

**COMMITTEE OF THE WHOLE MEETING  
MAY 1, 2017**

**REPORT #ENG-2017-27**

**TOTTENHAM AIRFIELD (TAC)  
FILL AND SITE ALTERATION PERMIT REVOCATION - UPDATE**

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**RECOMMENDATION**

That Report #ENG-2017-27 be received;

That confidential direction be provided to the Town Solicitor on the next steps in the enforcement of the Site Plan Agreement.

**OBJECTIVE**

The purpose of this report is to update Council on the revocation of the Fill and Site Alteration Permit for the Tottenham Airfield (TAC) following their direction from the April 24, 2017, Council Meeting.

**BACKGROUND**

The Supreme Court of Canada has made two recent decisions which reaffirm that the federal government has the exclusive jurisdiction over aeronautics. These decisions examined whether or not specific provincial and municipal legislation impaired core federal power over aeronautics. In general, these decisions confirmed that the Government of Canada has exclusive authority over aeronautics and controls the location and operation of aerodromes. Provincial legislation and Municipal by-law may be applied when the impact does not interfere with the core Federal authority over the aerodrome.

The two decisions are known as:

- Quebec (Attorney General) vs Canadian Owners and Pilots Association (COPA)
- Quebec (Attorney General) vs Lacombe

Some of the key findings of the decisions are as follows:

- The Government of Canada has exclusive jurisdiction over aeronautics and has established a legal framework through the Aeronautics Act and Canadian Aviation Regulations (CAR), which sets safety and security requirements for the civil aviation industry among other things;
- Aerodromes are governed by a permissive regime that does not require prior federal authorization for the establishment/location of aerodromes;
- The exclusive jurisdiction over the location of aerodromes facilities has been repeatedly affirmed by Canadian Courts. Federal jurisdiction encompasses not

only the regulation of the operation of aircraft and aerodromes but also their location;

- In the decision noted above, the Supreme Court of Canada has recognized that a degree of jurisdictional overlap is inevitable. In cases of multiple jurisdictions' laws, compliance with these laws might be enforced by those jurisdictions;
- The Aeronautics Act may not grant immunity from compliance with other applicable federal, provincial, territorial or municipal legislation. As mentioned in the COPA Supreme Court decision, the test is whether the provincial law impairs the federal exercise of the core competence;
- In cases of valid and applicable jurisdictional overlap of laws compliance with provincial, territorial and municipal non-aeronautics legislation might be enforced by those jurisdictions.

Transport Canada, had issued a letter which outlined their position with respect to the development of Aerodromes (Airfields). In general, Transport Canada controls aerodromes with respect to operation and location, and recommends that proponents be aware of Provincial and Municipal regulations provided they do not interfere with the location or operation of the aerodrome.

Some key points from that letter are provided as follows:

- Recent amendments to the Aeronautics Act were made allowing Transport Canada to improve the efficiency and transparency of construction and operation in Canada;
- The Department has new authorities to prohibit the development of an aerodrome if there is a risk to aviation safety or if it is not in the public interest;
- The amendments require proponents to consult with stakeholders before developing an aerodrome or making significant changes to an existing one;
- Transport Canada encourages aerodrome operators to be aware of other jurisdictions, which might include federal or provincial legislation or municipal by-laws, where the elements in question are not integral to the operation of an aerodrome; and
- Transport Canada remains committed to working with Canadians to support aerodrome development in a way that considers the safety and economic impact on the community and aviation at large.

Council approved the execution of the Site Plan Agreement (SPA) pursuant to By-law 2016-061. The SPA executed with TAC is not a typical development agreement and was negotiated to deal specifically with the issues that the Municipality can enforce. Text with respect to actions that the Municipality can take have been tailored to be in keeping with the authority provided by the federal and provincial governments and the works on the site.

The objectives of the SPA are outlined in Section 4 of the Agreement and state the following:

- Maintain confidence in the Town and its Residents in the airfield improvements at the property which includes the importation of soil;
- Minimize disruptions to the Residents and the general public from the activities in the airfield improvement both on the property, the adjacent properties, Highway #9 and the construction entrance to the Property from Highway #9;
- Ensure the importation and placement of soil is managed in an environmentally responsible manner and in accordance with the *Environmental Protection Act*;
- Ensure that all soils imported to the Property is in compliance with and meets the standards set out in Schedule "1" BMPP, which includes following all appropriate protocols and soil testing; and
- Limit the fill importation of the airfield improvement to the development of the runways and associated facilities in accordance with the design set out in the Development plan.

