CITATION: Town of Georgiana (Corporation) v. Blanchard, 2014 ONSC 5414
NEWMARKET COURT FILE NO.: CV-14-119699-00
And **FILE NO.:** CV-14-119836-00
DATE: 20140918
CORRECTED DATE: 20140918

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: The Corporation of the Town of Georgina, Applicant

AND:

Marvin Blanchard and 1124123 Ontario Limited, Respondents

RE: Marvin Blanchard, 1124123 Ontario Limited and Baldwin 33, Inc., Applicants

AND:

The Corporation of the Town of Georgina, The Ministry of Natural Resources and Forestry and The Ontario Aggregate Resources Corporation, Respondents

BEFORE: THE HON. MR. JUSTICE P.H. HOWDEN

COUNSEL: R.A. Biggart, Counsel for The Corporation of the Town of Georgina

R. Cuervo-Lorens, Counsel for Blanchard, Baldwin 33, and 112

S. Valair, Counsel for the Ministry of Natural Resources and Forestry

I. Fischer, Counsel for The Ontario Aggregate Resources Corporation (TOARC)

HEARD: September 12, 2014

Corrected Decision: The text of the original Endorsement was Corrected on September 18, 2014 and the description of the correction is appended.

ENDORSEMENT

[1] There are two applications before me which all counsel agree will have to be heard together. Now before the court for disposition is the motion by the Town of Georgina ("the Town") restraining on an interim basis 1124123 Ontario Limited ("112") and Mr. Blanchard from placing or dumping fill, or causing a site alteration on lands which were formerly a pit under the *Aggregate Resources Act*, R.S.O.1990, c.A8 as amended, contrary to a duly enacted by-law of the Town in that it is being done without the approval of the Director under the by-law.

[2] The subject of the motion and eventually the applications is a large property known as the Smith Blvd. property, located in a rural area of the Town and owned until recently by 112. Marvin Blanchard is the principal of this company. The property was formerly used and licensed as a pit; the pit license issued in 1991 and the pit ceased operation in 2008. According to Mr. Blanchard, approximately twenty-one acres of the 144-acre parcel of land have been used for extraction since the 1970s. Due to progressive rehabilitation, fifteen acres remained to be rehabilitated as of 2008.

[3] Recently, Mr. Blanchard has been importing fill into the Smith Blvd. property for the purpose of rehabilitating the land to agricultural use, according to him. The applications and the interim motion deal with whether or to what extent Mr. Blanchard and 112 can import fill onto the Smith Blvd. property purportedly for purposes of rehabilitating the pit land pursuant to a site plan contained in the pit license.

[4] On August 19, 2014, on the first return of the motion by the Town for an interim restraining order, such order was put in place adjourning the hearing until September 12, 2014 on the following terms to apply pending return of the motion:

(i) there is to be a limit of truck loads per day, five days per week, Monday to Friday, between 8:30 a.m. and 4:30 p.m. depositing fill to a maximum cumulative total of forty trucks per week;

(ii) the Town is to be provided with the duplicates of the certificates issued to the qualified person who conducted the tests of the area of fill at the original site to demonstrate compliance with *MOE* guidelines for agricultural standards;

(iii) all fill to be brought into the subject property is to be kept in identified stock piles; and

(iv) the Town shall have a right of inspection at the premises Monday to Friday, 8:30 a.m. to 4:30 p.m.

[5] On September 12, 2014, these matters came before me for hearing of the applications and to consider further the motion by the Town of Georgina for an interim restraining order. All counsel have found now that the applications are not ready for hearing. Further affidavit material was filed by the Ministry of Natural Resources, the Town and Mr. Blanchard. In addition to the original supporting affidavit by Michael Baskerville, Engineering Manager of the Town of Georgina ("the Town"), the Town filed a second affidavit of Mr. Baskerville in reply to Mr. Blanchard's evidence; the Ministry of Natural Resources filed the affidavits of Catherine Douglas, Aggregate Technical Specialist (formerly Aggregate Resources Officer) of the Regional Operations Division, Ministry of Natural Resources and Forestry ("MNRF") who has held a number of technical positions prior to the present post within the Ministry to 1980, and of Margaret Allan, Director of the Realty Management Branch of the Ministry of Economic Development and

Infrastructure ("MEDIE"); and Mr. Blanchard and 1124123 Ontario Limited ("112") filed a supplementary affidavit of Mr. Blanchard.

[6] The Town has established that By-law No. 2011-0044 (Reg-1) is, and has been, in force since its passage by Council on April 26, 2011 and applies to the subject land. It is called the Site Alteration By-law. By its terms, no one is permitted to place or dump fill or alter the grade of land or cause a site alteration of former extraction land within the Town without a permit issued by the Director under the by-law. Neither 112 nor Mr. Blanchard has applied for or obtained a permit. The Town therefore asks that the permissive terms of the earlier restraining order come to an end and Mr. Blanchard and 112 be ordered to stop importing and placing fill on the Smith Blvd. land pending the hearing and disposition of the applications.

