

**CITATION:** The Corporation of the Township of Uxbridge v. Talbot, 2014 ONSC 1276  
**NEWMARKET COURT FILE NO.:** CV-12-108679-00  
**DATE:** 20140228

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
)  
THE CORPORATION OF THE )  
TOWNSHIP OF UXBRIDGE ) C. Loopstra and D. Earthy, for the Applicant  
)  
Applicant )  
)  
– and – )  
)  
WILLIAM MONTGOMERY TALBOT )  
AND GOODWOOD NURSERIES LTD. )  
)  
Respondents )  
) P. Sutherland, for the Respondents  
)  
)  
)  
)  
) **HEARD:** February 21, 2014

2014 ONSC 1276 (CanLII)

**HEALEY J.**

**Relief Sought**

- [1] The Corporation of the Township of Uxbridge (the “Township”) seeks declarations that the respondents are in contravention of its Zoning and Site Alteration by-laws, together with injunctive relief to remedy those contraventions.
- [2] The Township also seeks an order declaring the respondents to be in contempt of an interlocutory order of May 2, 2012, with sanctions.
- [3] The relief sought by the Township is in respect of activities conducted at or upon two properties located municipally at 374-376 Regional Highway 47, and 388 Regional Highway 47, both in Goodwood, Ontario, hereafter referred to as the “Goodwood Property” and the “Talbot Property”, respectively.
- [4] It is the position of the Township that on the Talbot Property, the respondents have performed site alterations that have left half of the property unsuitable for agricultural

purposes, and currently use the property for storage of vehicles, equipment and debris from an excavation and haulage business operated by a related company.

[5] On the Goodwood Property, the Township asserts that the respondents have illegally deposited fill on a former farm field, and have converted another former farm field into an “industrial soil screening and mixing operation”. The Township also states that the respondents store construction materials and debris on the Goodwood Property and use it for a waste disposal business.

### **Issues**

[6] The respondent William Talbot (“Talbot”) purchased the Talbot Property in July 1994.

[7] The respondent Goodwood Nurseries Ltd. (“Goodwood”) purchased the Goodwood Property in November, 2007. The issues to be decided by this court are:

- i) Has the Township met its onus of proving that the conduct complained of by the Township is not in conformity with the by-laws in question?
- ii) If yes, have the respondents met their onus of proving that the defence of legal non-conforming use applies to either property as of its date of acquisition?; and
- iii) Has the Township met the onus of proving that the respondents are in breach of the injunction imposed by the interlocutory order?

### **Uncontested Evidenced**

[8] The dates of acquisition of the two properties are not in dispute, nor are the identities of the registered owners. Talbot is an officer and director of Goodwood.

[9] Talbot also operates a business under the name Quality Haulage and Farming Ltd., as evidenced by that company’s corporate profile report, as well as the purchase order which is Exhibit B to Talbot’s affidavit sworn April 22, 2011.

[10] Pursuant to the Township’s Zoning By-law No. 81-19, as amended (the “Zoning By-law), both the Goodwood Property and the Talbot Property are zoned Rural (RU). Permitted uses in the RU zone include single family detached dwelling house, conservation, forestry and reforestation uses, a farm or nursery farm and greenhouse associated therewith, and a farm produce retail sales outlet operated on a temporary and seasonal basis, provided that the majority of such produce offered or kept for sale is a produce of the farm on which such retail sales outlet is located.

[11] The former owner of the Goodwood Property was David Gribble. He and his parents owned the property for a period of 35 years before it was purchased by Goodwood. It is Mr. Gribble’s evidence that they operated a roadside stand for sale of fruits and vegetables grown on the land, which expanded to a larger retail building that the Gribbles constructed on the

Goodwood Property. Then in the 1970s they developed a garden centre with greenhouses, from which they grew and sold perennial and annual plants, and garden centre products such as pots, fertilizers and soils.

[12] After the greenhouses were built in the 1970s the Gribbles stored topsoil, compost, various animal manure and mulch on the property, both on the north and south halves of the property. In the earlier years this was used by the Gribbles to make potting mix for their own purposes, and they composted vegetation from their greenhouse business. Later they began to sell bagged soil and compost, but sold it to customers in bulk, starting in approximately the 1990s. This occurred particularly in the last few years leading up to the sale of the Goodwood Property to Talbot, in conjunction with a landscaping business that the Gribbles began in 2003.

[13] When the Gribbles made their own triple mix for their nursery or personal landscaping or possibly even to sell in bagged form, they had only two to three truckload of material brought in per year in the early years. When pre-purchased bagged medium was sold, starting in the 1980s, Mr. Gribble Sr. stopped his own screening of triple mix. When the landscaping business began in 2003, they kept piles of the individual material such as manure, mulch and soil but had only one to two truckloads on site at any time. Generally, these materials were stored behind the greenhouses. The topsoil pile was one to two truckloads in size, which the Gribbles began to accumulate in the late 1990s. The river stone pile was generally one truckload in size. Before the landscaping business began, the size of the topsoil sold in bulk to customers on sight was just a few truckloads per year, sold in small individual quantities. Overall, bagged product of gardening material such as mulches, triple mix and small aggregate made up the bulk of the nursery-related product sold, until the landscaping business began.

[14] The Gribbles kept one or two tractors on the Goodwood Property, one being a rear-loader, and a skid steer loader used in the landscaping business. They also eventually purchased a dump trailer after 2003, and a small dump truck in 2006. Aside from bringing in equipment for specific purposes such as levelling the ground for work space or digging trenches, they kept no other equipment on the property.

[15] A compost pile was located behind the treeline on the north half of the property, and another between the greenhouses. After the landscape business began in 2003, compostable material from brought in from work sites and placed on that compost pile.

