plant.

[10] That prompted appeals to the Ontario Municipal Board ("the Board") from two directions:

- The applicant said Council had not gone far enough, when it failed to approve the new asphalt plant; the applicant appealed to the Board accordingly.
- Inversely, various neighbours argued that Council had gone too far, by increasing the quarry's extraction zone to the extent proposed.

[11] Many of those neighbours had banded together in 2008 to incorporate Friends Addressing Concerns Together in McNab / Braeside Incorporated (“FACT-MB”), which appealed to the Board on their behalf.

[12] Another neighbour, John Kerr, filed an appeal which was said to be on behalf of fourteen neighbours, including David Simek. However, Mr. Simek filed his own appeal. In practice, they handled their appeals together. They said their particular concern was

that setbacks from the quarry expansion could “sterilize” the potential for future development for much of their own property.

[13] The Board was told that Council was then "dumped" in the following election.

[14] In January 2015, an entirely new Council adopted a new By-law, By-law No. 2015-03 (“the 2015 By-law”). The latter almost doubled setbacks from neighbouring residential properties, from 180 metres ("m”) to 300 m. This reduced the proposed extraction zone by 9.7 hectares (“ha”), compared to the 2013 By-law. The Board calls that 9.7 ha "the disputed setback area." It represented about one seventh of the total area which the applicant proposed to quarry, and about 7% of the applicant’s total landholding.

[15] The 2015 By-law was also appealed by the applicant and by FACT-MB (though not Messrs. Kerr and Simek).

[16] In due course, the applicant's ARA Licencing application was also referred to the Board. The Board consolidated the appeals.

[17] The two core issues were still (a) the size of the extraction area and setbacks, and (b) the asphalt plant. To recap, the first debate focused on whether the extraction zone should have:

- a buffer area of 180 m from the property line, as in the 2013 By-law,
- or a buffer of 300 m from the property line, as in the 2015 By-law.

[18] The second debate, over the permanent asphalt plant, was whether it should exist at all.

[19] Although the above two questions were the focus of most attention, there were also ancillary questions such as the geographic extent of the licence, application of the Township's By-law No. 2011-47 (“the Noise By-law”), water and tonnage.

[20] At the month-long Board hearing, the applicant was represented by counsel, with the support of planners Gary Bell and Anne Guiot, along with engineers Hugh Williamson, Robert Cyr, John Trought, Jennifer Gorrell, Jay Clark and William Kasper; ecologists Kyle Fleming and Dan Brunton; and geoscientist George Gorrell. The Board also heard from County planner Bruce Howarth, testifying under summons at the request of the applicant. The applicant supported the boundaries under the 2013 By-law, not the 2015 By-law. It continued to seek approval of for an OPA to permit the asphalt plant.

[21] The Township defended its 2015 By-law (not its 2013 By-law), and its refusal to approve an OPA for the asphalt plant. The Township also took issue with the way that the ARA licence would apply to areas around the extraction zone, and had concerns about compliance with the Noise By-law. The Township was represented by counsel, with the support of consulting planner Stuart David.

[22] FACT-MB was represented by counsel, with the assistance of the Canadian Environmental Law Association. They had the support of engineers Wilf Ruland and Sam Kiger, and environmental scientist Henry Cole. By the end of proceedings, counsel for FACT-MB said its position was now similar to the Township's: it was prepared to accept the quarry boundaries under the Township's 2015 By-law (not the 2013 By-law), and agreed with the Township's refusal to approve an OPA for the asphalt plant.

[23] Messrs. Kerr and Simek were self-represented, essentially representing each other. They had the support of planner Robert Clark. Like FACT-MB, they ultimately said they were prepared to accept the quarry boundaries under the Township's 2015 By-law, and agreed with the Township's position on the asphalt plant.

[24] The Board had recognized the above parties at the Pre-hearing Conference (decision issued on March 6, 2014). The Board also heard from 27 neighbours, many of whom had filed objections to the proposed ARA Licence. Some were members of FACT-MB, while others testified as participants.

[25] Although there was considerable discussion of Provincial positions, no Provincial officials testified, whether voluntarily or under summons.

[26] The Board has carefully considered all the evidence, including some six cubic feet of materials. The Board was offered three different versions of the Site Plan and Site Plan Notes for approval.

[27] The Board was impressed by the lucidity and eloquence of all sides.

[28] On reflection, the Board finds in favour of the Township on the subject of the extraction area. The Board finds the 300 m boundary more consistent with the OP – and the Court judgments pertaining to this same quarry.

[29] The Board also finds that this area, whose residential traits have already been affirmed by the Courts, would be inappropriate for a heavy industrial use like an asphalt plant. The OP specifies that a new industry beside a designated Settlement Area must be "small" and "light", whereas asphalt plants are "heavy."

[30] Concerning the geographic extent of the licence, the Board finds in favour of the applicant. The ARA Licence should apply to the entirety of the subject property.

[31] On the question of the Noise By-law, the Board finds that the By-law should apply, under less ambiguous terms then now expressed.

[32] On the question of water, the Board is satisfied with the applicant's current research.

[33] On the question of tonnage, the Board declines to intervene in the limits specified in the applicant's existing licence.

[34] The Board therefore directs the Minister to issue the ARA Licence, subject to the above adjustments. The Board withholds its Order on that account, pending a revised Site Plan and Site Plan Notes. The Board does not approve the applicant's proposed OPA seeking approval for the asphalt plant; the OP appeal on that account is dismissed. Although the Board generally agrees with the 2015 By-law, there are certain provisions which the Board herein amends. To that extent, the rezoning appeal is allowed in part.

[35] The details and reasons are outlined below.

2. CONTEXT

2.1 The Subject Property

[36] The subject property is just west of the crest of Braeside Ridge, a limestone formation. The property covers an area of 132.7 ha, i.e. about 1⅓ square kilometers (“sq km”). The current owner, the applicant, operates dozens of quarries and asphalt plants across Ontario.

[37] The quarry has an existing Category 2 Class A ARA Licence. The extraction zone is 27.1 ha. The existing licenced extraction zone has been zoned "EM" ("Extractive Industrial"), whereas the applicant's unlicenced surrounding land has been zoned "EMR" ("Extractive Industrial Reserve").

[38] The existing licence also allows a portable asphalt plant for public projects. The licence contains no restriction on the hours of operation for either the quarry or an asphalt plant.

[39] There is also an alvar on part of the property, straddling the northeast corner of the Reserve lands. An alvar is a biological environment based on a limestone plain, with thin soil and sparse grassland vegetation, with distinctive prairie-like plants. The applicant's paper trail (*Responses to Planning Advisory Committee Technical Questions)* referred to the presence of "Provincially rare species" like the Ram's-head Ladyslipper (in the orchid family), the Hooker Rein-orchid, and the Neglected (or Cooper’s) Milkvetch.

2.2 Surrounding Area

[40] For applications such as this, s. 11.3(6) of the Township's OP states that municipal authorities must study effects on an "influence area" of 500 m, whereas various Ministry documents refer to an influence area of 1,000 m.

[41] To the north of the site there are 23 to 25 rural residential properties on estate lots, along Golf Club Road, typically 220 m deep.

[42] To the east, along the crest of the ridge, is municipally-owned forested land. The County planning report said it covered some 52 ha, and had been acquired as parkland. Beyond the ridge is a residential subdivision called Sand Point.

[43] Both the municipal property and the subdivision are in a designated Settlement Area. An unopened road allowance runs along the boundary between this Settlement Area and the applicant's property. Although maps did not indicate whether the Settlement Area boundary directly abutted the applicant's property, or whether it was separated by the road allowance, the Township's planner testified that the Settlement Area was indeed "adjacent" to the applicant’s site, and this testimony was not rebutted. The Board therefore treats the subject property and the Settlement Area as being adjacent.

[44] To the south of the subject property is more forested land. At the southeast, just beyond the site boundary, is a wetland complex.

[45] To the west is Usborne Street, which is also County Road 3. The quarry gate is there. Some 15 rural residences plus one roof truss business line this part of the road near the quarry.

[46] The County's planning report said 23 residential properties abut the subject property to the north along Golf Club Road, of which 13 had dwellings, and the rest were zoned residential. The applicant's own Planning Justification Report put the figure at 25 lots, of which 16 had dwellings. The County planning report said there were 17 dwellings to the west.

[47] There appeared to be no dispute that there are 116 dwellings within 1000 m of the subject property. According to the Township's consulting planner, "for a rural Township, it's quite dense." A more detailed description of the nearby rural residential context was provided by the Courts in the nuisance litigation, outlined later.

2.3 History

[48] The Board was told the quarry was opened in 1961, by a family named Smith. In the 1970s, an estate lot subdivision was created to the north, on Golf Club Road. At the time, it was separated from the quarry by about a half kilometer of land, zoned Rural. In the 1990s, however, the quarry's landholding expanded northward and eastward, as the current owner acquired intervening lands, bringing the landholding to its present 132.7 ha. That also brought the applicant's property into direct physical contact with the Golf Club Road residential properties.

[49] In 1999, the Township adopted Comprehensive Zoning By-law No. 99-18 (“the 1999 By-law”). It zoned the existing licenced extraction area EM, and the unlicenced surrounding land EMR.

[50] That By-law also called for a setback of 300 m – measured not between an extraction zone and a residential *property line*, but between the extraction zone and a "*dwelling*."

[51] Next, under a Township OP adopted in 2008 (in force in 2009), all 132.7 ha of the applicant's property were designated for “Mineral Aggregate” use.

