

**Local Planning Appeal Tribunal**  
Tribunal d'appel de l'aménagement  
local



**ISSUE DATE:** May 22, 2018

**CASE NO(S):** PL171254

The Ontario Municipal Board (the “OMB”) is continued under the name Local Planning Appeal Tribunal (the “Tribunal”), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

**PROCEEDING COMMENCED UNDER** subsection 41(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Referred by:	1804072 Ontario Inc.
Subject:	Site Plan
Property Address/Description:	450 Myrtle Road West
Municipality:	Town of Whitby
OMB Case No.:	PL171254
OMB File No.:	PL171254
OMB Case Name:	1804072 Ontario Inc. v. Whitby (Town)

**Heard:** March 29, 2018 in Whitby, Ontario

**APPEARANCES:**

**Parties**

**Counsel**

1804072 Ontario Inc.

John Alati\*

Town of Whitby

Christina Kapelos\*

**DECISION DELIVERED BY RICHARD JONES AND ORDER OF THE TRIBUNAL**

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[1] A site plan application was made to the Town of Whitby (“Town”) by 1804072 Ontario Inc. (the “Applicant”/“Appellant”) to permit site alteration on an eroded portion of lands known municipally as 450 Myrtle Road West (“subject property”). The fill is intended to improve the agricultural viability of the affected area only as there is no

development proposed on the eroded portion which is part of an active farm operation consisting of approximately 155 acres. The subject property is surrounded by agricultural uses although nearby residential lots are also found to the south and west of the subject property in the Hamlet of Ashburn.

[2] Because the proposed filing is construed as a site alteration activity within a Landform Conservation Area-Category 2 of the Oak Ridges Moraine, the Town required a site plan application. Furthermore, although the Town's Planning Department supported the application with conditions, Town Council denied the application.

[3] The total area affected by erosion consists of approximately 121,395 square metres located within the south-central portion of the subject property nearby the barn. To effect remediation, the Applicant's engineering report, submitted in conjunction with the site plan, and resubmitted several times thereafter as consultations with approval authorities progressed, involved the importation of approximately 19,212 cubic metres of clean fill which would be spread and compacted over the affected area. This new fill would yield a subsequent finished grade of 2 percent ("2%") appropriate to the cultivation of soy, wheat and corn, which are currently grown on the subject property.

[4] The engineer responsible for the report, Chris Follett P. Eng., testified at the hearing and was qualified to provide opinion evidence. Mr. Follett stated that the Applicant had previously attempted to stabilize the eroded section via planting initiatives, but that technique had failed to halt the erosion. In his view and in accordance with his engineering report (tab 8 of Exhibit 1) the best method to reinstate the section's agricultural potential was to regrade the eroded section by raising the elevation to allow for a 2% grade. The engineer was of the view that a failure to achieve an average elevation of 2% would also prompt the resumption of erosion after five years. His report also addressed construction control measures regarding access to and from the subject property and municipal road cleaning obligations pertinent to truck activity during the fill operation.

[5] Alex Lam, the Manager of Development Engineering and Environmental Services for the Town, whom was qualified to testify on behalf of the Town, stated that in his view a fill volume of 7,500 cubic metres would suffice for the purposes of erosion control, a measure which would still achieve a reasonable level of flatness in relationship to grade although Mr. Lam admitted to having a more limited range of experience with regard to active farm operations. Mr. Lam's estimate of 7,500 cubic metres would require an estimated 750 truckloads of fill, versus 1,900 truckloads required for the larger fill volume of 19,212 cubic metres recommended by Mr. Follett.

[6] Despite the discrepancies regarding the respective fill volumes, the Board also heard testimony that both estimated volumes fell well short of the 100,000 cubic metre figure which the Town considers to be a "large" fill amount. Furthermore, in addition to Planning Staff support, the Board was also advised that the Central Lake Ontario Conservation Authority, and the Regional Municipality of Durham Public Works Department had recommended the application with conditions. The issue of conditions will be reviewed in the final paragraphs of this decision.

[7] Marcus Gagliardi on behalf of the Applicant provided planning testimony. Mr. Gagliardi is a professional planning consultant and his evidence was uncontested.

[8] The planner opined that Provincial Policy Statement (2014) and the Growth Plan for the Greater Golden Horseshoe (2017) both encouraged the protection of agricultural lands and improvements related to those lands.

[9] With regard to the Oak Ridges Moraine Conservation Plan 2017 ("ORMCP"), the area proposed to be remediated fell within Category 2 of the Landform Conservation Area and as such, the site plan complied completely with policies that required maintenance of significant landform features, limiting disturbance to not more than 50% of the total site area and limiting the portion of the net developable area of the site that has imperious features to not more than 20% of the total site area. The planner testified

that the Durham Regional Official Plan mirrored these same policies and as such, Regional officials did not express concerns with the site plan application.

