Ontario Municipal Board
Commission des affaires municipales
de l'Ontario

ISSUE DATE: May 22, 2015 **CASE NO(S).:** PL140203

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

Appellant:	Bonnie Danes
Appellant:	Marjorie Kelly
Subject:	By-law No. 2014-07
Municipality:	Municipality of Marmora and Lake
OMB Case No.:	PL140203
OMB File No.:	PL140203
Heard:	November 14, 2014 in Marmora and Lake, Ontario

APPEARANCES:

Parties	**Counsel**
Marjorie Kelly	
Bonnie Danes	
Municipality of Marmora and Lake	A. Tinney-Fischer

DECISION DELIVERED BY M. A. SILLS AND ORDER OF THE BOARD

[1] Marjorie Kelly ("Kelly") and Bonnie Danes ("collectively the Appellants") have filed separate appeals of the passing of Zoning By-law No. 2014-07 ("ZBA") by the Council of the Municipality of Marmora and Lake ("Municipality").

[2] The effect of the ZBA is to amend Comprehensive Zoning By-law No. 2003-11 ("ZBL"), by adding new subsection 5.35.1, as follows:

> **5.35.1 Legal Lots of Record within Areas of Influence**
>
> Notwithstanding the provisions of paragraphs 5.35 items i) and ii), and provided that such structure does not contravene any other provisions of this by-law, a residential structure may be erected on a lot approved under the *Planning Act* and within a Residential Zone, which was held under distinct and separate ownership as shown by a registered conveyance in the records of the Registry or Land Titles Office at the time of the passage of this by-law, provided that such structure shall be setback a minimum of 30 metres (98.4 ft.) from any lands zoned and licensed MX-Mineral Extraction for Extraction and Storage uses, and a minimum of 90 metres (295.3 ft.) from any lands zoned and licensed MX-Mineral Extraction for Open and Closed Pit and Quarry Processing Operations. Such residential structures shall be constructed in accordance with noise and dust attenuation designs or standards.

[3] By way of background, in the 1980's a number of lots were created by consent in Part Lot 10, Concession 16 - Deloro Road. Five of these lots, which range in size from 2.2 to 7.6 acres, were formerly part of the larger Kelly farm landholding.

[4] One of these lots was recently purchased for the purpose of constructing a dwelling (the "Lupton lot"). However, in reviewing the ZBL it was realized that the Lupton lot could not be built on due to constraints involving setbacks from areas that are licensed and zoned for pit and quarry operations, and/or for areas that are zoned for preserving aggregate deposits.

[5] The Lupton lot is located across Deloro Road from the Kelly gravel pit, and has water frontage on the Moira River. The Kelly pit operates under a Class B license, with a maximum extraction limit of 20,000 tonnes in any calendar year.

[6] The Lupton lot is designated Rural Residential by the County of Hastings ("County") Official Plan ("COP") and is zoned Waterfront Residential by the Municipality of Marmora and Lake ZBL.

[7] A subsequent review by County staff confirmed there are six other legal lots of record within the Municipality which are affected in this same manner. All seven of

these parcels are vacant legal lots of record created by consent in the mid 1980's; all are zoned for residential purposes and are within 500 metres ("m") of an existing licensed area.

[8] The provision of the ZBL which is problematic is as follows:

> s. 5.35 AREAS OF INFLUENCE
>
> No person shall erect any residential structure in any zone within 500 m (1,640.4 ft.) of lands zoned and licenses MX – Mineral Extractive (quarries) and within 300 metres of lands zoned and licenses MX – Mineral Extractive (pits) without the approval of the Ministry of Natural Resources upon successful application for a minor variance and provided the residential use is a permitted use on the adjacent lands within the area of influence.
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> No person shall erect any residential structure within the area outlined on the attached schedules as being an Area of Mineral Aggregate Preservation without the approval of the Ministry of Natural Resources upon successful application for a minor variance and provided the residential use is a permitted use on the lands in question.

[9] The effect of the proposed ZBA (s. 5.35.1) would be to reduce the area of influence in order to permit residential use for only those lots which had been approved for residential use under the *Planning Act* ("PA"), and, which were in separate and distinct ownership as a matter of record at the time the comprehensive ZBL was passed (January 20, 2004). The larger 'Areas of Influence' restrictions would continue to apply to any new residential lots to be created.

CASE PRESENTATION OF THE APPELLANTS

[10] Bonnie Danes is a former member of the Council of Marmora and Lake. Although she does not reside or own property in the vicinity of a pit or quarry operation, she has concerns about the "drastic decreases in setbacks from quarries/pits to allow new development on lots or record", as is being proposed by the ZBA. In her view, "the change [in setback] is too much".

[11] In the case of the Kelly pit, Ms. Danes is concerned that if the adjacent legal lots of record are allowed to be developed, the future residents of these homes will be

exposed to noise and dust impacts. This will result in nuisance complaints and possibly put pressure on the current or future operations of the Kelly pit. She is also concerned about any potential liability to the Municipality that could arise as a result of the reduced setbacks.

