

**COMMITTEE OF THE WHOLE
APRIL 16, 2012**

REPORT CAO-2012-05

**UPDATE RE 8128 HIGHWAY #9
1493690 ONTARIO INC
FILL OPERATION**

RECOMMENDATION

That Report #CAO-2012-05 including the case law analysis and confidential advice of the Town Solicitor be received;

And that staff and the Town Solicitor continue to work with the property Owner and its solicitor and the Provincial agencies to ensure that matters within the Town's Site Alteration and Fill By-law are addressed to the satisfaction of the Town.

OBJECTIVE

The purpose of this report is to provide Council with an update on the issues related to the fill operation being undertaken at the property located at 8128 Highway #9 (formerly Volk property).

BACKGROUND

Further to the deputation made on behalf of the residents of Tecumseth Pines at the Council meeting held on Monday March 26, 2012 Council directed that an Order to Discontinue Activity (2012-04) pursuant to the Town's Site Alteration and Fill By-law be issued in respect of the fill operation that has been occurring on the property located at 8128 Highway #9.

The Order was issued and served on Tuesday March 27, 2012. The owner's solicitor responded with the letter advising that the work is being undertaken on the lands for the purposes of creating new runways; that the work falls within the jurisdiction of the Federal government as it is an aeronautical undertaking and that the Town should immediately rescind the Order to Discontinue Activity. Further the Owner advised that should damages result from the failure of the Town to rescind the Order an action would be commenced to recover such costs from the Town.

Council held a Special Council Meeting on Friday March 30, 2012 for the purposes of receiving a report from staff and the Town Solicitor and provided the following direction:

That the Town Solicitor and staff be directed to meet with the owner and its solicitor to ensure that matters within the Town's Site Alteration and Fill By-law are addressed to the satisfaction of the Town and that a progress report be brought forward to the April Committee of the Whole meeting."

COMMENTS AND CONSIDERATION

Further to Council's direction a meeting took place with the Owner's representatives and their solicitor on Thursday April 5, 2012. The meeting was an open and informative discussion. The Town's representatives reviewed the various requirements included within the Town's Site

Alteration and Fill By-law and requested information as to how those matters would be addressed and the impacts on area residents mitigated.

The Owner has agreed to provide the Town on a "*without prejudice basis*" the following documents that would be provided in the normal course as part of the normal Town fill by-law process:

- A current copy of the plan that shows the estimated quantity of soil required, the grade and elevations
- Documents/evidence of compacting of the dirt and grading that supports the construction of a runway
- Report or plan demonstrating the direction of run-off
- A drainage plan if that has been prepared
- Details of the final appearance of the property, ie if non-runway lands to be seeded, location of berms, etc.

The Owner further agreed that a Town representative can attend the site to monitor the works being done upon notice being given of such attendance to the company's office.

The Owner is working with the Ministry of Transportation and the Ministry of the Environment to ensure that the requirements of these agencies are also addressed. Both Ministries have attended on site and meetings have been held with the Owner. The matters being addressed through these Ministries requirements and conditions cover off the majority of the requirements included in the Town's process related to a fill operation.

Use of the lands

The lands have been used as an existing registered aerodrome for a number of years. The Owner advises that the aerodrome use is continuing on the west part of the property. The former east west runway has been taken out of service and work is underway to construct a new north south runway. Once the new runway has been fully constructed and it is operational, the other existing north south runway will be upgraded. New hangars are to be constructed as well as a parking lot.

Ministry of the Environment (MOE) Comments

The MOE have made site visits to the property and have advised of the following:

The Barrie District and Central Region's Technical Support Section conducted a site visit on April 4, 2012 to assess concerns expressed by residents associated with fill and ground water/surface water quantity and quality. The Regional Hydrogeologist who attended the site is preparing comments that are anticipated to be completed by next week.

During the site visit MOE staff confirmed that the Owner has maintained the MTO barrier. The site foreman confirmed that no trucks have been on site since the MTO barrier was installed. During the visit it was noted that site grading and compacting was occurring. During the visual site visit the Officer did not find any indication of contaminated fill. The Officer did observe a drainage ditch (swale) but did not see any evidence of flowing water (run off collection).

Soil analytical reports have been provided to the MOE and are currently being reviewed by staff

in the Barrie District Office. Copies of the soil analytical reports will be forwarded to the Town of New Tecumseth.