[10] With regard to the Town's Official Plan, the planner opined that this document also carries forward the policies of the ORMCP and confirms that site plan control will be required to control grading and the alteration of the natural landscape. The planner also confirmed that the Town's Zoning By-law No. 5581-05 zones the subject lands ORM-A, a category which permits the permitted use. The planner stated in his final statements that the application conforms with prevailing planning policy and sound planning practice.

[11] Several Ashburn residents made statements in opposition to the site plan application. Although appeals relating to s. 41 (of the *Planning Act*) matters concern only the Applicant and the Approval Authority, counsel for the Applicant nevertheless advised the Tribunal of his client's consent in this regard and the Tribunal subsequently allowed statements from several of those residents in attendance at the hearing..

[12] In this regard the statements from Jane Ling, John Burgess and Robert Nixon are summarized in the following bullets:

- The truck traffic associated with the larger fill volume will be hazardous to the health and safety of their small hamlet which is located to the west of the subject property. In their collective views, the trucks will travel too quickly and access the subject property where site distance constraints will impose an unsafe hazard to passing motorists.
- As the Applicant had initiated filling activity without benefit of a permit in 2016, there was considerable doubt that the Applicant would adhere to good practices if site plan approval were forthcoming. The Tribunal heard from Brian Booth, a by-law enforcement officer with the Town who had issued an order to comply in late 2016 in association with unauthorized fill activity, but

Mr. Booth also stated that top dressing activity undertaken 2017 had complied with municipal regulations. Mr. Booth testified under subpoena on behalf of the Applicant.

- There was considerable concern that the fill would not be clean which would accordingly expose the Ashburn community, which consists of approximately 120 residences, to considerable harm despite assurances that the fill had been certified as clean material from an approved City of Markham source. Ashburn water supplies are privately sourced from individual wells, which intensified the vulnerability of the community to unclean fill in the neighbours' view.

## **FINDINGS**

[13] The Tribunal finds that the weight of evidence is overwhelmingly in favour of the application with regard to its consistency and conformity to provincial, regional and local policy. Moreover, there is no dispute whatsoever in the Tribunal's opinion that this is a *bona fide* farm operation which the fill operations are intended to improve.

[14] The planning evidence was uncontested as noted and it was also very clear from the exhibits made available to the Tribunal, that the site plan application was in turn favourably supported by the agencies and departments which typically respond to applications of this kind.

[15] The truck movements will no doubt cause some distress to Ashburn residents. However as the hamlet exists within a much larger agricultural and rural community which will convey impacts wholly consistent with this rural character, Ashburn residents will experience impacts of a distinctly non-residential category from time to time. From a policy perspective, it has been clear for over a decade, that planning policy does not allow residential values and considerations to preempt and constrict agricultural operations in situations where the two land uses co-exist. Within agriculturally-

designated areas, it is farms, rather than residences, which are accorded a higher level of protection and the Tribunal finds that the site plan application complies with this priority.

### **CONDITIONS OF APPROVAL**

[16] The Tribunal heard from the Appellant's counsel in his final submission that several fees associated with the fill activity were unfair as described in Tab 14 of Exhibit 1, but there was no evidence provided in testimony which examined or critiqued the appropriateness of the fees and the associated conditions of approval. The Tribunal accordingly ordered counsel for both parties to make submissions in this regard, which were subsequently made available to me through the case management staff within one week of the hearing event.

[17] In the review of these submissions, counsel on behalf of the Applicant, believed several fees recommended by the Planning Department were either too high and/or unwarranted for various considerations associated with several of the approval conditions, and counsel for the Town argued that the duration of fill activities be limited to 15 days which was not a condition pertinent to the Planning Department Report, nor did this suggested time limit reflect testimony heard during the hearing.

[18] Notwithstanding these submissions, the Tribunal will rely on the conditions proposed by the Planning Department which originate from the recommendations of the various commenting agencies advising the Planning Department. The Tribunal relies on the soundness of those recommendations, which were presumably made pursuant to existing policy.

### **ORDER**

[19] The Tribunal orders that the site plan application by 1804072 Ontario Inc. with regard to lands known municipally as 450 Myrtle Road in the Town of Whitby be

approved in accordance with the final engineering plans prepared by Chris Follett P. Eng. requiring the deposit of 19, 212 cubic metres of clean fill.

[20] That the conditions of approval prescribed in the Planning Report dated October 16, 2017, specifically, Attachment #7 ( of the planning report), are approved and will be accordingly enforced by way of a site plan agreement to be executed by the parties within 60 days of the issuance of this order.

*“Richard Jones”*

RICHARD JONES  
MEMBER

If there is an attachment referred to in this document,  
please visit [www.elto.gov.on.ca](http://www.elto.gov.on.ca) to view the attachment in PDF format.

**Local Planning Appeal Tribunal**

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