[12] From a planning perspective, Ms. Danes contends that the proposed ZBA is not consistent with numerous policies of the Provincial Policy Statement, 2014 (“PPS”) and/or the COP.

[13] Ms. Danes’ other concerns generally involved the process by which the ZBA was processed and approved.

[14] Ms. Kelly is concerned about how residential development on the lots in the vicinity of their two licensed pit areas will hinder their current and/or future operations. She told the Board that while there is limited excavation taking place at the current time, they are hopeful that an increased supply demand in the future will lead to an expansion of their pit operations.

[15] In this regard, she contends that once these lots are developed with homes, the future occupants will start launching complaints about aggregate haulage truck traffic and vibration, dust and noise nuisances as well as environmental issues such as well contamination.

EVIDENCE OF THE EXPERTS

[16] County planner, Paul Walsh, provided planning evidence and opinion in support of the proposed ZBA. Mr. Walsh is a Registered Professional Planner, and a Member of the Canadian Institute of Planners and the Ontario Professional Planners Institute.

[17] Mr. Walsh provided documentary materials pertaining to the following chronology:

- 1982: the former Township of Marmora and Lake adopted comprehensive ZBL No. 18-81, which established an Extractive Industrial (M2) Zone for a small pit on the westerly side of Deloro Road in the vicinity of the Lupton parcel.

- 1985: the Lupton parcel was created by consent. The Ministry of Natural Resources and Forestry ("MNRF") offered no objections to the application for consent.

- 1993: the MNR issued a license for the Kelly pit (the parcel opposite the Lupton lot).

- 2002: the County OP is updated establishing an "Extractive" and "Extractive Reserve" designation.

- 2003: the Municipality of Marmora and Lake updated its comprehensive ZBL, which resulted in the inclusion s. 5.35, and established an Extractive Industrial (MX) Zone for the Kelly parcel, and a Waterfront Residential (WR) Zone for the Lupton lot.

- 2013: the Lupton lot was purchased by the current owner.

[18] Mr. Walsh submitted that in accordance with s. 5.35 the subject lots would not be eligible for development unless the MNRF agreed to same. However, he said, the MNR is generally not in the practice of providing formal comments on applications for a minor variance. In this regard, Mr. Walsh testified that despite not having objected to the severances of the subject lots in 1985, and having issued a license for the Kelly pit in 1981, "in dialogue with MNR, the Aggregate Resources Officer expressed reluctance in supporting a minor variance" [for the Lupton lot].

[19] The purpose of s. 5.35.1 is to allow existing legal lots of record already designated for residential purposes to be developed, in accordance with express zoning

provisions and/or mitigation measures in relation to noise and dust attenuation.

[20] It is Mr. Walsh's professional opinion that the proposed general provision (s. 5.35.1) is in keeping with the intent of the PPS and the COP, and represents good land use planning.

[21] Bernie Fuhrmann is an Aggregate Development Specialist with extensive knowledge and experience in the development of aggregate pits and quarries, government approval processes, regulatory compliance requirements and the Ontario *Aggregate Resources Act* ("ARA"). Prior to entering into private practice, he was employed as an Aggregate Resource Inspector for the MNRF, Midhurst and Peterborough District (1986 – 1997).

[22] Mr. Fuhrmann proffered substantial evidence and opinion in regard to the relevant legislation and regulatory regime as it pertains to the licensing of pits and quarries; including, but not limited to the ARA, Provincial Operational Standards, the *Environmental Protection Act* ("EPA") and the PPS.

[23] Mr. Fuhrmann takes the position that the "principle of development" has been established by the creation of the lots to the east of the Kelly pit, including the Lupton lot. Essentially, he contends that when these lots were approved, regardless of the date of approval (i.e. either before or after the pit was established), "the intent of creating a series of lots was to eventually develop those lots".

[24] In situations such as this, it is his practice to advise aggregate operators to plan for the eventuality that existing lots of record could eventually be built upon. In this regard, he contends that the 300 m area of influence is not intended to be an outright prohibition to development, but rather, is to be used as a tool to assess impact, and to determine appropriate mitigation measures. Mr. Fuhrmann stated that in his professional capacity he has encountered the 'Area of Influence policy' several times in the development of new pit and quarry sites. In this regard, he asserts that numerous pits have been developed within the 300 m area of influence, subject to the

implementation of mitigation measures.

[25] The ARA Operational Standards as they relate to Class B licensed pits establish "excavation setback areas" as follows:

> No extraction within 30 metres of any road or road allowance.
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> No extraction within 15 metres of any property boundary.
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> No piling of aggregate, top spoil or overburden (except for berms), or locating of any processing plant, or construction of any building or structure within 30 metres of the licensed boundary, or within 90 metres of land in use for residential purposes at the time the license was issued, or land restricted to residential use by a zoning by-law when the license was issued.