Based on visual observations, no local groundwater impacts were identified.

MOE staff have advised that they will provide a further update after the soil analytical reports have been reviewed, and upon receipt of the Hydrogeologist's comments.

Ministry of Transportation (MTO) Comments

The MTO has provided the following comments:

A meeting took place with the fill operator on April 10th to discuss the necessary provisions and conditions which need to be in place to ensure the safe operation of the entrance.

The MTO staff are currently discussing a plan with the Owner. As part of this plan the following is being required:

1. Reduced permitted number of trucks to the site (300 max/day)
2. Reduced hours of operation: M-T 8am to 4pm, F 8am-3pm, Sat. 8am-2pm to avoid peak periods
3. The need for a traffic control plan, flagman on site, and paid duty police officers on site during operation (Discussions with OPP have taken place and they are in agreement)
4. Comprehensive measures to prevent tracking of mud and debris onto Hwy. 9 (These include paving the roadway within the site, an internal cleaning system, sweeping, etc).

A resubmission of the operation plan is required to be submitted. A meeting took place with the OPP on April 12 for their cooperation. The site will not be opened until the final plan is approved and all provisions are in place to the Ministry's satisfaction.

Further to OPP presence the Ministry will have staff on site to monitor operations and should conditions not be met or unsafe operations are observed the site will be closed.

It is anticipated that all issues may be resolved within a week, with the potential for the entrance to be reopened late next week.

These conditions and discussions will allow the entrance to re-open until May 20th. At such time as the entrance permit expires further submissions will be required to the MTO for a new permit. These will include a Traffic Impact Study and consideration for potential highway improvements if necessary to ensure the safe operation of the entrance.

Prior to providing approval to re-open the site, the Ministry will inform the Town of the date.

NVCA

NVCA staff attended at the property on April 12 and observed that the site access was closed off with a cement barricade across the driveway. NVCA staff took several pictures from the side of the road and observed that the creek crossing Hwy 9, in close proximity to the aerodrome site, showed no sign of visible impairment and that the water was running clear. As well, the creek, wetland and pond on the southern side of Hwy 9 also appeared to look unimpaired.

The roadside ditch immediately east of the creek has no signs of sediment build up and appears to look like a "normal" vegetated ditch. Further on in the ditch, there appears to be some build up, primarily gravels and sand, likely from the road shoulder (no flowing water in this ditch). There also appears to be some grading works that have taken place along the roadside.

Although a very small portion, in the south west corner, of this property is mapped as being regulated by the NVCA, the text of the regulation applies in this case. For this property in particular the mapping is over-estimated as the watercourse is located on the opposite side of Highway 9 and is located within an online pond. The erosion hazard associated with this watercourse would need to be addressed to protect the Highway before the hazard could ever reach this property through protection or hardening measures south of Highway 9. This property would never be subject to the forces associated with the erosion hazards.

The Oak Ridges Moraine

The site lies within the Oak Ridges Moraine which is implemented through the Town's Official Plan and Zoning By-laws (ORM). The effect of these provisions is to identify permitted uses and the manner in which they can be located on the property i.e. setbacks from woodlots and Environmental Protection Zones, maximum impervious surface etc. and would be identified through a Natural Heritage Evaluation.

As set out in the detailed case law analysis prepared by the Town Solicitor and included within this report the ORM provisions being Provincial and municipal legislation would not apply so as to interfere with or prevent the development and operation of an aerodrome site.

Noise and Tree Preservation

The Owner has advised that they will abide by the provisions of the Town's Noise By-law and the work conducted on the site will be in compliance with such By-law. They have indicated that there is no intention to impact on the woodlot other than any minimal impacts that may be required for the purposes of the operation of the runway.

Site Alteration and Fill By-law provisions

In summary, further to Council's direction and working in cooperation with the Provincial Ministries of the Environment and Transportation, the matters that would be addressed through a permit issued pursuant to the Town's By-law have been substantially addressed including:

- Ensuring no contaminated fill being placed on the lands
- Ensuring no hydrogeological impacts
- Ensuring no groundwater impacts
- Ensuring proper road safety, highway operations and safe access
- Ensuring proper road maintenance, cleanup and dust control
- Ensuring appropriate hours of operation for truck traffic
- Ensuring work is undertaken in compliance with the Town's Noise By-law
- Ensuring tree preservation measures are applied
- Ensuring that the site is appropriately vegetated upon completion

Provided that the Owner continues to work in a cooperative manner as has been evidenced in the past two week period, and carries out the work in compliance with the measures noted above, it appears that the matters that are required to be addressed pursuant to the Town's Site

Alteration and Fill By-law are being complied with and monitoring to ensure they continue to be in place.