[52] In 2010, the Township adopted a new Comprehensive Zoning By-law No. 2010-49. It provided the same setbacks as the 1999 By-law, i.e. 300 m from a "dwelling."

2.4 Disputes and Court Cases

[53] The Board was not told exactly when relations between the quarry and neighbours soured, but there were issues a decade ago.

[54] One was blasting. The applicant's experts acknowledged "three anomalous exceedances over the years." One blast, in 2005, was labeled the "megablast.” There were also complaints about flyrock from blasting in 2007.

[55] Neighbours took the applicant and the blasting firm to Court. One neighbour, Mr. Battiston, described flyrock that landed on his roof over 400 m from the site. After the megablast, said neighbour Norma Moore, "the water was murky for days." The applicant produced a damage report, denying all responsibility. It said it took all such complaints seriously and had conducted a thorough internal investigation, but found no non-conformance.

[56] The blasting firm was found guilty, but charges were dropped against the applicant. That blasting firm was not subsequently used by the applicant.
The next issues were noise and odour from the portable asphalt plant, which went into operation in late 2009. The neighbours introduced some of the applicant’s form letters in evidence, whether for noise, odour, or other complaints. Those letters all contained the

same wording: "We take all such complaints very seriously and have conducted a thorough internal investigation…. We have not found any issue of non-conformance." In some cases, the letter attesting to "thorough internal investigation" appeared to have been sent only minutes after receipt of the complaint.

[57] In 2011, ten neighbours – all members of FACT-MB – again took the quarry owner to Court, this time for nuisance from the portable asphalt plant. That asphalt plant was located farther from neighbours than the plant currently proposed.

[58] That case was heard by the Ontario Superior Court of Justice (Small Claims Court, Renfrew), in *Moore et al. v. Miller Group Inc*. [unreported]. The neighbours claimed that noise and odour from that portable asphalt plant "interfered with the reasonable and ordinary use of their residential properties." The applicant replied that the situation had already been reviewed by MOE, and by the local Health Unit. Neither had found a problem. The applicant concluded that it took all such complaints seriously, but found no non-conformance.

[59] Although there were comments at the current Board hearing about this litigation being "only" at the level of the Small Claims Court, the matter was clearly taken seriously by all concerned at the time. Four counsel were involved, along with various experts, some of whom were also in the current Board proceeding. In a detailed 38-page decision, issued on November 3, 2011, the Court first devoted particular attention to "the character of the neighbourhood," and found that it had significant "residential" traits:

> (The area) is zoned rural and if anything it would be much more residential than commercial, as there is only a roof truss business, a quarry and farming property in the area as opposed to approximately 150 residential houses….
>
> The plaintiffs were aware that there was a quarry when they purchased their properties but they did not know that this asphalt plant was going to operate in it.… The noise and odour that they experienced when the plant started was severe. Overnight, the enjoyment of their land and residences was substantially interfered with.…

[60] The Court found that three torts had been committed: trespass (in the form of contaminants), negligence (breach of duty of care), and nuisance. The Court awarded damages and costs.

[61] The applicant appealed that decision, *in Moore v. Smith Construction Company, a Division of the Miller Group Inc.,* [2013] O.J. No. 3768. On appeal, the Court issued a 14-page decision disallowing liability for trespass and negligence, but maintaining liability for nuisance, and maintaining the damages. Again, the Court cited the "character of the neighbourhood" as its key premise:

> The trial judge determined that the quarry was in a rural area that had a mix of uses but which was primarily residential in character…. In the present appeal, there is adequate evidence to support the trial judge's finding that the area was, in his words, "much more residential than commercial."

3. THE PROPOSAL

3.1 General

[62] The quarry has been active for perhaps 55 years. Its existing licence permitted excavation to a depth of 125 metres above sea level (“mASL”), including below the water table. It also allowed crushing equipment and a portable asphalt facility. The original licence made little allowance for the protection of any environmental features on-site. It also had no provisions for mitigation, or monitoring programs.

[63] In 2007, the applicant filed a formal application to expand its extraction area, including rezoning part of its EMR lands (Extractive Industrial Reserve) to full extraction (to be zoned Extractive Industrial). Informal discussions had started in 2005. Under the proposal,

- the gross extraction area would expand by 47.4 ha northward and eastward, as compared with the existing area of 27.1 ha.

- However, on the west side near Usborne Street, 9.8 ha would be removed from the existing licenced area, to enlarge the buffer near residential properties there, and address a small wetland near the southwest corner.
- That would leave the net extraction area at about 67 ha, thereby increasing the licenced extraction zone by a factor of about two and a half.
- That would leave 65.7 ha of the existing EMR areas still outside the extraction zone. In those remaining EMR lands, the applicant was also prepared to set aside 24 ha for a "Significant Wildlife Habitat Protection Area" (“Protection Area") and "Wildlife Corridor" ("Corridor").

[64] Inside the expanded extraction zone, about 4½ ha would be devoted to a new permanent asphalt plant, requiring an OPA.

[65] The applicant insisted that this project would alter some of its operations, but not others:

- the tonnage that it was licenced to haul would not change (though it was already about eight times what it said it would extract);
- nor would the permitted depth of extraction;
- its existing licencing already permitted a portable asphalt plant (for public projects) and stockpiling; and
- the permitted hours of operation (currently unrestricted) would be reduced (though there was some confusion on that account, described later).

[66] The application based its original calculations on a minimum separation distance of 300 m – measured from the edge of the proposed extraction zone to the back wall of houses facing Golf Club Road. This usually meant that:

- about half of the separation distance would be on the applicant's own property (150 m from the edge of the new extraction zone to the property line),
- and half would be on the neighbours' property.

[67] Messrs. Kerr and Simek took exception to that approach. Their lots, like those of other neighbours along Golf Club Road north of the site, are 220 m deep. Their stated concern was as follows.

[68] Ministry rules on separation distances, between quarries and residences, specify that quarries cannot come closer than a given distance from residences – but inversely, residences similarly cannot come closer to quarries. Other governing documents say likewise. This meant, said Messrs. Kerr and Simek, that with 150 m of the separation distance on their own land, they were being deprived of future residential uses on the back 150 m of their own lots (what Messrs. Kerr and Simek called “sterilizing” their property). That was a distance longer than a football field.

[69] Municipal authorities then intervened. They said that:

- Instead of measuring between the extraction zone and the dwelling's *back wall* (or property line),
- one should measure to a dwelling's *rear amenity area*, presumed to extend 30 m behind the dwelling.

[70] That is the approach which the Township adopted in its 2013 By-law. In practice, the separation distance between the extraction area and dwellings themselves (or "potential dwellings") would now be 330 m. of which 180 m was on the applicant's property, and 150 m was on the neighbours'.

[71] There were other aspects to the proposal. One was that the entire 132.7 ha property would be licenced, not just the extraction zone. It would include the Reserve area, the Protection Area and the Corridor.

[72] Another factor was that, surrounding the extraction area, quarry operations would also have a minimum eight-metre berm or barrier (i.e. at least 2½ storeys):

- On the north side of the extraction zone, the berm/barrier would be located outside the extraction zone, and within the Reserve area zoned EMR.
- In contrast, on the east side, the berm/barrier would be within the extraction zone itself, not the Reserve area, because the latter was where the Protection Area and Corridor would be located, as described later.
- The applicant's planner, Ms. Guiot, testified that in her opinion, such an arrangement was not unusual. She added that it was not unusual to expand the licenced area to encompass associated purposes, including a buffer.

3.2 Staging

[73] The limestone deposit within the proposed extraction area was estimated at 29 million tonnes. Depending on topography, the top of the deposit was estimated at about 142-147 mASL.

[74] The project would comprise five phases, each in two lifts. The Board was told that, in each phase, the upper lift might be to a depth of 133 mASL, followed (eventually, though not likely immediately) by a lower lift, to a depth of 125 mASL. They were labeled in the following sequence:

Phase 1 referred to the current extraction area.

Phase 2 would be east of the current extraction area, in the direction of the wooded municipal property. According to the applicant's expert, Ms. Guiot, the upper lift in this Phase would likely be quarried out around 2037.

Phase 3 would be northeast of the current extraction area, also in the direction of the wooded municipal property and the alvar. The upper lift there might be quarried out around 2080.

Phase 4 would be north of the current extraction area, in the direction of Golf Club Road. The upper lift might be quarried out around 2100.

Phase 5 would be toward the northwest side of the property; it would be excavated last, and would accommodate the asphalt plant in the meantime.

[75] The applicant's expert, Mr. Bell, testified that according to his understanding of the rates of extraction as currently projected, quarrying activity would reach the disputed setback area around the year 2108 (Exhibit 41).

[76] Neither Ms. Guiot's nor Mr. Bell's estimates appear to bear any relation to the tonnage permitted by the existing licence. The latter authorized extraction of up to a million tonnes per year (the applicant suggested no change to that licenced tonnage). If one were to extract at that speed, the entire deposit would be quarried out in 29 years.

[77] However, the existing quarrying comes nowhere near that one-million-tonne figure. Current production is at around 117,000 tonnes per year, rising occasionally to 155,000 tonnes.

[78] The latter figure was used by the applicant, e.g. in its traffic study, which was predicated on the assumption of 155,000 tonnes per year. The Board was told that in an emergency, the quarry would be capable of producing that figure in four weeks;

however, the Board was shown no evidence of proposed increases in production above the latter figure.

[79] At that rate, it would take until the year 2202 A.D. to exhaust the licenced supply, that is 187 years.