[7] The pit license was revoked by the Minister of Natural Resources and Forestry. That revocation was appealed by Mr. Blanchard but on May 23, 2014, he withdrew his appeal. Therefore the pit license was revoked on May 23, 2014.

[8] The evidence from Catherine Douglas is that the pit license for the Smith Property includes a site plan for final rehabilitation. The site plan indicates what is permitted on an individual property. She states, "If the site plan is silent regarding a specific type of activity, then that activity is not permitted for that particular site." (Douglas aff., para 4)

[9] Ms. Douglas states that a license is required to operate the site and to perform rehabilitation including final rehabilitation. The site plan in this case calls for stock-piling of overburden and topsoil for future rehabilitation, slopes of a grade less than 3:1, and replacing of overburden and topsoil that were stripped from the land. In her opinion, neither the notice of revocation nor the aggregate site plan permit importation for rehabilitation purposes, and that there is enough material on site to complete the rehabilitation as set out in the plan.

[10] Margaret Allan states that the Smith Blvd. property is registered in the name of 112. That company was dissolved in June 13, 2005 and its Charter revoked. While it may be revived with the consent of the Minister of Finance, it remains dissolved and the Smith property ownership is vested in the Crown in right of Ontario. See the Business Corporations Act, 1990, c.B.16, s. 244.No application has been made and therefore at present and for some time in the past, the Crown owns and has the right to control the Smith Blvd. property. The Minister of Economic Development and Infrastructure has control of the subject land through the definition of "public works" as including any real property. *Ministry of Infrastructure Act,* S.O.2011, c.9, s.11. She states that Mr. Blanchard does not have permission from the Crown to access the property at this time or to cause fill to be placed on it.

[11] Mr. Blanchard has produced certificates showing that the fill he is importing is of good quality. He says that he is under a time line to rehabilitate this land within 36 months and that good quality fill is not always available as it is now. In his view, there is not enough native material on site to rehabilitate as he feels he is required to do. His opinion is

supported by a person from whom he sought a professional opinion (Ex. G). Mr. Kennedy states:

> After viewing the site…, it is my professional opinion that this site should be restores/rehabilitated back to a "finished elevation" that matches the elevations of the surrounding properties , but with an end result that benefits the landowner's rights to produce cash crops.

[12] To accomplish this objective, importation of fill is necessary. But is this the objective of the site plan? This is a major difference of opinion from Ms. Douglas of the MNRF and no doubt one of the reasons that counsel want cross-examinations to occur before the hearing of these applications. It appears from Mr. Blanchard's and his expert's idea of rehabilitation, and from the evidence of Ms. Douglas, that he may be trying to do more than the fairly simple site plan requires.

[13] Mr. Blanchard asks to be able to continue to truck fill into the property at an increased rate of 150 truckloads a week. He says this is required to meet the time line. His counsel points to a notice sent by the MNRF. It gave notice of the revocation of the pit license. It says that rehabilitation must proceed "immediately". The consequence of not doing so is, according to this notice, is that TOARC may enter and carry out the rehabilitation at Blanchard's expense (Blanchard rff., para. 17, ex. D).

[14] The well-known three-part test for considering an application for an interlocutory injunction or restraining order is to be applied here. Each counsel, other than Ms. Fischer, addressed it. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Second, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Third, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusing of the remedy pending a decision on the merits.

1. Serious Question to be Tried

[15] Counsel for Mr. Blanchard submitted that there are essentially three serious questions to be tried. First, the issues between his client and the MNRF are serious:

(i) does the site plan's silence on importation of fill mean it is allowed as needed to make the rehabilitation work, or, as Ms. Douglas says, is the site plan intended to be prescriptive in nature, allowing only the material and activities expressly set out?

(ii) is imported fill required at all for the rehabilitation as planned by MNRF to be carried out? If so, the consequence is trucks loaded with fill using the Town's roads as part of the haul route, and what level of truck deliveries daily or weekly should be allowed?

(iii) is the Town's site alteration by-law either invalid or inoperable as being in conflict with provincial law requiring rehabilitation of Smith Blvd.?

[16] The third cause depends on whether there is an operating conflict between the Town by-law and the requirements of the *Aggregate Resources Act* and the site plan, and that, in turn, rests in part on the answers to issue (i). The first two issues are serious to both the Ministry and the Town and its inhabitants, and to Mr. Blanchard. At present, the case for Mr. Blanchard and 112 on the inoperability of the Town's by-law is weak in fact and in law.

2. <u>Irreparable Harm</u>

[17] Mr. Blanchard's counsel submits that, although the owner-company is dissolved now, it can be revived given some time for Mr. Blanchard to get his affairs in order and if he cannot carry out the required rehabilitation in time within 36 months as he sees the time line, TOARC will do it at his expense The Ministry has given him notice that the time for rehabilitation is immediate. If he cannot continue to import fill at an increased rate, he will not make it.