Case law Analysis Respecting Aerodromes and Municipal Authority

The case law is currently unsettled on whether a municipality can enforce its Site Alteration and Fill By-law on an aerodrome site. Until the decision in *Scugog*, it was a well established principle that the creation of aviation facilities, including the construction of a runway, goes to the core of aeronautics and thus falls within federal jurisdiction. However, *Scugog* states (albeit it in *obiter dicta*) that merely regulating the manner in which site alteration is performed does not seriously impair the landowner from performing any site alteration required to enable a runway to be built. Therefore, the federal government does not have exclusive jurisdiction.

Any attempt to require the landowner to obtain a complex site alteration permit pursuant to the Town's Site Alteration and Fill By-Law will result in this issue being decided by the courts. It is unlikely, given the recently divided case law that it will be determined at a lower level of court and will likely have to reach the appellate courts to determine the matter.

Analysis

The federal government has jurisdiction over matters relating to air travel under its general power "to make Laws for Peace, Order and Good Government of Canada", s.91 of the *Constitution Act, 1867*, also known as the "POGG" power. Through a long line of cases, it is settled that the federal government has exclusive jurisdiction over the location and operation of airports and aerodromes.

The leading case on federal jurisdiction of aeronautics is the Supreme Court of Canada's decision in *Johannesson v. Municipality of West St. Paul* [1952, 1 SCR 292]. In that decision, landowners sought to operate an aerodrome in a municipality near Winnipeg. The municipality, pursuant to its powers under *The Municipal Act*, sought to regulate the location of aerodromes by limiting the areas where they could operate. The court held that aeronautics fell within federal jurisdiction and the provincial or municipal authorities could not regulate the location of aerodromes. Aerodromes were found to be an integral and vital part of aeronautics and the location of an aerodrome cannot be severed from that subject-matter so as to fall under a different legislative jurisdiction.

The Ontario Court of Appeal followed the *Johannesson decision in Re Orangeville Airport Ltd. v. Town of Caledon et al* (1976) 11 O.R. (2d) 546. In that decision, the municipality passed a zoning by-law that zoned the land agriculture and restricted the uses of the land. At the time of the re-zoning, the affected land was an operating airport licensed by the federal Department of Transport. In 1974, the airport proposed to construct five new hangars, which was approved by a representative of the federal Minister. The airport applied for building permits with the municipality, which applications were refused on the ground that the proposed buildings were not a permitted use under the zoning by-law. The Court of Appeal found that hangars, similar to the location of aerodromes, are a necessary and integral part of airports and thus fall within the exclusive jurisdiction of the federal government. The municipality did not have the jurisdiction to stop the construction of hangars through its zoning by-law and the by-law was read down so as not to apply to hangars.

Similarly, in *Quebec (Attorney General) v. Lacombe*, 2010 SCC 39, the Supreme Court of Canada struck down a zoning by-law amendment that attempted to regulate the location of aerodromes. The Court found that the purpose of the zoning by-law did not relate to land use matters or zoning issues, but was created solely for the purpose of regulating the location of aerodromes. As such, the by-law was outside the municipality's jurisdiction and was not valid. The case law is clear that where the main purpose or "pith and substance" of a provincial law is to regulate the location or operation of an aerodrome, such law is *ultra vires* and will be declared invalid.

What is less clear is the extent to which a municipality can enforce its by-law that has an ancillary or incidental impact on a federal undertaking. The Supreme Court of Canada in *Quebec (Attorney General) v. Canadian Owners and Pilots Association (COPA)* 2010 SCC 39, recently summarized the following process when determining the validity of a provincial law or municipal by-law:

1. What is the "pith and substance" of the law in question. This involves determining the purpose of the legislation as well as its effect.
2. Does the legislation fall within the provincial jurisdiction as determined by the *Constitution Act, 1867*.
3. If the "pith and substance" of the legislation falls within provincial jurisdiction, does the doctrine of interjurisdictional immunity apply so as to prevent the provincial legislation from applying to a federal undertaking.
 - a. interjurisdictional immunity applies if the legislation impacts on the protected "core" of a federal undertaking and impairs the federal exercise of its core jurisdiction. A provincial law impairs the core federal power only if its impact seriously or significantly trammels the federal power.