[80] If there were any ambitions for accelerated quarrying, they were not factored into, for example, the traffic study, and the Board was not told about them.

3.3 The Asphalt Plant

[81] The applicant insisted that there are still many Provincial approvals required, before any asphalt plant could actually be built.

[82] There were few specifics. The applicant said, for example, that the design and supplier had not been chosen yet. Similarly, the company Vice-President Mr. Kasper testified that no decision had yet been made about whether the silo would be enclosed, or whether it would be hot mix or warm mix (most of the paper trail referred to hot mix, but warm mix had not been definitively ruled out). Similarly, the question of whether the plant would be new or reused had "not been determined." On the important question of capacity and production rates, some analyses were predicated on 150 tonnes per hour – but then Mr. Kasper said the plant might produce 300 tonnes per hour.

[83] All that could be said, at this time, was that the new plant would be electric rather than diesel-powered, and that its burner would "most likely" run on fuel oil. The plant would not rely on a generator, which was blamed for much of the noise from the previous portable plant.

3.4 Noise

[84] The applicant said it was prepared to comply with the Noise By-law. The latter does not refer specifically to "quarries", but does refer to facilities which produce "construction materials."

[85] The applicant's studies said noise would be within Provincial standards – if just barely – as long as one measured to neighbouring dwellings, and disregarded noise impacts at the other rear portions of neighbouring properties along Golf Club Road. The Board will return to that question later.

3.5 Blasting

[86] As mentioned, the Board heard in particular about two blasts, one in 2005 ("the megablast"), and one in 2007.

[87] The blasting studies, too, measured impacts to the neighbouring dwellings, not to the property line. At the property line, blast effects like overpressure – at the back of the Golf Club Road properties – could exceed Provincial standards, but not at the dwellings themselves. The Board will also return to that question later.

3.6 Water

[88] FACT-MB criticized the applicant's water analyses. It called for a further water balance analysis, and also expressed concerns about wetlands both on-site and nearby.

[89] None of those wetlands were evaluated for Provincial significance, but the applicant’s ecologists testified that, for all purposes of analysis and recommendations, they were treated as if they could be Provincially significant.

[90] There were other wetlands southeast and south of the subject property. The ones to the southeast appeared substantial enough. The ones to the south, labeled "S-1” and "S-2”, were less so, and there was some controversy as to how much attention they deserved. The Board will return to that question later.

3.7 Environment and Protected Areas

[91] The applicant's consultants did natural environment studies, to address the alvar, wetlands, and other lands surrounding the proposed extraction area, including animal/bird habitat, deer yards, and significant woodlands.

[92] On the subject of the alvar, one of the applicant’s own consultants called it "globally significant”, "This is extraordinary", “No one’s encountered anything like this.”

[93] Those studies recommended that two areas be protected: the Protection Area for the alvar on the northeast side of the property, and the Corridor on the eastern side of the property, linking the alvar to the wetland complex southeast of the property. Later in the hearing, the applicant said it would treat the Corridor in the same way as the Protection Area.

[94] The Board was told that the proposal would compromise only 41% of the deer yards, 41% of the amphibian breeding area, 54% of the bird breeding habitat, and 44% of the significant woodland. It would also compromise 53% of the alvar, but the applicant's consultants assured the Board that the remaining 47% would "retain every significant alvar value." Overall, the applicant's consultants called its environmental commitments "exceptionally robust."

[95] The other side expressed puzzlement at how an environmental commitment which eliminated half of a "globally significant" resource could be called "robust", but that counterargument was not significantly pursued.

[96] Indeed, this arrangement was accepted by the various officials and peer reviewers. Under the proposal, the "Significant Wildlife Habitat Protection Area" would be zoned "EMR-E1" (Extractive Industry Reserve Exception 1), with various protective provisions. It appeared that the consensus was that, notwithstanding the encroachment, the "core" of the environmentally-significant area and its "values" had been protected to the extent considered realistic under the circumstances.

[97] Various other reports were prepared by the applicant's consultants, and peer-reviewed on behalf of municipal officials. All peer reviews were completed by November, 2012. The applicant insisted that the latter were all done to the satisfaction of the officials involved.

4. CRITERIA

[98] The definition of the verb “to plan”, according to the *Concise Oxford Dictionary,* is “to arrange beforehand”. In addressing “planning”, the Board is not exercising subjective discretion in inventing a course of action; on the contrary, it is determining what course of action has been objectively arranged beforehand. The Courts have repeated that the Board is obliged to assess the proposal, and the positions of parties, from the perspective of applicable legislation, regulations, Provincial plans, the Provincial Policy Statement (“PPS”), official plans and by-laws. The Act adds that the Board must also have regard to any decision of Council, and the supporting information and materials thereto.

[99] That task is complicated here by the multiplicity of criteria and policies, emanating from:

- Statutes,
- Regulations,
- Provincial position papers, and
- the OP.

[100] Beginning with statutes, s. 11(8) of the ARA authorizes the Board to “direct” the Minister of Natural Resources and Forestry to issue the requested licence, subject to obligatory conditions, and other conditions recommended by the Board. The Board may alternatively direct the Minister to refuse to issue the requested licence. The ARA directs all concerned to have regard to criteria at s. 12(1):

> In considering whether a licence should be issued or refused, the Minister or the Board, as the case may be, shall have regard to,
>
> (a) The effect of the operation of the pit or quarry on the environment;
> (b) The effect of the operation of the pit or quarry on nearby communities
> (c) Any comments provided by a municipality in which the site is located;
> (d) The suitability of the progressive rehabilitation and final rehabilitation plans for the site;
> (e) Any possible effects on ground and surface water resources;
> (f) Any possible effects of the operation of the pit or quarry on agricultural resources;
> (g) Any planning and land-use considerations;
> (h) The main haulage routes and proposed truck traffic to and from the site;
> (i) The applicant's history of compliance with this Act and the regulations, if a licence or permit has previously been issued to the applicant under this Act or a predecessor of this Act; and
> (j) Such other matters as are considered appropriate.

[101] There is also s. 7(1) of Ontario Regulation 244/97. When a licence is issued, certain conditions are attached automatically, called "prescribed conditions." In addition to the requirements of the ARA and the Regulation, a licencee must also comply with the requirements of all other applicable statutes and regulations. Further site-specific conditions may be attached to the licence (or to the Site Plan) by the Minister or the Board. Once a licence is issued, s. 15 of the ARA requires compliance with the licence, the Site Plans associated thereto, the ARA, and any Regulations passed under the ARA. The other statutes are also applicable.

[102] This hearing, however, involved more than the ARA Licence: it also addressed a proposed OPA and rezoning under the *Planning Act*. The latter instruments, in turn, must be “consistent” with Provincial policy as expressed in the "PPS". The applicant

drew the Board's attention to several relevant policies, including the PPS emphasis on the importance of aggregates:

> 2.5.1 Mineral aggregate resources shall be protected for long-term use and, where Provincial information is available, deposits of mineral aggregate resources shall be identified.
>
> 2.5.2.1 As much of the mineral aggregate resources as is realistically possible shall be made available as close to markets as possible….

[103] The PPS adds that incompatible uses should not be allowed too close to aggregates:

> 2.5.2.4 Mineral aggregate operations shall be protected from development and activities that would preclude or hinder their expansion or continued use or which would be incompatible….
>
> 1.1.1(c) Healthy, liveable and safe communities are sustained by…avoiding development and land use patterns which may cause environmental or public health and safety concerns.
>
> 2.5.2.5 Extraction shall be undertaken in a manner which minimizes social, economic and environmental impacts.

[104] There are, however, other considerations which could constrain aggregate development:

> 1.1.1(c) Healthy, liveable and safe communities are sustained by…avoiding development and land use patterns which may cause environmental or public health and safety concerns.
>
> 2.5.2.3 Extraction shall be undertaken in a manner which minimizes social, economic and environmental impacts.

[105] Accordingly, policy 1.2.6.1 calls for "buffering and/or separation" between "major facilities" and "sensitive land uses", to prevent “adverse effects":

> Major facilities and sensitive land uses should be planned to ensure they are appropriately… buffered and/or separated from each other to prevent or mitigate adverse effects from odour, noise and other contaminants… and to ensure the long-term viability of major facilities.

[106] The PPS specifies that "a major facility" includes "resource extraction activities":

> **Major facilities:** means facilities which may require separation from sensitive land uses, including but not limited to… resource extraction activities.

[107] "Sensitive land uses", in turn, include residences, along with amenity areas and "outdoor spaces where normal activities occur":

> **Sensitive land uses:** means buildings, amenity areas, or outdoor spaces where routine or normal activities occurring at reasonably expected times would experience one or more adverse effects from contaminant discharges generated by a nearby major facility…. Examples may include, but are not limited to: residences….

[108] In short, the PPS clearly calls for "buffering and/or separation" between "resource extraction facilities" on one hand, and "residences" on the other – including their "outdoor spaces where normal activities occur."

[109] The potential "adverse effects" in question are defined here as in the *Environmental Protection Act,* including "loss of enjoyment of normal use of property":

> a) impairment of the quality of the natural environment for any use that can be made of it;
> b) injury or damage to property or plant or animal life;
> c) harm or material discomfort to any person;
> d) an adverse effect on the health of any person;
> e) impairment of the safety of any person;
> f) rendering any property or plant or animal life unfit for human use;
> g) loss of enjoyment of normal use of property….