[18] I have nothing before me other than the revocation notice to indicate any time line other than within a reasonable time. No order has been made by MNRF under s. 48(2). That is the provision that allows the Minister to set a time deadline. He has not done so. There is no time line imposed on Mr. Blanchard other than the time required for him to revive the company and to pay the property tax arrears which are more than three years behind, as indicated by the registration of the certificate of tax arrears by the Town.

[19] As of now, the Crown owns and controls the subject land and the Ministry with authority over this land, as Ms. Allan swore, has given no permission to Mr. Blanchard to enter onto it or to place fill on it. To ignore the Crown's interest in this land means that more and more fill will be allowed and, should Mr. Blanchard not repossess it and revive the owner-company, the resulting clean-up will be at public expense, both the province's and the Town's expense. As well, to ignore the requirements of the Town by-law where there is a process to permit site alteration in an orderly way and it has not been used by Mr. Blanchard, and to not take into account the controlling interest of MEDIE in this property and the Town's by-law is to undermine the authority of the law. I have no evidence that Mr. Blanchard would suffer some hardship if he cannot import fill onto this property for three – six months (i.e. to the next two sittings of this court for trials and hearings), part of which time is winter when he himself says a supply of good quality fill is not available anyway. There is no business involved here on which he and others are dependant for continuance of the fill. If financial loss was the concern, the Town's undertaking to pay damages should the order later to be found in error is confirmed and will be in place.

[20] In my view, there is no time line or likelihood of penalty in place that would allow TOARC to take over rehabilitation here, and this court can control any prejudice of that sort by the terms of the order. Counsel for TOARC has assured me that she is not aware

of any prejudice facing Mr. Blanchard if the order delays shipment of more fill. The applicant does not face irrevocable harm if he is delayed for the time required for the issues to be properly tested and tried. The major harm and prejudice in my view is facing the Town and the province and their tax-payers for cleanup and rehabilitating the site if Mr. Blanchard continues to pile up fill which may well be unnecessary, cannot reassert ownership through his company, cannot pay up his taxes, and leaves the remaining work to be done at public expense.

3. The Greater Harm

[21] For the reasons given, on the evidence before me, I find that the Town and the province and their respective publics will face the greater harm. Nothing for Mr. Blanchard rides on his importing fill for the next three - six months and consequently through the winter. There is no evidence he would suffer economic harm or loss of his ability to rehabilitate in due course if the law permits him to do so. That requires the determination of these applications and the pre-hearing processes required by counsel.

Conclusion

[22] I will consolidate the order with my endorsement at the hearing of the motion. Based on my findings on the evidence before me at this time, it is ordered that:

(a) an interim and interlocutory order issue restraining the Respondents, 1124123 Ontario Limited and Marvin Blanchard, from contravening the provisions of By-law No. 2011-0044 (REG 1) of Georgina (Georgina Site Alteration By-law), in connection with a certain property municipally known as 6017 Smith Blvd., Georgina (Smith Blvd.), and more particularly, restraining the Respondents 1124123 Ontario Limited and Marvin Blanchard from contravening the following sections of the Georgina Site Alteration By-law:

i. Section 2(a) of the Georgina Site Alteration By-law, which prohibits any person from placing or dumping any fill, removing any peat, top soil or otherwise altering the grade of land by causing, permitting or performing any form of site alteration on land within the Town without the owner first receiving a permit issued under the Georgina Site Alteration By-law by the Director (as defined in the said By-law).

ii. Section 2(i) of the Georgina Site Alteration By-law, which prohibits any person from causing, permitting or performing a site alteration on lands which were previously licenced or permitted and used as a pit or quarry under the *Aggregate Resources Act*, R.S.O. 1990, chapter A8, as amended, (or any predecessor legislation thereof), or otherwise, whether such lands have been rehabilitated or not.

(b) an order abridging the time for service of the within motion or alternatively, an order validating the service of the within motion.

(c) TOARC and the MNRF shall not count the period during which this order is in force against, or to the prejudice, of Marvin Blanchard and 112 and their right to rehabilitate the said property, nor shall either take any action to enforce rehabilitation during the period of this order.

(d) The applications in files 14-119699-00 and CV-14-119836-00 shall be heard together.

(e) The applications are adjourned for hearing to the sittings at Newmarket commencing November 17, 2014, and this order shall continue in force until disposition of the applications or further order of this court.

[23] Costs shall be reserved to the judge hearing the applications or the trial, if the application process is converted to a trial process.

HOWDEN J.

Date: September 18, 2014

September 18, 2014 – Correction:

1. Para. (c) now reads: The applications are adjourned for hearing to the sittings at Newmarket commencing November 17, 2014, and this order shall continue in force until disposition of the applications or further order of this court.