In the case at hand, the purpose of the Site Alteration and Fill By-Law is to regulate the placing or dumping of fill through a permit process. The pith and substance of the By-Law is to regulate fill and does not seek to directly regulate aerodromes. The regulation of fill falls within the provincial jurisdiction under s. 92(13) (property and civil rights) and s.92(16) (matters of a merely local or private nature). The municipality has the authority to pass the By-Law pursuant to s.142 of *the Municipal Act* and is thus acting within its jurisdiction in passing a By-law regulating the placing and dumping of fill.

The question then becomes whether the enforcement of the Site Alteration and Fill By-Law invokes the doctrine of interjurisdictional immunity such that the By-law impacts on the protected "core" of aeronautics and, if so, whether the By-Law's affect on the exercise of the protected federal power is sufficiently serious that the By-Law should be read down so as not to apply to the aerodrome site.

The courts have addressed the issue of interjurisdictional immunity with respect the impact of zoning by-laws, *Building Code* and, in the recent *Scugog* decision, fill by-laws on aerodromes and airports.

Zoning By-Laws

In a number of cases, the courts have analyzed the impact of zoning by-laws on the operation of aerodromes. In many cases, the zoning by-laws main purpose is to regulate land uses and only

have an incidental impact on aerodromes. However, the courts have held that zoning by-laws must be read down so that they do not apply to aerodrome sites. The application of a zoning by-law that prohibits the operation of an aerodrome is effectively regulating the location and operation of aerodromes, which is the exclusive jurisdiction of the federal government.

The Ontario Court of Appeal in *Venchiarutti v. Longhurst* (1992) 8 O.R. (3d) 422, found that a zoning by-law, enacted well before an aerodrome was in operation, was inapplicable with respect to the aerodrome site as the location of an aerodrome fell within the federal jurisdiction. The zoning by-law itself was valid, but interjurisdictional immunity applied to limit the application of the by-law on the aerodrome. The same finding was made in *Regional District of Comox-Strathcona v. Hansen et al* (2004) BCSC 220 and *Mullaney v. Red Deer (County No. 23)* (1999) ABQB 424. In both cases, the zoning by-laws were found to be aimed at and regulating the use of lands, and thus valid by-laws, but had an incidental impact on the location of aerodromes, which impaired the federal government's ability to regulate aeronautics. The principle of interjurisdictional immunity was invoked so that the zoning by-laws did not apply to aerodromes.

In one case, *R. in Right of B.C. v. Van Gool* (1987) CanLII 2756 (BCCA), the British Court of Appeal found that a zoning by-law was valid and effectively prevented an aerodrome from operating in a specific zone. This decision has been widely criticized by the Ontario Court of Appeal in *Venchiarutti* and was found to be decided in error by the Supreme Court of Canada in *COPA*. Thus, this decision cannot be relied upon.

The cases establish that zoning by-laws do not apply to aerodrome sites as the location of aerodromes goes to the core of aeronautics and thus falls exclusively within federal jurisdiction.

Building Code

The Ontario Court of Appeal had the opportunity to consider the application of the *Building Code* to the expansion of the *Pearson International Airport in Mississauga (City) v. Greater Toronto Airports Authority* (2000) CanLII 16948 (ONCA). Similar to the zoning by-law cases, the court found that the construction of buildings related to the airport go to the core of aeronautics and fall within federal jurisdiction.

In that case, the City of Mississauga attempted to enforce the *Building Code* and its development charges by-law for the redevelopment of Pearson Airport. The federal government's standard practice was to require all contractors building aviation facilities on federally-owned land to apply for a municipal building permit or tender an amount equivalent to the building fee as its "good neighbour policy". The City demanded payment of development charges of approximately \$14.5 million, which increased to \$47.3 million during litigation, as a condition to receiving a building permit. The court held that the City could not enforce the *Building Code* or its development charges by-law in relation to the construction of the airport facilities as to do so was an attempt to regulate the physical structure of airports and airport buildings which are an integral part of aeronautics.