[110] The above environmental considerations are consistent with s. 45 of Ontario Regulation 419/05 under the *Environmental Protection Act*:

> No person shall cause or permit to be caused the emission of any air contaminant to such extent or degree as may,

> (a) cause discomfort to persons;
> (b) cause loss of enjoyment of normal use of property;
> (c) interfere with normal conduct of business; or
> (d) cause damage to property.

[111] All the above criteria flow directly from the legislation and the PPS, which is binding on this Board's planning decision. The hearing also devoted much attention to two MOE position papers which, though not legally binding, represented an important reflection of Provincial policy.

[112] The first was *Guideline D-6: Compatibility between Industrial Facilities and Sensitive Land Uses* ("D-6"). Subject to reservations mentioned later, that Provincial document categorized industry in three "Classes", of which "Class III" had the most environmental consequences. Subject to those comments later, there was no dispute that a quarry would normally fall into Class III. D-6 went on to outline four relevant propositions.

[113] First, as a general principle, s. 4.3 recommended a separation distance of 300 m:

> No incompatible development… should occur in the areas identified below…:
> … Class III - 300 metres minimum separation distance.

[114] The Guideline's s. 4.4.2 added that, as a general rule, this distance was measured from the industrial property line to the next sensitive land *use*:

> Measurement shall normally be from the closest existing, committed or proposed property/lot line of the industrial land use to the property/lot line of the closest existing, committed or proposed sensitive land use. This approach provides for the full use and enjoyment of both the sensitive land use and the industrial properties.

[115] However, s. 4.4.4 outlines a first exception. The above measurement may disregard the property boundary – allowing the 300 m to be measured from the source of the impact and across a third party's property – on condition that the latter is not

"sensitive". For example, although a hospital is generally considered a sensitive use, its parking lot may be an exception:

> Where the established use of on-site lands are not of a sensitive nature, such as a parking lot servicing a hospital, the land area comprising the parking lot may be included within the separation distance (i.e. measure from where the actual sensitive activities occur). [Parenthetical comment in original].

[116] D-6 s. 1.2.4 outlines a second and important exception, namely that D-6 does not apply to quarries:

> This guideline does not apply to the following… activities, nor to any on-site industrial-type facilities associated with them, except as noted below…:
>
> - pits and quarries.

[117] Finally, D-6 is called a "guideline", implying that the document itself does not normally purport to be legally binding. That status, however, may be affected by the OP, as described later.

[118] The hearing also heard discussion of a second MOE position paper, entitled *Guideline D-1: Land Use Compatibility* ("D-1"). It too is a non-binding "guideline", but unlike D-6, it appears to include quarries.

[119] D-1 refers to buffers as its "preferred approach":

> 2.1(b) The guideline is applicable when a new facility is proposed where an existing sensitive land use would be within the facility's influence area or potential influence area.
>
> 2.2.2 This guideline applies for the review of municipal… general plans and proposals….
>
> 2.4 Depending upon the particular facility, adverse effects may be related to, but not limited to, one or more of the following:
>
> a) Noise and vibration…
> c) Odours and other air emissions;
> d) … Dust and other particulates; and
> e) other contaminants.

> 3.1 … Distance is often the only effective buffer, however; and therefore adequate separation distance, based on the facility's influence area, is the preferred method of mitigating "adverse effects."

[120] However, D-1 adds an important caveat, namely that separation distances should not normally "freeze" intervening land:

> 3.2 The separation distance should be sufficient to permit the functioning of the two incompatible land uses without an "adverse effect" occurring. Separation of incompatible land uses should not result in freezing or denying usage of the intervening land….

[121] At the municipal level, any rezoning is legally obliged to conform to the OP. As mentioned, the applicant's lands had been entirely designated for "Mineral Aggregates" since 2008. The OP, like the MOE documents, said that future projects would require study, particularly in an "influence area" defined by OP s. 11.3(6) as a radius of 500 m (Ministry documents referred to an "influence area" of 1000 m).

[122] The OP also contained a number of other relevant provisions, outlined below. First, although D-6 itself was a “guideline”, the measurements therein were then incorporated into the Township’s OP, at s. 6.3(12), which apparently made them mandatory:

> The minimum separation distances for industries classified by the Ministry of Environment in their Guideline D-6, as… Class III will be 300 metres. [Emphasis added]

[123] OP s. 14.2(3) then elaborated, notably about the importance of separation and buffering:

> Where different land uses abut, every effort shall be made to avoid conflicts between different uses. Where deemed necessary, buffering will be provided for the purpose of reducing or eliminating the adverse effects of one land use upon the other. A buffer may be open space, a berm, wall, fence, plantings or a land use different from the conflicting ones….

[124] OP s. 4.3(7) devoted particular attention to proposed industrial uses adjacent to a Settlement Area. It not only reiterated that under this OP, the MOE separation distances become mandatory, but added that the industry must be "small" and “light”:

> …New industrial uses… may be considered… adjacent to a Settlement Area only if:
>
> a) the industry is small scale and light in nature with no outside storage;
>
> b) existing or proposed residential uses are protected… (and)
>
> d) adequate separation distances are provided in accordance with the Ministry of Environment Guideline on Separation Distance Between Industrial Facilities and Sensitive Land Uses….

[125] OP s. 11.3(9) added that, by definition, this OP equated concrete and asphalt plants with "heavy industrial uses". It also called for buffering, and an absence of adverse impacts on "nearby sensitive land uses":

> …Permanent asphalt batching plants and permanent concrete batching plants are considered heavy industrial uses which potentially have negative impacts to the air, ground, and surface and ground water, shall require an Official Plan amendment and Zoning By-law amendment to be permitted. These uses shall be adequately buffered to protect adjacent land uses, and shall meet the industrial pollution control and any other applicable standards of the Ministry of the Environment. A permanent asphalt batching plant and permanent concrete batching plant shall not be permitted unless:
>
> a) there is no adverse impact on groundwater and surface water quality and quantity;
>
> b) there is no adverse noise, odour, or dust impacts on nearby sensitive land uses and natural heritage features;
>
> c) the operation of such a plant is addressed on a Site Plan approved by the Province

[126] Finally, and critically, OP s. 11.2(3) specifically addressed quarries, insisting that environmental impacts should not be allowed to extend off-site. It said that it was the “objective” of the OP:

> To regulate all quarry operations so that disturbance to the environment is limited to the site….

5. PRELIMINARY BOARD OBSERVATIONS

5.1 Key Issues at the Hearing

[127] The presentations by all the parties were exemplary.

[128] Positions evolved during this month-long hearing. Although the applicant insisted that its application already complied with the 1999 By-law and the 2010 By-law, it nonetheless made changes to its proposal. The other parties – the Township, FACT-MB and Messrs. Kerr and Simek – also adjusted their positions, ultimately agreeing among themselves on the main outcome they advocated.

[129] In the Board's view, there were six significant issues by the end of the hearing. The first two were major:

- First was the size of the ultimate extraction area. Although the 1999 and 2010 By-laws had called for slightly smaller separation distances between a dwelling and the EMR zone (150 m), and between a dwelling and the extraction zone (300 m), the applicant was prepared to defend the 2013 By-law's separation distance of *180 m between the extraction zone and the property line* (330 m between the extraction zone and a dwelling).
- The other parties called for the 2015 By-law's separation distance of *300 m between the extraction zone and the property line*, i.e. 120 m more than the 2013 By-law.
- The second issue, equally major, was whether there should be a permanent asphalt plant.

[130] There were then four ancillary issues:

- One was the regime to apply to the EMR Reserve lands and the Wildlife Protection lands. The applicant proposed that they be included in the ARA Licence, under the direct jurisdiction of MNRF. The Township did not support licencing them, and asked that jurisdiction over them belong to the municipality, rather than MNRF.
- The second ancillary issue pertained to hours of operation, notably the interface with the Township's Noise By-law.
- The third pertained to some outstanding questions about water, although many water-related issues had been resolved.
- The final issue was tonnage. The existing licence allowed a million tonnes per year. The applicant's own reports were predicated on an output of 155,000 tonnes per year. The other side proposed that the licence be amended, to roll back the allowable annual output to 300,000 tonnes. The applicant disagreed.

[131] Other questions were not pursued by the parties. For example, although some participants challenged the proposed concrete plant, there was no expert evidence to contradict its acceptability. Similarly, although one participant (Neil Masson, a retired policeman) testified about traffic, the applicant's supporting studies were not challenged by municipal officials (who would have had the strongest interest), nor by other experts. In the same vein, although some participants urged the Board to change the existing ARA Licence, to prohibit future quarrying below the water table, the Board heard no expert evidence to support any such rollback.

5.2 Factors in the Lead-up to the Hearing

[132] Debate was nonetheless vigorous, particularly over the two major issues. The applicant pointed repeatedly to the apparent approvals by Provincial Ministries. Furthermore, said the applicant, the proposal met all relevant criteria at the time of the

application, which therefore should be rightfully granted. The Board offers two preliminary observations.

[133] First, the Board attaches weight to Ministry opinions. In this specific case, however, the Board must be circumspect. The portable asphalt plant too had the approval of those same authorities – but that did not stop the Courts from finding that it was nonetheless a nuisance, whether Provincially licenced or not.

[134] Furthermore, in *M.A.Q. Aggregates Inc. v. Grey Highlands (Municipality),* 2012 CarswellOnt 10693, the Board addressed a licence application wherein "all the issues identified by MNR… have been addressed to the satisfaction of this Ministry." MOE too had "no outstanding concerns regarding the feasibility of the project." The Board nonetheless reached its own decision. It acknowledged that "this level of support by authorities with specific responsibilities and expertise cannot be ignored;" but the Board nonetheless concluded that "it is in no way bound by the decisions of the approval authorities and commenting agencies."