The intent of the SPA is to address items which do not interfere with the construction of an Airfield. It intends to address issues such as quality of soil that is imported and placement of that soil, in addition to off-site impacts. Issues which relate to the location of runways, taxiways, hangers, and other associated airfield operations are not controlled by the Agreement.

In keeping with the SPA, the Fill and Site Alteration Permit was issued upon the execution of the SPA and is valid for a period of three years from the effective date of the Agreement, being May 1, 2016.

Under the SPA, TAC is solely responsible to ensure there are no off-site impacts to the neighbouring properties and community. The Agreement addresses off-site impacts such as drainage, dust, mud tracking, waste, and acknowledges that the Town's Noise By-law will apply. Access issues to the site are governed by the MTO Entrance permit and the conditions in the permit are generally more restrictive than the SPA.

The SPA sets out Protocols and Best Management Practices Plan (BMPP) to ensure that the soils placed on the site will meet to objectives of Section 4 of the Agreement, in an environmentally responsible manner. In general, TAC is required to provide monthly soil audits undertaken by their Qualified Person (QP), which has been identified as Peto McCallum LTD. (PML). The audits are to be completed by TAC's QP and are peer reviewed by the Town's Consultant WSP Canada Inc. (WSP) to ensure compliance with the BMPP and good engineering practices.

A Ground Water Monitoring Program complete with a Hydrogeological Assessment was identified as incomplete at the time the SPA was executed. This program has been progressing and the series of twelve (12) monitoring wells have been developed as of February 2017. A first round of water samples was completed at the beginning of March 2017, and initial results indicated detections for several parameters, including several metals, as well as toluene, but no exceedances of the Table 2 SCS. The detections were generally on the order of 10% or less of the Table 2 SCS with the notable exceptions of

sodium and chloride. Most of the metals detections were reported in two wells, which are the up-gradient background monitoring wells. This suggests that many of the metals detections could be the result of naturally occurring minerals in the subsurface. Although the Town has received the first round of sampling results, the report is still incomplete as details on the well drilling program, geology, ground water elevations, and confirmation of ground water flow directions are still to be documented and submitted. This information is required to confirm that the well drilling program is sufficient and will not need to be expanded.

Staff have been working with TAC since the execution of the Agreement to ensure compliance with the SPA and to minimize off-site impacts. There has been progress on some aspects such as the regular submission of preliminary information on soil testing results. Initially, TAC was reluctant to provide any information until the reports were finalized. Staff now receives preliminary information on sample findings and are able to provide comments through our Consultant WSP on the progress of remediation to ensure it is in keeping with the BMPP as outlined in the Agreement. There are still challenges in working with TAC on the timely submission of information and the finalization of reports. Staff continue to follow up regularly with TAC to have them complete works and finalize reports.

A monthly meeting program has been established between Town and TAC Staff and the appropriate Consultants are in attendance. The scheduling of these monthly meeting has improved the communication between the groups and fostered a better understanding of issues from both sides. These meetings have contributed to advancements on the site.

The TAC site has experienced two significant breaches of sediment in the north western corner of the property, these occurred in the spring of 2016 and 2017. The land owners downstream of this breach have had their lands and the ephemeral stream impacted by the sediment deposited. Staff from the MOECC and the Town attended the site in 2016 on a number of occasions and directed TAC to take action. TAC did take some actions in 2016 to start to address the issue and worked with the MOECC, Town Staff and the Residents to establish a remediation plan. The finalized plan could not be implemented due to the time of year and weather conditions. Following the breach in 2017, TAC has taken further actions to address the situation and a revised remediation plan is being developed. Site meetings have taken place in 2017, and TAC is to submit a sampling plan by May 3, 2017, to outline the scope and frequency of soil samples to be taken on the impacted lands. Depending on the results of the sampling, a remediation plan will be developed and the works are scheduled to take place in June of this year. The impacted Residents were in attendance at the site meeting where this was discussed and are aware of this timeline.

Council at their meeting of March 20, 2017, passed resolution 2017-037 which states:

*And further that Staff be directed to provide semi-annual update reports to Council with regards to the matter.*

It is intended that the first semi-annual update will be provided following the finalization of the Ground Water Monitoring Program. Staff will continue to work with TAC to have this report finalized and have the information presented as quickly as possible.

On April 24, 2017, Council at their meeting passed resolution 2017-066 which states:

*BE IT RESOLVED THAT the confidential additional information from the Town's Solicitor be received;*

*AND FURTHER THAT the deputation of Michael Fleischmann, Loopstra Nixon Barristers and Solicitors, LLP representing his client Alex Steimle and the deputation of Drew Creswicke be received;*

*AND FURTHER THAT staff be directed to revoke the fill permit of the Tottenham Airfield Corporation (TAC) until borehole testing has been undertaken to the satisfaction of the Town.*

#### **COMMENTS AND CONSIDERATIONS**

In keeping with the direction of Council, Staff have issued a letter to TAC to provide them with Notice that the Town of New Tecumseth has revoked the Fill and Site Alteration Permit No. 1-2016. A copy of the letter has been included as Attachment No 1 to this report.