The court, quoting an earlier Supreme Court of Canada decision, stated:

"However, it is clear that federal jurisdiction is not just celestial; it is also terrestrial. It extends to those things in the air and on the ground that are essential for 'aerial navigation' or 'air transportation' to take place".

The court summarized the doctrine of interjurisdictional immunity as follows: “if a provincial law affects a vital or essential or integral part of a federally regulated enterprise, then the otherwise valid provincial law does not apply to that enterprise”. As such, the *Building Code* and the *Building Code Act* do not apply to the construction of aviation facilities.

In another case, the British Columbia Court of Appeal found that the *Builders Lien Act* (the equivalent to the *Construction Lien Act* in Ontario) did not apply to the construction taking place at the Vancouver International Airport Authority (*Vancouver International Airport Authority v. British Columbia (Attorney General)*, 2011 BCCA 89). The legislative scheme was such that unpaid sub-contractors could register a lien against the Authority’s leasehold interest and possibly enforce a sale of the interest. The court found that the potential to impair the Authority’s ability to obtain financing (due to a registration of a lien) and a possible sale of the interest could end the Authority’s mandate to operate the airport and thus affected a core aspect of aeronautics.

The Supreme Court of Canada in *Construction Montcalm Inc. v. Quebec (Minimum Wage Commission)* (1978) CanLII 18 (SCC), discussed what constitutes an integral part of aeronautics, and thus within exclusive federal jurisdiction:

“The construction of an airport is not in every respect an integral part of aeronautics. Much depends on what is meant by the word “construction”. To decide whether to build an airport and where to build it involves aspects of airport construction which undoubtedly constitute matters of exclusive federal concern. That is why decisions of this type are not subject to municipal regulation or permission....Similarly, the decision of a future airport, its dimensions, the materials to be incorporated into the various buildings, runways and structures, and other similar specifications are, from a legislative point of view and apart from contract, matters of exclusive federal concern. The reason is that decisions made on these subjects will be permanently reflected in the structure of the finished product and are such as to have a direct effect upon its operational qualities and, therefore, upon its suitability for the purposes of aeronautics.” [emphasis added]

In this case, the provincial authority imposed the minimum wage legislation on employees employed by the airport and the Court found that such imposition did not affect the core of aeronautics and was within the province’s authority to impose the minimum wage.

The *Montcalm* decision is significant with respect to the issue of fill. The court articulated that the materials used to build runways go to the core of aeronautics and thus fall within federal jurisdiction. Based on this decision alone, the placing of fill to build the runway goes to the core of aeronautics and would fall within federal jurisdiction. However, this decision must be viewed in light of the recent decision in *Scugog*.

Land Fill

The Ontario Divisional Court’s decision in *2241960 Ontario Inc. v. Scugog* 2011 ONSC 2337, dealt with the issue of fill being brought onto property for the purpose of building a runway for a proposed aerodrome. The court found that the applicant was not engaged in the activity of aeronautics and then went on to find that even if the importing of fill was related to aeronautics, that the doctrine of interjurisdictional immunity does not prevent the application of the town’s fill by-laws. In short, the regulation of fill does not go to the core of aeronautics and thus falls outside the federal jurisdiction.

The facts are important to this case and as it relates to the Town's current situation. In *Scugog*, the applicant obtained a fill permit from the Township. The applicant brought a substantial amount of fill onto the property, as much as 400 trucks a day. The Township had concerns regarding the fill operation and issued a stop work order until its concerns were addressed. The concerns were addressed and the fill operation continued. A few months later, the Township received reports that soil samples taken did not meet the acceptable quality of fill. The Town revoked the fill permit. It was not until the permit was revoked that the applicant took the position that the fill was for the purpose of a runway for an aerodrome. The applicant continued its operation on the basis that the Township did not have jurisdiction to regulate aerodromes.

The court ultimately found on the evidence that the site was a commercial landfill operation and not for the purpose of a runway. In particular, the owner had told some government agencies that the property was for residential purposes and told other agencies that it was for an aerodrome. Also, the applicant did not tell the Township that the fill was for an aerodrome until after the permit was revoked. There was no existing aerodrome in operation at the time and there was no established intention to build an aerodrome. This is to be distinguished from the aerodrome property in New Tecumseth, which is an operational aerodrome licensed by the federal Department of Transportation.