[135] A more dramatic example is *Capital Paving Inc. v. Wellington (County),* [2010] O.M.B.D. No. 9 ("Capital Paving"). There, the Board reached a conclusion entirely different from the ministries and commenting agencies.

[136] As for the argument about regulatory compliance at the time of the application, the Board is mindful of the frequent practice of assessing planning applications in light of planning instruments applicable at the time of the application. Here, there was no question that the OP had already designated all the subject lands for "Extractive Industrial" use. There was also no question that the applicant's proposed extraction zone would comply with the zoning setbacks existing at the time of the application. In the words of counsel for the applicant, "we meet the requirements. What more can one do?"

[137] However, there are limits to that argument here. Nothing in the pre-existing regulatory framework guaranteed that the applicant would be entitled to an OPA for the asphalt plant, or to the rezoning of its lands: it would still have to prove that these represented good planning. The Board also has an ongoing residual obligation to assure that, in its entirety, the application meets all applicable standards, including the OP.

5.3 The Interplay of Legislation and Classifications

[138] This Board must make findings not only under the ARA, but also under the *Planning Act*. In the words of counsel for the Township, "the *Aggregate Resources Act* and the *Planning Act* are two completely different beasts."

[139] Parenthetically, there is a common misconception that asphalt plants are inherently the subject-matter of the ARA; but they are actually mentioned there only once (s. 74) – and only in a parenthetical reference to aggregates being moved off-site. In contrast to quarrying, which is a quintessential extractive industry, asphalt is a manufactured product – and manufacturing is a land-use typically addressed in the *Planning Act*. The Board returns to that question later.

[140] Granted, quarrying and asphalt plants do share the characteristic, in common parlance, of being “heavy” industries. Indeed, OP s. 11.3(9) singles out asphalt plants as a "heavy industrial use."

[141] The Board also finds that they would both answer the definition of a "major facility" under the PPS.

[142] Even if OP s. 11.3(9) were not determinative in classifying an asphalt plant as a "heavy industrial use”, both the plant and the quarry would answer the description of a Class III industrial facility under D-6, were it not for the technical exclusion of quarries from the latter guideline. The Board finds, however, that the exclusion of quarrying from

D-6 does not make that industry any less "heavy" for OP purposes or others. Anything that requires a 2½ storey barrier can hardly be called otherwise.

6. THE EXTRACTION AREA

6.1 Introduction and Practical Implications

[143] OP s. 6.13(12) does not overtly recognize any exceptions to the general rule that "the minimum separation distance for industries classified by the Ministry of Environment in their Guideline D-6 as… Class III will be 300 m." The applicant's inference, however, was that its project should be considered an exception, in the same way that D-6 foresees exceptions, described later.

[144] As mentioned,

- The applicant called for the extraction zone to have a setback of 180 m from the property boundary, in accordance with the 2013 By-law.
- The Township, FACT-MB and Messrs. Kerr and Simek wanted it to extend 300 m from the boundary, per the 2015 By-law.
- The difference between those two measurements represented a total space of 9.7 ha (some 24 acres), which the Board calls "the disputed setback area."

[145] So the immediate question is whether both the licence and the zoning should treat this disputed setback area as part of the extraction zone, or the buffer:

- The applicant said it should be part of the extraction zone.
- By the reasoning of the Township and the other parties, it should be part of the buffer and reserve lands, whether zoned EMR or in a protective category.

[146] At first glance, the sheer size of this disputed intervening space – fully 9.7 hectares – would suggest that its fate must be immediately important to quarrying plans. Closer examination, however, discloses otherwise.

[147] The key to that question is the quarry's reputed 187-year timeframe. The applicant's phasing evidence indicated that this disputed 9.7 ha area would not *start* to be quarried until the 22nd century.

[148] The Board asked why such intensive debate had been engaged now, over a licence and zoning for quarrying which (according to the evidence presented) was unlikely to occur for close to a century, i.e. until the lifespan of the great-great-grandchildren of those present, at a date as far in the future as the Model-T and *The Great Gatsby* were in the past.

[149] In response, the Board heard of only one immediate pragmatic consequence. OP s. 11.2 specifies that "separation distances between new or expanding aggregate operations and sensitive land uses are applied reciprocally." The applicant's proposal would pre-empt “conflicting land uses” from coming any closer to the quarry, from the opposite direction – notably residential uses (moving closer, from the direction of Golf Club Road). This would immediately restrict each neighbour's use of his/her land – even if the quarrying did not reach its intended limit for the next century.

6.2 The "Sterilization" Argument

[150] The objection from Messrs. Kerr and Simek could be called "quarry creep." Their residential lots had existed for decades, without unexpected restrictions on use. However, the applicant acquired more property, moving its landholdings closer to them. Suddenly, said Messrs. Kerr and Simek, through no fault of their own, they lost the right to develop the back 150 m or so of their own property (it was "sterilized"), because the separation distances (introduced in the 1999 By-law) stipulated that any development there might be too close to the expanding quarry.

[151] Indeed, if the lots of Messrs. Kerr and Simek had been deeper, and their dwellings (or prospective dwellings) had been 330 m back from the property line, then by the applicant's reasoning, the quarry would not need to provide any buffer at all. The operator would not need to provide any setback: it could quarry to the very edge of its property line, knowing that required separation distances would be all on the neighbour's property (thereby making the neighbour's land into a buffer area, without the neighbour's consent).

[152] Messrs. Kerr and Simek added that the proposed quarry boundary, and the consequent separation distances, ran squarely contrary to D-1's admonition (at s. 3-2) against "freezing or denying usage of the intervening land."

[153] The applicant replied that this objection came fifteen years too late. The separation distance had been entrenched in the 1999 Comprehensive Zoning By-law, which Messrs. Kerr and Simek could have appealed – but did not (they said they were unaware that such a zoning change was buried in the small print at the time).

[154] On this "sterilization" argument, the Township sided with Messrs. Kerr and Simek. Counsel for the Township argued that "it makes no sense to say your land has been expropriated because (the applicant) wants to expand." She added that, as a general rule, this OP did not normally tell third parties that their private property was now subject to restrictive separation distances, e.g. in the case of other expanding facilities, notably for sewage treatment, animal hospitals, or kennels.

[155] On consideration, it is not necessary for the Board to opine on this sterilization argument, because this matter can be determined on other grounds. The Board does observe, however, that Messrs. Kerr and Simek did raise a legitimate question concerning compliance with D-1’s provision about "freezing" intervening land. It is a question worthy of a proper answer in due course, but that is for another day.

6.3 The Argument about Physical Impacts

[156] The applicant said that no expert input had gone into the contents of the 2015 By-law, portrayed as a knee-jerk reaction.

[157] The applicant also devoted many days of expert testimony to the proposition that,

- whatever the environmental impacts at the very back of those deep neighbouring lots,
- the impacts on the *dwellings and amenity areas themselves* would fall within Ministry limits (if only barely).

[158] The rationale for that argument, i.e. focusing on impacts as measured at dwellings and amenity areas (instead of lot lines), was as follows.

[159] As mentioned earlier, the general rule in key Ministry guidelines is that 300 m is the recommended minimum distance from the *property line*. That 300 m figure is a "minimum"; indeed, even when operations were *farther* from neighbours than 300 m, adverse impacts still precipitated two Court Orders.

[160] However, the Ministry outlines exceptions:

- One, which the Board calls “the insensitive lands exception”, is for neighbouring property which is not "sensitive" (e.g. parking lots).
- Another, which the Board labels the “scientific exception”, is for situations where expert proof shows that there are no significant adverse impacts, notably on sensitive receptors.

[161] The applicant argued that its project fell within both of those exceptions to the general rule. The abutting residential lots were very deep, and there was no evidence that the very back of those lots was in noticeable use. Most of the applicant's focus,

however, was scientific, intended to show the absence of significant disturbance – as measured at sensitive receptors, in terms of e.g. noise and blasting.

[162] The broader policy framework deserves explanation. In the mid-1990s, the government of the day chose to bestow particular status on the quarry industry. When it created the PPS, it declared that "as much of the mineral aggregate resources as is realistically possible will be made available to supply mineral resource needs, as close to markets as possible…. Mineral aggregate operations will be protected from activities that would preclude or hinder their expansion…." The *Capital Paving* case, cited earlier, said that aggregate resources were "given a privileged position in the PPS."

[163] The government of the day also adopted guidelines – not only for quarrying, but also for other heavy industries, like those addressed in D-6 – which treated noise and blasting in a particular way. They said separation distances could be measured not from the neighbour's property line, but rather from the neighbour's "receptor" (usually a dwelling). The Board calls this "the receptor methodology." In short,

- the impacts could be treated is relevant if they affected the neighbour's receptor,
- but not the rest of the neighbour's property.

[164] D-6, however, added that if impacts were to be felt on the property of neighbours, it should specifically be on land which was not "sensitive" (citing the example of parking lots). Other guidelines, like those for noise and blasting, were less specific.

[165] That was in the mid-1990s. Subsequently, in 2005 and 2014, the PPS was modified to underscore various qualifiers, notably about health and the environment. However, although the PPS was updated, D-1 and D-6 (both dating from 1995) were not.