The next steps in the enforcement of the revoked permit are outlined in the Town Solicitor's letter included as Confidential Attachment No. 2. As this letter deals with potential legal proceeding, it has been included as a confidential attachment.

#### **FINANCIAL CONSIDERATIONS**

There are no cost implications on the receiving of this report. Financial impacts will be dependent on the direction Council provides to the Town's Solicitor with respect to the next steps to be taken for the enforcement of the agreement.

Respectfully submitted:



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Rick Vatri, C.E.T.  
Director of Engineering

Report #ENG-2017-27, May 1, 2017

Attachments:

- Notice to Revoke Fill Permit 01
- Confidential Letter from the Town's Solicitor

**Approved By:**  
Blaine Parkin, P. Eng.

**Department:**  
CAO

**Status:**  
Approved - 27 Apr 2017



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April 26, 2017

File: D11-TE-040 (Leg/Gen)

**VIA FAX #416-447-9798 & Email: [john@baileyca.ca](mailto:john@baileyca.ca)**

Tottenham Airfield Corporation  
c/o Mr. John Bailey  
220 Duncan Mill Road  
Toronto, Ontario  
M3B 3J5

Dear Mr. Bailey:

**Re: Tottenham Airfield Corporation (TAC);  
Town of New Tecumseth/  
Fill and Site Alteration Permit #1-2016**

The purpose of this letter is to provide you with notice that Council for the Town of New Tecumseth has revoked the above-noted permit pursuant to its motion passed at the Council Meeting of April 24<sup>th</sup>, 2017. In accordance with the motion, a copy of which is attached, Staff has been directed to revoke the permit until bore hole testing has been undertaken to the satisfaction of the Town.

There have been a number of underlying concerns that have resulted in the Council motion including the following:

1. The failure to provide sufficient and proper drainage and sediment control of the property which has resulted in at least two (2) events where there have been substantial sediment breaches from the TAC property to neighbouring properties to the north. The breaches to neighbouring properties has been serious, resulting in significant soil being deposited on the neighbouring properties and causing damage to the property of the neighbours. This is contrary to Section 13 of the Site Plan Agreement dated April 21, 2016, and in particular, fails to meet the best management practices required under Section 2.5 of the Development Plan attached as Schedule 4 to the Site Plan Agreement.

2. The ongoing failure to provide timely reports identifying compliance issues with the BMPP and supporting development documents.
3. The recent decision to continue with runway filling without completing the Phase 1B berm along the adjoining residential property.
4. The importing of material containing PCB's from Commercial Soil Treatment Facilities that permits the acceptance of PCB's in any amount, contrary to the Site-Specific Parameters Protocol set out in Schedule "A" of Schedule 1 of the Site Plan Agreement (page 21).

These deficiencies and breaches of the Agreement have undermined the confidence of Council in the ability of TAC to meet its obligations under the Site Plan Agreement. As a result, the revocation of the permit has been made in conjunction with conducting bore hole tests in order to ensure that the quality of the soil meets the standards of the Site Plan Agreement.

In revoking the permit, Council has not terminated the Site Plan Agreement. It is the position of the Town that the Site Plan Agreement continues to be a binding Agreement between the parties. As a result, the Town acknowledges the continuing applicability of Section 17 of the Site Plan Agreement relating to either technical disputes or interpretive issues. The Town continues to be willing to meet and also to consider mediation or arbitration as a solution to the outstanding concerns

Regards,



Rick Vatri, C.E.T.  
Director of Engineering

cc: Via email  
John Tidball, Miller Thomson LLP  
James Feehely, Feehely Gastaldi Barristers and Solicitors  
Brad Allen, MOECC Barrie  
Blaine Parkin, Town of New Tecumseth

Encl: Council Resolution 2017-066



**CW-1(2) TOTTENHAM AIRFIELD CORPORATION (TAC)**

2017-066 Moved by Councillor Harrison McIntyre  
Seconded by Councillor Beattie

BE IT RESOLVED THAT the confidential additional information from the Town's Solicitor be received;

AND FURTHER THAT the deputation of Michael Fleischmann, Loopstra Nixon Barristers and Solicitors, LLP representing his client Alex Steimle and the deputation of Drew Creswicke be received;

AND FURTHER THAT staff be directed to revoke the fill permit of the Tottenham Airfield Corporation (TAC) until borehole testing has been undertaken to the satisfaction of the Town.