The court found that the site was not in relation to aeronautics but was a commercial fill operation. Thus the Township's site alteration and fill by-law applied to the property. However, the court went further to find that even if the applicant was engaged in an aeronautic activity, the doctrine of interjurisdictional immunity does not prevent the application of the fill by-law. The court held that the Township's fill by-law does not prohibit the use of lands for an airport or the future construction of an airport on the site. The court distinguished the decisions in *Montcalm and the City of Mississauga* on the basis that regulating the manner in which the site alteration is to be performed does not seriously impair the landowner from performing any site alterations required to enable a runway to be built.

The *Scugog* decision was not appealed to the Ontario Court of Appeal so it is unknown if the Appellate court would concur with the Divisional Court's interpretation of interjurisdictional immunity as it applies to regulating fill on aerodrome sites.

There is a significant body of case law and authority from the Supreme Court of Canada that the creation of aviation facilities, which include a runway, goes to the core of aeronautics and falls within federal jurisdiction.

The *Scugog* decision is supportive of the Town's position that it can enforce its site alteration and fill by-law on the aerodrome site; however, it has yet to be tested by the appellate courts which have to reconcile this position with the positions taken in earlier decisions that the construction of a runway goes to the core of aeronautics thereby invoking the doctrine of interjurisdictional immunity.

The Town Solicitor has provided additional specific advice related to this matter in the attached confidential memorandum.

FINANCIAL CONSIDERATIONS

As set out in the Town Solicitor's memorandum.

Respectfully submitted:

A handwritten signature in cursive script, appearing to read "T. Caron", written over a horizontal line.

Theresa (Terri) A. Caron
Chief Administrative Officer

Attachments (1)

FEEHELY GASTALDI

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To: Mayor and Members of Council of the Town of New Tecumseth
From: Jay Feehely and Colleen Butler
FG client: Town of New Tecumseth
FG file No.: 8814JF11
Date: April 13, 2012

PRIVILEGED AND CONFIDENTIAL

LEGAL MEMORANDUM

We have considered the various legal options available to address the concerns raised regarding the aerodrome being constructed on Highway 9. There are four options available to the Town, which are detailed below.

1. Injunction to Stop the Fill Operation

The Town can bring a court application seeking injunctive relief to stop the fill operation on the basis that it is a commercial landfill and such use is not a permitted use pursuant to the Town's zoning by-law. If successful, the court would order that all fill operations cease and may order that the lands be remediated.

The risk in bringing such application is that the Town has to prove on a balance of probabilities that the site is a commercial landfill operation and that the fill is not for the purpose of the aerodrome. A significant amount of fill has been brought on site, which is consistent with a fill operation. However, the majority of the evidence supports a finding that the fill is for the construction of a runway and hangars. The fill is being compacted as it is brought onto the site and the property owners have provided plans demonstrating where the runway and hangars will be located and the fill is being placed as indicated in the plans. Most importantly, there is an existing aerodrome on site that is in operation and provides further support that the fill being brought onto the property is to expand an existing aerodrome.

On a balance of probabilities, it is likely that the court will find that the purpose of the fill is for an aerodrome facility and not for a commercial landfill operation. The courts have consistently held that the location of an aerodrome, including the runways and hangars, are the exclusive jurisdiction of the federal government and the municipality cannot control the location of an aerodrome through its zoning by-law.

It is our opinion that it would be extremely costly to proceed with an injunction to stop the fill operation with little, if any, benefit. The Town would be liable for its legal costs in the range of \$50,000 to \$100,000 and the property owner's legal costs as well as any damages for lost contracts for fill should there be a temporary interruption of the operation due to the court application.

2. Regulate the Fill through the Town's Site Alteration and Fill By-Law

The Town can bring a court application seeking an injunction to stop the property owner from importing fill until the owner has obtained a permit pursuant to the Town's Site Alteration and Fill By-Law. If we are successful, such application would not permanently stop the fill from being brought on site, but would temporarily stop the dumping of fill until the permit has been obtained.

In order to obtain a site alteration permit, the property owner would have to comply with the restrictions set out in the *Oak Ridges Moraine* Plan and the Town's *Oak Ridges Moraine* Conformity By-Law. Accordingly, the property owner would have to obtain a Natural Heritage Evaluation Study to determine if it is possible to dump fill on the property for a runway and hangars and, if so, the location for such facilities.