[166] Some other Ministry information, however, was revised. New MOE noise recommendations were published in *NPC-300 Environmental Noise Guidelines Stationary and Transportation Sources – Approval and Planning* ("NPC-300"). However, there was some ambiguity concerning its method of measurement:

- On one hand, it announced that its objective was "the proper control of sources of noise omissions to the *environment*", not just sensitive *receptors*. Indeed, it went on to define "point of reception" as "*any location on a noise sensitive land-use* where noise from the stationary source is received" [emphasis added]. This wording led some observers to suppose that noise could be measured from any location on a neighbouring residential lot.

- On the other hand, NPC-300 devoted page after page to sensitive "points of reception", including windowpanes. This led the applicant's expert to conclude that, notwithstanding occasional wording to the contrary, the actual intent of the Ministry guideline was confined to impact on individual receptors, not entire lots. The Board was also told that, in daily practice, the Ministry used the receptor methodology.

[167] The Board was also told that, in this context, NPC-300 recommended a maximum of 50 decibels ("dB") by day (45 dB by night). The applicant's noise analysis projected daytime levels – at "plane of window points of reception" of neighbouring properties – at between 45 and 49 dB, and concluded that there was therefore "compliance with (the) performance limit."

[168] There was no suggestion that, on neighbouring properties, locations *elsewhere* than those "points of reception" would be free of excessive noise. However, the applicant's expert indicated that (a) those other locations were not the points of reception listed in NPC-300, (b) all his calculations were "worst-case scenarios" anyway, and (c) if necessary, one could increase the mitigation, by adjusting the height and/or position of the berm/barrier.

[169] The applicant's noise expert concluded that, since his analysis indicated decibel levels at "points of reception" under the NPC-300 maximum, "adverse noise impacts will not occur at the nearby noise sensitive points of reception, hence overriding the minimum separation distances in guideline D-1."

[170] The applicant's experts added, in their *Responses to Planning Advisory Committee Technical Questions*, that noise levels at the back of neighbouring properties were essentially irrelevant, because:

> Where property is large, as is the case with properties around the quarry, the MOE guideline noise limits apply at the residence and the Outdoor Living Area within 30 m of the residence. *The limits do not apply to further distances from the residence.* [Emphasis added]

[171] Essentially, excess noise elsewhere on neighbouring property was treated as essentially irrelevant, regardless of potential decibel figures. For example, if the separation distance were a third smaller (e.g. a location on neighbouring land that was 200 m away from the quarry noise, instead of 300 m), then that location could experience an increase in noise levels of 4 dB. By that calculation, much of Mr. Simek's and Mr. Kerr's lots, at 180+ m from the extraction zone, could experience noise levels over the guideline maximum of 50 dB.

[172] Ministry blasting guidelines also used the receptor methodology, and the applicant's blasting expert similarly measured impacts from the "receptor." "Blast vibrations and overpressure will remain minimal at the nearest receptors." He cited MOE's document *NPC-119 – Model Municipal Noise Control By-law* ("NPC-119"). Again, the "receptor" would be the neighbouring dwelling, not the neighbouring property in its entirety.

[173] NPC 119 called for a maximum vibration of 12.5 millimeters per second Peak Particle Velocity ("mm/sec PPV"). The applicant's expert reported that, at a distance of 300 m, the vibration on a typical blast would be 12.4 mm/sec PPV. If the separation distance were cut in about half – e.g. near a neighbour's property line, 180 m from the

extraction, then the applicant's experts said the vibrations could almost triple. It was said that on Mr. Kerr's property, vibrations at his property line could be four times those felt at his house.

[174] In their *Responses to Planning Advisory Committee Technical Questions*, the applicant's experts again discounted impacts elsewhere than at "receptors", e.g. on accessory buildings on neighbouring properties:

> Sheds constructed at the rear of the property would not be considered sensitive receptors and would not be subject to the (MOE) guideline vibration and overpressure limits.

[175] The Board finds, however, that whatever the merits of receptor methodology in meeting Ministry guidelines, there is a critical problem in confining oneself to that approach here. That problem is elementary, namely that the environmental standards laid out by the Ministry and the OP are *not the same*:

- Under both the insensitive lands exception and the scientific exception, those MOE standards (not legally binding) measure environmental disturbance only at the "sensitive receptors", not at other parts of neighbouring lots;
- But this OP (legally binding), in contrast, says at s. 11(2)(3) that “disturbance to the environment” must be “limited to the (subject) site…”, to the apparent exclusion of significant environmental disturbance, not just at receptors, but on neighbouring sites altogether.

[176] Furthermore, although factors like noise and blasting would fall within Ministry guidelines when measured at the receptors themselves, there was no dispute that, if those factors were measured elsewhere on the neighbours' lots, Ministry limits could be exceeded.

[177] The above is problematic. Noise and overpressure are "disturbances to the environment"; and to the extent that they exceeded Ministry limits on neighbouring

properties, those disturbances were clearly not "limited to the site", as required by OP s. 11.2(3).

[178] The Board is compelled to conclude that the applicant's proposed boundaries, and those reflected in the 2013 By-law, failed to confine disturbances to the site, and hence did not comply with this provision of the OP. The 2015 By-law was more consistent with the OP in that regard. Similarly, the Board was not persuaded to depart from the general 300 m rule. For those reasons, the Board declines to intervene either in the 2015 By-law boundaries (which it finds more appropriate), or the usual measurement of 300 m from the boundary line. The proposed licence should so specify, as should the zoning.

[179] Parenthetically, counsel for the Township said that although it was not in the Board's jurisdiction to amend the 1999 By-law, which had originally adopted the 150 m setback (repeated in the 2008 By-law), it was certainly within the Board's jurisdiction to suggest to Council that it consider changing the minimum setback to 300 m. The Board is compelled to agree.

[180] Finally, one might speculate as to whether the applicant could have salvaged its proposed 180 m setback, if the proposal had been reorganized to reduce impacts further. Perhaps a reorganization might have produced prospective impacts on neighbouring property – even at a distance of only 150 m – such that they fell within the limits in the guidelines. The applicant's noise expert testified, for example, that hypothetically, the berm might be moved closer to the source of the noise – the Board might envision something four storeys tall. For his part, the applicant's blasting expert testified that blasting too could be rearranged, via different blast design.

[181] The problem is that none of those hypotheses represent the scenario that was submitted to the Province, vetted and peer-reviewed by experts, or is currently before the Board. The Board has no sufficient evidentiary basis on which to approve such a conjectural scenario, even on a conditional basis.

7. THE ASPHALT PLANT

7.1 Introduction

[182] As mentioned, the asphalt plant would require its own site-specific OPA and rezoning.

[183] The applicant offered few specifics on its proposed plant. It said the design and supplier had not been chosen yet. Although the Board was told that a new asphalt plant might be a "state-of-the-art facility" (Exhibit 46), there was little testimony on how it would avoid the pitfalls that led the preceding plant to be declared a nuisance by the Courts.

[184] For example, this application contained no odour assessment *per se*. The applicant's Vice-President, Mr. Kasper, said an odour study had been developed and applied at the applicant's asphalt plant in Whitby, in the form of a "test protocol"; but no comparable data – or approach – were in evidence here.

[185] Counsel for FACT-MB called this one of the "fundamental deficiencies" of the applicant's paper trail. He added that, although some 400 pages were produced on the subject of quarry impacts on water, only four pages contained any reference to the asphalt plant. He concluded that "it was incumbent on (the applicant) to do a thorough study of the asphalt plant and its consequences, and that just didn't happen."

[186] The applicant countered that the proposal had not only been signed off by Provincial officials, but that further Provincial assessments were also expected.

[187] Again, the Board must be circumspect. Granted, Provincial officials had not found a violation of Provincial standards – but there was no evidence that the old portable plant had violated Provincial standards either. According to Mr. Kasper, the old plant had met all Provincial regulatory requirements too.

[188] The Township, for its part, was less engaged in that environmental debate. Although it called for strict proof of environmental compliance, its main argument was that *even if* the project met Provincial ecological standards, this site was still inappropriate, for planning reasons. It argued that, from a strictly land-use standpoint, there would be an undue juxtaposition of a heavy industrial use with a rural residential area, contrary to the OP. That argument is outlined below.

7.2 The Township's Planning Argument

[189] The Township said that, even if one disregarded issues like smell and noise, an asphalt plant would be as inappropriate – in this predominantly rural/residential location – as, say, a steel foundry or a plastics recycling facility. Counsel for the Township argued that in evaluating the asphalt plant, the first question must be: "Should we allow this new industry here"? "The big issues in this hearing are planning issues." She pointed to OP s. 4.3(7), which calls for industries "adjacent to a Settlement Area" to be "small in scale and light in nature."

[190] The applicant countered that an asphalt plant was not an "industrial use". Its experts and counsel pointed to OP s. 6.3(7), which says that quarrying cannot be conducted on lands designated for "Industrial" use. They reasoned that:

- if quarrying was not permitted in the “Industrial" designation,
- then quarrying and asphalt plants were not "industrial uses", subject to the same limitations as on other new "industrial uses." They must be in some other category, like "Extractive"; or perhaps an asphalt plant was a stand-alone use, in a distinct (and unnamed) category by itself.

[191] The applicant pointed to the 1994 Board decision in *Gibb v. Bentinck (Township),* 1994 CarswellOnt 5035 (“*Gibb*”). There, the opponents of an asphalt plant argued that, "because of the processing nature of these plants, such use should be construed as an Industrial use." They added that the OP's "Industrial" policies – similar to s. 4.3(7) here –

"set out principles, locational criteria, procedures and constraints which… could militate against the proposed (asphalt) use of the site." The question was therefore whether these "Industrial" constraints would apply. In that instance, the Board concluded that they did not. The applicant in the current case suggested that constraints under OP s. 4.3(7) were similarly inapplicable.