CARRIED.

**FEEHELY, GASTALDI**  
Barristers and Solicitors

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April 27, 2017

**VIA E-MAIL**

**Privileged & Confidential**

The Mayor and Members of Council  
Town of New Tecumseth  
10 Wellington Street East  
Alliston, Ontario  
L9R 1A1

Dear Mayor Milne and Council:

***Re:Town/Site Alteration and Fill Agreement  
Town/Tottenham Airfield Corporation (TAC)  
Our File No. 8814JF11***

I am writing as a follow up to the motion passed by Council in this matter at its meeting of April 24<sup>th</sup>, 2017. My primary concern is to seek instructions from Council as to enforcement of the motion. While Council has revoked the permit, it has not addressed the manner in which the revocation is to be enforced.

The revocation of the permit is likely to result in one of two actions being taken by TAC. First, it may choose to simply ignore the revocation of the permit and continue to import fill on the basis that the Town's jurisdiction arises from either the Court cases or the terms of the Site Plan Agreement. In the event of the continued importation of fill, the only avenue open to the Town to prevent the continued importation would be to apply to the Court. The parameters of municipal jurisdiction were established in the *Scugog* and *Burlington* cases.

On that basis, the Town will face difficulty. Under the Court cases, the Town only has jurisdiction to address the quality of fill but does not have the authority to stop an undertaking that is under Federal jurisdiction. However, there is no evidence to date upon which the Town can rely to prove that the overall soil quality fails to meet the standards of the MOECC. Up until the time of entering into the Site Plan Agreement of April 21, 2016, the site had been under the primary jurisdiction of the MOECC which had the initial soil importation reviewed by a hydrologist and in addition, conducted a review of soil quality issues. At no time did the MOECC find any basis for terminating the operation.

Subsequent to our Agreement being put in place, the importation of soil has been closely monitored in accordance with the protocol set out. There has been one test

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showing an exceedence of the Ministry standard for PCB's for Table 2 which was remediated by removal. There have been, from time to time, other exceedences detected through our supervisory process, but mitigated in accordance with the BMPP. As a result, it will be difficult to obtain a Court Order to prevent the fill activity on the basis of soil quality alone.

Alternatively, the Town would be entitled to rely upon the Site Plan Agreement to obtain a Court Order to prevent the fill activity. The Site Plan Agreement has broader protection provisions and enforcement mechanisms. However, it will be particularly difficult to rely upon the terms of the Agreement since the motion to revoke the permit failed to follow the protocol set out in Section 27 of the Site Plan Agreement. In order to prevent the fill activity, the Court application would essentially be in the nature of an injunction and the Court requires an applicant seeking that equitable remedy to have acted entirely appropriately and in accordance with any agreements by which it is bound. A party seeking equity must come to Court with what is described as "clean hands".

The second alternative for TAC would be to take the position that the Town has breached the Agreement and actively seek a Court remedy. I have already received some indication that TAC will litigate this matter on the basis of the Town's breach of the Agreement in terminating the permit without following the protocol set out in the Site Plan Agreement.

In litigating the matter, TAC may follow one of two alternate routes. It may continue to import the soil while the litigation takes place, or it may cease the importing activity until the Court case is resolved. In either case, substantial Court costs will be involved and likely assessed against the Town. However, in the second case, if the Town was found to have improperly revoked the permit, the Town could also be responsible for the lost revenue and other damages, as well as an extension of the time to complete the project.

As part of this current process, Council may wish to consider contacting Transport Canada. In December 2014, an amendment was made to the *Aeronautics Act* to allow Transport Canada more authority to prohibit the development of an aerodrome if there is a risk to aviation safety or if it is not in the public interest. Given the concerns expressed by the local ratepayers, it may well be worthwhile to engage Transport Canada to assess whether or not this particular operation is in fact in the public interest, given the number and nature of the complaints.

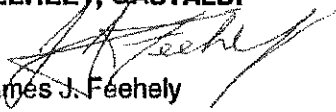
In the event that TAC chooses to litigate, that litigation is likely to come fast and furious. As a result, Staff needs to be in a position to have direction from Council in terms of determining the next steps that will inevitably have to be taken one way or the other. In order to allow us response time I instructed staff to also serve the Notice of Revocation by prepaid registered or ordinary mail as provided for in Section 37 of the Site Plan Agreement. In my opinion this was the most appropriate method for giving proper service in this case. As a result the Notice will be effective on the fifth business day after it has

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been mailed.

I would be pleased to address these issues with Council.

Yours very truly,  
**FEEHELY, GASTALDI**



James J. Feehely

JJF/jm