The risk in proceeding with this application is that the *Oak Ridges Moraine* Plan may potentially impact the location of the runway and hangars. The courts are clear that provincial and municipal authorities do not have the jurisdiction to control the location of aerodromes and their facilities. If the enforcement of the Town's by-laws would result in the Town mandating or controlling the location of a runway or hangars, the Town will be acting outside its jurisdiction. This would fall squarely within the zoning by-law cases where the courts found municipalities acted outside their authority when they used by-laws to either directly or indirectly control the location of aerodromes.

Seeking an injunctive relief, albeit on a temporary basis, is costly and the same concerns raised in Option 1 with respect to legal fees and damages for lost contracts would apply to this option.

3. Amend the Site Alteration and Fill By-Law

The Town could consider amending its current Site Alteration and Fill By-Law in one of two ways:

- (i) limit the amount of fill that is imported from outside the Town's municipal boundary; or
- (ii) limit the amount of fill that can be brought onto any site.

It would be prudent to give careful consideration to such action and any unintended consequences such amendments may have on property owners. The by-law would have to apply equally throughout the Town without targeting any one property owner. The amendments would impose significant restrictions on property owners' ability to import fill as required.

(i) Limit the Amount of Fill Imported from Outside Town's Boundary

Limiting the amount of imported fill from outside the Town's municipal boundary may ensure greater control over the quality of fill and may slow down the amount of trucks arriving on site each day. However, the negative impact is that there are other sites in Town that require fill. The Town has a limited supply of fill within the boundaries and there will likely be developers that will need to import fill. This amendment would restrict their ability to do so. In addition, if the Town does not have sufficient fill within its boundaries to meet the needs of the aerodrome site, the property owner will likely argue that the impact of the amendment is to prevent the creation of runway facilities, which is outside the Town's jurisdiction. The Town would then be defending a court application that it is attempting to regulate the location of aerodrome facilities, which is exclusively within the domain of the federal government. In addition, other potentially affected landowners who develop their lands may join in the attack on this by-law.

(ii) Limit the Amount of Fill that can be Brought onto any Site

An amendment to limit the amount of fill that is brought onto any site could be considered to strengthen the Town's by-law. However, if this amendment would result in preventing the construction of aerodrome facilities, the by-law is likely to be read down by the courts so as not to apply to the aerodrome site. The property owner would likely bring a court application to either strike down the amendment or have it read down so as not to apply to it on the basis that the amendment seeks to control the location of aerodrome facilities, which a municipality cannot do.

The Town's Site Alteration and Fill By-law is a very thorough and effective by-law. If either of the suggested amendments applied to the aerodrome site, we would anticipate that any court application by the property owner would be successful with the result that the amendment(s) would either be struck down or read down so as not to apply to the aerodrome and therefore would have no impact on this situation. In addition, the Town may be liable for any court costs and damages incurred by the property owner.

4. Negotiate with the Property Owners

The next option is to negotiate conditions with the property owner that would provide the Town with the protection and regulation it would normally have under the Site Alteration and Fill By-law without requiring the owner to submit to the application.

This option has the benefit of the Town being kept informed of the progress of the development, confirming the quality and source of the fill and ensuring the fill is being placed in accordance with the plans. The property owner is currently cooperating with the Town and is providing plans and materials to support the aerodrome construction. This cooperation will be lost if the Town proceeds with Option 1 or 2, which will result in the parties proceeding to court.

The risk is that the Town cannot insist or demand any of the information it would require in a permit process. However, the Town at all times reserves the right to proceed to court should the property owner cease cooperating or the evidence more clearly establishes that the fill is for purposes other than an aerodrome facility.

We recommend proceeding with Option 4 as it provides the Town with the greatest amount of involvement and communication without the cost and risk of litigation. Any attempt to control the location of the aerodrome facilities will result in litigation. There is substantial court authority stating that a municipality cannot control the location of aerodromes. The Town would have great difficulty in successfully arguing for the operation to be shut down or to control the location of the runway and hangars. Should this option be pursued, we recommend that the Town's Order to Discontinue Activity be put in abeyance on a without prejudice basis for the Town to reinstitute the Order should the property owner cease cooperating with the Town.