[192] The problem with that argument is that, in the *Gibb* case, the OP was different. Indeed, the Board specified there that the reason why the asphalt plant should be assimilated to that OP's "Extractive Industrial" policies – rather than its general "Industrial" policies – was the "clear emphasis which (that Official) Plan places on… the relationship between aggregate extraction and asphalt." In contrast, McNab / Braeside's OP specifies no such overt "relationship" which might shift asphalt away from its normal "Industrial" policies into some other category. In short, the *Gibb* case is distinguishable; under the present Township's OP, there is nothing to suggest that the production of asphalt is not an "industry" subject to “Industrial” policies.

[193] For good measure, even if the applicant's OP interpretation were correct, and asphalt were in a separate category from other industries, the Board was not persuaded that, on a purposive analysis, an asphalt plant should be expected to abide by standards that were significantly more lax than those of comparable heavy industries.

7.3 Review of the Evidence

[194] The Board has reviewed the six cubic feet of scientific evidence and planning evidence. The Board finds that, in general, this application was thoughtfully put forward. Most of the necessary materials were not only addressed by the applicant's experts; they also satisfied peer reviewers and government officials. Finally, its case was professionally assembled and presented, as was the case for the other parties.

[195] The applicant did, however, downplay the position already taken by the Courts. Granted, the Board is not necessarily bound by the opinions of the Courts indicating that the area was "primarily residential in character." However, on the evidence, the Board

heard no sufficient rebuttal of that characterization – particularly in light of the number of nearby residential properties, and the number of dwellings within the subject property's "influence area", as understood under either the Provincial or OP definition.

[196] In short, the Board was not persuaded to disagree with the characterization already expressed by the Courts.

[197] Next, the previous asphalt plant had not only been Provincially licenced; it had been even *farther* from nearby dwellings than the currently-proposed location. The Courts still found it to constitute a nuisance.

[198] At the current hearing, the Board would have expected evidence to show that history was not about to repeat itself. It would have expected some methodical demonstration that the new facility would enjoy advantages of design, installation and/or performance, which would prevent similar adverse impacts from recurring.

[199] That did not happen. Although the applicant's Vice-President spoke lucidly about the company's options, and the applicant's counsel alluded to a "state-of-the-art facility", no firm decision had yet been made about the kind of facility – or even whether it would be new or pre-owned, let alone what the distinctive features might be, that might lead to an outcome *different* from before.

[200] In short, on the evidence, the Board was not satisfied that the scientific case had been made for the superiority of a new system, compared to the old.

[201] The Board was equally unconvinced from a planning perspective. As mentioned, OP s. 4.3(7) calls for industries "adjacent to a Settlement Area" to be "small in scale and light in nature." On a literal reading, this project does not comply with the OP. The proposed use is not small in scale; nor is it light in nature – notably because the OP itself labels it "heavy", at s. 11.3(9).

[202] For that matter, on a purposive reading, the underlying question in this OP policy – and in broader principles of good planning – was whether there was sufficient provision for a moderate *transition*, between heavy industrial uses and nearby residential uses, rather than a blunt juxtaposition. That case was not established.

[203] The Board is compelled to conclude that a new industrial facility of this scale was not what the OP had intended for land uses at this location. The Board therefore declines to intervene in the Township's refusal of an OPA for the asphalt plant**.**

8. THE TOTAL LICENCED AREA

8.1 Introduction

[204] The applicant proposed that all its lands be covered by the ARA Licence – including the Reserve and Wildlife Protection areas.

[205] The Township said it disagreed, for reasons of jurisdiction and statute, outlined below.

8.2 The Jurisdiction Argument

[206] Although the Township said the extraction zone itself should be licenced, it opposed extending that licence to the Reserve and Wildlife Protection areas. The Township expressed apprehension that if the latter were entirely included in the ARA Licenced area, this would preclude any future municipal intervention in the use of those lands.

[207] The Township pointed to ARA s. 66, which treats the licence and Site Plan as paramount over municipal by-laws:

> This Act, the regulations and the provisions of licences and Site Plans apply despite any municipal by-law, official plan or development agreement and, to the extent that a municipal by-law, official plan or development agreement deals with the same subject-matter as this Act, the regulations or the provisions of a licence or Site Plan, the by-law, official plan or development agreement is inoperative.

[208] So if all the lands were licenced, as the applicant proposed, all decisions for these lands would henceforth be under the supervision of MNRF – essentially to the exclusion of the municipality.

[209] The applicant replied that there was nothing either uncommon or wrong in vesting supervision in MNRF. The applicant's planner, Ms. Guiot, testified that it was not uncommon for a licenced area to include not only the extraction area itself, but also its ancillary appurtenances, like a berm and/or buffer areas, including environmentally-sensitive ones. The County planner added that it was his understanding that, in day-to-day practice, MNRF routinely licenced ancillary and buffer areas.

[210] The Ministry itself certainly appeared to express that opinion, in one of the Township's own exhibits (Exhibit 1b, Tab 12B), containing a Ministry letter distinguishing between lands to be "extracted" and lands to be protected:

> All lands proposed to be *extracted* within a licenced pit or quarry property must be zoned under an Extractive/Industrial Zoning at the time of licensing.
>
> However, there may be instances where another zoning and/or designation may be warranted on a portion of the proposed licenced site *to protect* a particular confirmed natural heritage feature (e.g. Environmentally Sensitive or Environmental Protection Area) to protect a municipal interest. There is also merit for including sensitive heritage features within the licenced boundary to protect the feature through the requirements of the Site Plan. This adds additional protection. [Emphasis added]

[211] The applicant agreed that, if anything, the Province was in a better position – and had more authority – to enforce protective provisions than did the municipality.

[212] The Township replied that the Province might have greater authority, but that did not mean it had greater interest. MNRF offered no guarantee of political will. Indeed, the Township said that at some future date, MNRF might change the limits of extraction. The Township would be notified, but its jurisdiction to intervene would be limited.

8.3 The Statute Argument

[213] In a separate argument, the Township pointed to ARA s. 12.1(1):

> No licence shall be issued for a pit or quarry if a zoning by-law prohibits the site from being used for the making, establishment or operation of pits and quarries.

[214] The Township drew the inference that it was not legally feasible to licence lands which were not specifically zoned for the extraction itself (e.g. lands zoned for an adjoining "reserve", or some protected category).

8.4 Review

[215] On consideration, the Board was not persuaded by either the Township's jurisdiction argument, or its interpretation of s. 12.1.

[216] Concerning jurisdiction and the question of who should have responsibility for future decisions, the Board was shown no proof to substantiate the Township's apprehension that a future Minister of Natural Resources and Forestry (and his/her officials) would necessarily be less trustworthy than some future municipal council. This municipality itself illustrates how dramatically political will can change. The Board is not prepared to accept any sweeping assumptions, about trustworthiness, without evidence.

[217] As for the statutory argument, the Board's interpretation of ARA s. 12.1 is that a quarry cannot obtain a licence at all, if it is banned by the zoning. That section does not purport to predict where every square metre of licenced area will be.

[218] What s. 12.1 does say is that the lands in question cannot be licenced, if they were zoned to prohibit "the making, establishment or operation" of a quarry. The question is then whether a *buffer area* is thereby precluded from being licenced, on the assumption that the buffer purportedly prohibits the operation of the quarry.

[219] The Board was unconvinced of any such statutory intent. The Province's own guidelines specify that a buffer area is usually indispensable to the operation of a quarry. That makes the buffer area at least ancillary to the operation of the quarry. The Board was not persuaded that the Province, having provided that buffers could be a prerequisite to the operation of quarry, would in the same breath declare that buffer areas “prohibit the operation” of that same quarry.

[220] The Board also notes the previous Board decision in *Cornwall Gravel Co. v. North Glengarry (Township),* 2005 Carswell Ont. 3664. In that case, the Board directed that the licence be issued for that quarry operator's entire property – but that the buffer area (in that case farmland) be recognized in distinct protective zoning, and a distinct OP designation:

> Although the Board is prepared to issue a direction… that the licence issue for the entire property, the delineation of the OP designation and the zoning are a different matter. Official Plan designations and zones are, first and foremost, linked to *use*; it is therefore entirely appropriate for the OP designation and the zoning to reflect the ongoing agricultural uses which are expected at the front of the property. [Emphasis in original]

[221] In the current case, the Board is similarly prepared to direct that the licence issue for the entire property, but that the zoning should reflect the actual expectations for use.

[222] A related question was the location of the berm. The applicant proposed that much of it be outside the extraction zone, and inside the EMR buffer area. The exception was on the east side, where the applicant proposed that the berm be inside the extraction zone and outside the Wildlife Protection area, where it said the berm would be inappropriate. 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.

9. INTERFACE WITH THE NOISE BY-LAW

9.1 Introduction

[223] The Noise By-law says it addresses both noise and vibration. However, there was some confusion about its application, particularly to nighttime operations.

[224] It regulates any "machine", "auditory signaling device" (e.g. backup beepers), "loading", "handling materials", and "manufacture of construction material." These are not permitted to make any "sound (which) is clearly audible at a neighbour's receptor in a Rural Area", at night or on Sundays.