[26] It is worthy of note, that should crushing of aggregate be contemplated at the Kelly pit, a Certificate of Approval ("COA") under the EPA would have to be obtained from the Ministry of the Environment and Climate Change. Among other things, the terms and conditions of a COA stipulates a minimum separation distance between the equipment and the nearest 'Point of Reception' ("receptors"). A Point of Reception means:

> Any point within a property on which there is a permanent or seasonal dwelling… up to a distance of a maximum of 30 metres from the dwelling;

[27] In the case of the Kelly pit, the existing residential receptors (the Kelly residence as well as an existing residence to the south) would likely require any crushing equipment be situated to ensure a setback of 300 m from the nearest Point of Reception.

[28] It is Mr. Fuhrmann's considered opinion that given the impact of the existing residential receptors, the introduction of new residential receptors (i.e. development on adjacent lots of record to the east) would not impact expansion of the Kelly pit, because the existing setback requirements already render the prospect of crushing difficult. However, it is possible that additional mitigation measures may permit some limited crushing.

[29] In terms of concerns related to dust, noise, aesthetics and well contamination, Mr. Fuhrmann contends there are already Site Plan Conditions in place to protect against these, such as requirements related to drainage and berming. In this regard, he contends that the development which could occur should the proposed ZBA be approved would not alter or otherwise restrict/constrain current or future (Kelly) pit operations. In the alternative, there are available mitigation measures that could be, or already should be in place to address these types of issues.

[30] In response to concerns that allowing the lots of record in this area to be developed could result in complaints from future residents which could lead to constraints or conceivably shut down the Kelly site, Mr. Fuhrmann contends that in reality the potential for complaints has existed since the time the Kelly pit was licensed, and will continue to exist regardless of whether the proposed ZBA is approved.

[31] In summary, it is his professional opinion that it is wise for the Municipality to offer a refinement within the ZBL to clarify policies, and to account for situations where existing lots of record may be developed with reduced setbacks from existing pits. The effect of the proposed ZBA is that the 300 m setback will remain valid for new PA applications, but in his view, this setback should not apply to existing lots of record which pre-date the institution of the ZBL policy and/or where the “principle of development” has already received municipal approval.

ANALYSIS AND DISPOSITION

[32] Principally, it is apparent to the Board that in adopting the ZBL it was not the intent of the Municipality or the COP to either freeze or otherwise outright prohibit the development of existing legal lots of record zoned for residential purposes. Had this been the case, it is unlikely that the same by-law would have established a Waterfront Residential Zone for among others, the Lupton lot [reference: paragraph 16].

[33] Clearly, the setbacks set out in s. 5.35 were not intended to be absolute; the reference to a ‘minor variance’ in this provision confirms as much.

[34] In the same vein, the PPS does not preclude and/or outright prohibit development within ‘Areas of Influence’. Rather, the PPS merely stipulates that new development will only be permitted subject to certain criterion being met, as follows:

> s. 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 for reasons of public health, public safety or environmental impact. Existing *mineral aggregate operations* shall be permitted to continue without the need for official plan amendment, rezoning or development permit under the *Planning Act.* When a license for extraction or operation ceases to exist, policy 2.5.2.5 continues to apply.
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> 2.5.2.5 In known *deposits of mineral aggregate resources* and on *adjacent lands, development* and activities which would preclude or hinder the establishment of new operations or access to the resources shall only be permitted if:
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> c) issues of public health, public safety and environmental impact are addressed.

[35] In the current case, there was no tangible scientific evidence before the Board which could be seen to give cause for concern that the public health and/or safety was at risk, or that the environment would be adversely impacted. In this respect, the Board relies on the uncontested expert evidence and opinion of Mr. Fuhrmann.

[36] Specifically, it was his evidence that there are currently controls in place to protect against environmental impacts such as well contamination [reference: Kelly pit Site Plan – conditions related to drainage]. Likewise, the Site Plan prescribes measures to be taken to mitigate noise, dust, and aesthetic nuisances; specifically, requirements involving operation setbacks, screening, berming, and fencing.

[37] While the Board can appreciate that Ms. Kelly’s concerns are sincerely held and no doubt, for good reason, the Board cannot base its decision on a mere apprehension of impact. That being said, individuals choosing to develop and/or reside on these properties ought to be mindful of the potential for nuisances associated with aggregate extraction operations.

[38] Notably, while the Board heard that the Aggregate Resources Officer “expressed

reluctance in supporting a minor variance", the MNRF did not appeal the passing of the ZBA and no one from that agency appeared at the hearing in opposition to the amendment. In this regard, the Board is satisfied that the MNRF had both knowledge of the passing of the ZBA and ample opportunity to make any objections known to the Municipality and/or the Board.

[39] The Board, having considered the contextual evidence and the planning evidence and opinion of Mr. Walsh, has been satisfied that the proposed ZBA conforms to, and effectively implements the intent of the COP. The matters of Provincial interest have been duly scrutinized, the policy intent of the PPS is being adhered to, and the principles of good land use planning have been taken into account. The public interest, health and safety have been duly considered and are being appropriately safeguarded.

ORDER

[40] The Board orders that the appeals against By-law No. 2014-07of the Municipality of Marmora and Lake are dismissed.

"M. A. Sills"

M. A. SILLS
MEMBER