[225] There are some permitted exceptions, notably if a project is on behalf of the Township (s. 6), or if Council authorizes an exemption (s. 7).

[226] The confusion stemmed from allegedly contradictory wording in the applicant's proposed Site Plan Notes (Exhibit 12C). On one hand, they announce that the Noise By-law "applies to this site":

> B1. The Township of McNab / Braeside By-law 2011-47 (Noise Control) applies to this site.
>
> B2. Consistent with this By-law, operations are permitted during the hours noted below, Monday to Saturday inclusive, except Statutory Holidays.
>
> B2.1 Crushing, drilling, cement powder truck unloading, washing, screening…: 07:00 – 19:00….

[227] However, the Notes then go on to itemize permitted nighttime operations – purportedly under the authority of the same By-law:

> B3. When required and permitted under the… Noise By-law, night operations may occur under the following circumstances:
>
> B3.1 Night operations, 19:00 – 7:00 may include: truck loading, shipping and operation of the… Concrete Plant and the Screening Washing Plant, provided there is no night crushing.
>
> B3.2 Crushing, and associated truck loading and movements, may take place at night, 19:00 – 7:00 in Phase 2, provided that there are no other quarry operations taking place at the same time….

[228] The Township interpreted the above wording as pre-authorization, allowing any of the listed activities to occur at night – potentially with "clearly audible" noise at "a neighbour's receptor", contrary to the normal application of the By-law. The Township called for B3.1 and B3.2 to be deleted.

[229] The Board has two observations. First, some (though not all) noise issues may now be moot, in light of the Board's finding that the setback from the residences should be increased by 120 m, mitigating noise accordingly.

[230] Second, the Board agrees that the language and intent of the above Site Plan Notes are not the clearest:

- On one hand, the phrase "when… permitted under the… By-law" *may* mean that the itemized nighttime noises would be permitted only if they occurred under the authority of either one of the By-law's exceptions (e.g. s. 6, "work carried out on behalf of the Township"), or of an exemption granted by Council (s. 7), by resolution from time to time.

- On the other hand, if that had been the applicant's intent, it is unclear why it would have felt the need to insert these Site Plan Notes with such specific itemization.

[231] The Board directs that B3.1 and B3.2 should be either redrafted or deleted. If, out of an abundance of caution, the applicant is seeking municipal authorization for reasonable activities on an ongoing basis (as opposed to an *ad hoc* basis), then it would be to the mutual advantage of the applicant and the Township to make those arrangements methodically ahead of time, rather than have the applicant produce a parade of periodic requests for exemptions *ad hoc*.

[232] In the meantime, the Board's order pertaining to these Site Plan Notes, and others, is described later in this section.

10. WATER

10.1 General

[233] Notwithstanding the applicant's two volumes of expert materials about hydrology and hydrogeology, FACT-MB's expert Mr. Ruland said that it was "premature" to proceed without further information about water.

[234] At the hearing, however, Mr. Ruland clarified that his primary concern was related to the asphalt plant (which he called the "crunch issue"), and not the quarry expansion, where he said "Miller has done enough work." Indeed, to the credit of the parties, most water-related issues were settled before the hearing, or during the month-long hearing itself.

[235] Some points nonetheless required clarification. For example, FACT-MB's expert had objected to the quarry floor going below 126 mASL. The applicant's experts said it could slope downward on the north side, to 125 mASL, at some point in the distant future. That location is close to a nest of test wells. The parties discussed possible approaches, in Exhibit 32. It may be appropriate to set a figure of 126 mASL, with the potential to be adjusted to 125 mASL at some future date, on condition that the test well data (collected by an independent professional) supports same, to the satisfaction of

MOECC. Indeed, in answer to the question of who would review water data generally, the Board finds that it should be to the satisfaction of the agency with the most expertise in that area, namely MOECC.

[236] There was, however, an unresolved issue concerning two small "wetlands", described below.

10.2 Wetlands “S-1” and “S-2”

[237] There was considerable discussion of two small “damp” areas south of the property. They were called "S-1” and "S-2.” If they were wetlands, they would be considerably smaller than the size typically described in the Province’s publication, *Ontario Wetlands Evaluation System*.

[238] When FACT-MB’s Mr. Ruland said "Miller has done enough work,” he made an exception for S-1 and S-2. He recommended an assessment and study program for them, though he later added that "this is not a huge issue."

[239] The applicant disagreed on the necessity of the assessment/study there. Indeed, its experts said the so-called "S-1" wetland was probably man-made.

[240] The Board was not persuaded of the need for further study. Although Mr. Ruland alluded to the possibility of open water, the Board was not shown any evidence of same; in fact, there was no evidence of a visible inlet, outlet, or likely beaver habitat. S-1 was even said to have a road through it.

[241] In short, there was no evidence before the Board to show that these areas had wetland characteristics which would trigger normal wetland policies. The Board will not intervene on that account.

11. TONNAGE

[242] The existing licence, previously approved by the relevant Ministries, permitted a quarry output of up to a million tonnes per year. The traffic studies, in contrast, were predicated on 155,000 tonnes per year.

[243] The Township called on the Board to seize this opportunity to roll back the quarry's permitted tonnage, to a figure closer to actual use. The Township suggested a new figure of 300,000 tonnes. FACT-MB echoed that call.

[244] The Board finds two problems with that suggestion. The first is procedural. Tonnage had not been on the agreed Issues List in the Board Procedural Order's for this hearing.

[245] The second problem is evidentiary. Granted, the numerical difference between the potential and actual tonnage figures appear substantial. However, there was no expert traffic engineering testimony at the hearing, one way or the other.

[246] If the applicant unexpectedly started to operate at levels beyond those predicted in its traffic studies, municipal officials – who are responsible for the roads on which that traffic moves – would have a legitimate grievance about approvals being predicated on a misleading premise. However, there was also no evidence that, in such an event, those issues could not be addressed at that time.

[247] In the absence of relevant information, the Board was unconvinced that it had a sufficient evidentiary basis on which to roll back a pre-existing Provincial decision, by Ministries directly responsible for the subject-matter. The Board therefore declines to intervene on the subject of maximum tonnage under this ARA Licence.

12. CONCLUSION

[248] The Board has carefully considered the evidence and arguments on the various issues.

[249] Concerning the ARA Licence, the Board has found that the licence should issue, but the extraction zone should be subject to the 300 m setback from the property line now recommended by the Township.

[250] The Board finds that the ARA Licence can extend to the entire property.

[251] The Board does not call for further study of "Wetlands S-1 and S-2", nor does it adjust the tonnage currently authorized.

[252] The Board finds that the Site Plan Notes are confusing, pertaining to the application of the Noise By-law. It would be appropriate to redraft them, in accordance with the process below.

[253] As a whole, the Site Plan Notes are numerous and interconnected. Several changes are required, pursuant to the current decision. Rather than have the Board undertake an encyclopedic revision of the Site Plan Notes, the Board directs the applicant to do so, in consultation with the other parties.

[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.

[256] The Board expects that draft to be submitted to the Board, within six months of the date at which this decision is issued, failing which the Board will direct that the ARA application be dismissed.

[257] Turning to the *Planning Act* applications, the Board does not support the proposed asphalt plant, and the applicant's OPA appeal on that account is dismissed.

[258] In terms of rezoning, the Board supports the extraction zone boundaries portrayed in the Township's 2015 By-law.

[259] The Board was advised that the Township wished to modify the language of its new By-law 2015-03, by inserting a new zoning category encompassing both the originally-proposed Protection Area and the Corridor. The Board agrees that this update is appropriate. The Board orders the necessary changes below. That part of the Board's order need not be withheld.

13. ORDER

[260] The Board orders as follows:

1. Subject to paragraphs 2 to 5 below, the Minister is directed to Issue the Category 2 “Class A” Licence under the *Aggregate Resources Act*, subject to the prescribed conditions.

2. The applicant shall, within six months of the date of issue of this Decision, file to the Board a revised Site Plan and revised Site Plan Notes, as follows:

    a) The boundaries of the extraction area shall be revised, to provide a minimum setback of 300 m from neighbouring properties.

    b) There shall be no reference to an asphalt plant.

c) The proposed Wildlife Corridor shall be assimilated to the Significant Wildlife Habitat Protection Area.

d) The Site Plan Notes shall clearly specify that the project is subject to the Township's Noise By-law No. 2011-47. If there is to be any systematic exception to that By-law specified in the Notes, such exception shall be clearly stated, to the satisfaction of the Township, acting reasonably.

3. At least two months prior to the filing, to the Board, of the above draft Site Plan and Site Plan Notes, the applicant shall circulate the draft of the revised Site Plan and Site Plan Notes to the other parties. If there are difficulties, the Board may be spoken to.

4. If the revised Site Plan and Site Plan Notes are not submitted to the Board within the above timeframe, the Board shall direct that the ARA Licence application be refused, unless the Board directs otherwise.

5. The Board withholds its Order pertaining to paragraph 1 above, pending receipt of the revised Site Plan and Site Plan Notes, the whole to the satisfaction of the Board.

6. The Board dismisses the applicant's appeal pertaining to an Official Plan Amendment to allow an asphalt plant.

7. The Board modifies Zoning By-law No. 2015-03 of the Township of McNab / Braeside in accordance with the wording recommended by the Township at Tab 1 of its document entitled *Proposed By-law and Site Plan Recommendations and Book of Authorities*. As so modified, the Board confirms that By-law No. 2015-03 is in full force and effect, and amends By-laws No. 2010-49 and No. 2013-31 accordingly.

"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.