### **The Township's Evidence**

[16] The Township's first dealings with Talbot were in connection with a Fill Agreement dated December 10, 2001 for the Talbot Property, issued pursuant to the Township's previous Site Alteration by-law. The 2001 Fill Agreement expired on October 1, 2004, and it is the Township's evidence that the work on Talbot property was never completed, and that Talbot is contravention of that Agreement.

- [17] An Order Directing Compliance was issued on May 22, 2009 requiring Talbot to take steps to comply with the 2001 Fill Agreement, and to cease the alteration of the existing grade and to cease dumping or placing fill on the Talbot Property other than in accordance with the Fill Agreement. The Township states that Talbot is in non-compliance with that Order.
- [18] The evidence of the Township is that approximately one-half of the Talbot Property has been stripped of topsoil and is in an unfinished state, unsuitable for agricultural purposes, as a result of the incomplete work undertaken pursuant to the expired 2001 Fill Agreement. It also asserts that the Talbot Property is being used as a contractor's yard or for outside storage.
- [19] The Township's position is that prior to its acquisition by Goodwood, the Goodwood Property was being used primarily for agricultural purposes, other than the greenhouse and nursery operation established by the Gribbles at the southeast corner of the Goodwood Property.
- [20] The Township states that in June, 2010 Talbot advised its Chief Building Official, Brian Pigozzo, of his intention to bring in and spread four inches of topsoil on the field west of the garden centre for purpose of planting trees for a nursery. Talbot denies that he said so. On a subsequent site inspection that month, Pigozzo observed that the topsoil had been spread in this area exceeding a depth of 20 centimeters (8 inches) and was up to a depth of two to three feet in some areas.
- [21] In 2011, the Township's evidence is that large amounts of peat and soil were stockpiled on the Goodwood Property. Commencing in February, 2012, the activities on the Goodwood Property substantially increased. On a daily basis, trucks were observed to deposit fill on the Goodwood Property in the area to the west of the greenhouses and fronting on Highway 47<sup>1</sup>. In an affidavit sworn March 21, 2012, Andre Gratton, who is the Manager of Municipal Law Enforcement for the Township, indicated that such activity was continuing on an almost daily basis up to the date of his affidavit. This information was based on complaints received, as well as his own personal observations. On some days, three or four dump trucks were seen to be lined up on Regional Highway 47 in front of the Goodwood and Talbot Properties waiting to dump their loads on the Goodwood Property.
- [22] It is estimated by Gratton that the grade on the Goodwood Property to the west of the greenhouse buildings has been raised by approximately four to five feet, consisting of hundreds of truckloads of fill. It is further estimated that approximately one-third of the Goodwood Property has been taken out of agricultural production. The Township relies on a series of photographs taken in February and March, 2012 depicting the extent of the fill operation on the Goodwood Property.

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<sup>1</sup> The Township refers to this area as the "Illegally Filled Area" in their evidence.

[23] Mr. Gratton deposed that he has a number of discussions with Talbot concerning the “illegal fill operation” and site alterations. He deposed that he was advised by Talbot the area being filled is being created in order to establish a triple mix plant and soil screening operation.

[24] An environmental report from Fisher Environmental Ltd. concluded that the imported soil on the Goodwood Property had been deposited to a depth ranging from 0.7 to 1.8 metres. The imported soils also complied with Ministry of the Environment soil standards. These measurements convert to 2.3 to 5.9 feet, which supports Gratton’s estimates in part.

[25] On December 13, 2012, Gratton conducted a site inspection of the two properties for the purposes of determining whether the respondents were complying with the injunction order. At the Goodwood Property, Gratton observed the following:

a. In the designated area near the nursery buildings, there was/were:

- i. Approximately 40-50 truckloads of a peat type material stockpiled;
- ii. Approximately 5-10 truckloads of screened soil material stockpiled;
- iii. Approximately 5-10 truckloads of large rocks stockpiled; and
- iv. A row of concrete storage bays containing various types of soil materials.

b. In the designated area to the north of nursery buildings, there was/were:

- i. A pile of 30-40 tires;
- ii. An L-shaped soil berm measuring approximately a 100 feet in one direction and approximately 200 feet in the other, 30 to 40 feet high, which he estimated to be comprised of approximately 100 truckloads of fill;
- iii. On the inside of the L-shaped berm, a stockpile of approximately 20 truckloads of sandy type soil;
- iv. Several other piles of soil and peat material;
- v. Another pile of 20-30 tires;
- vi. Piles of garbage, including office furniture;
- vii. Piles of construction debris;
- viii. Piles of “grubbing” including branches and root systems;

- ix. Piles of debris containing concrete, bricks, construction fencing, and irrigation tubing;
- x. Several vehicles and a commercial office trailer;
- xi. Several clothing donation bins; and
- xii. A pile of 50-100 truckloads of mulch or woodchips.

c. Outside of that designated area, there was/were:

- i. A pile of manure;
- ii. A pile of tires; and
- iii. A collection of 8 roll-off disposal bins.

[26] Gratton estimates that as at December 13, 2012, the respondents were stockpiling between 2,000 and 3,000 cubic metres of soil, fill and stones on the Goodwood Property, based on his knowledge that an average dump truck load holds approximately 10 cubic metres.

[27] On the Talbot Property, Gratton observed the following:

- a. Three-four piles of gravel;
- b. Approximately 8-10 commercial vehicles including two dump trucks;
- c. One flatbed trailer;
- d. Four excavators;
- e. Four bulldozers;
- f. A pile of 10-20 tires;
- g. A commercial truck with machinery on the trailer;
- h. 20-30 pickup trucks with plows;
- i. A watering truck;
- j. Three boats;
- k. Several salting trucks;
- l. Gas tanks; and

m. Several earth moving vehicles.

[28] Photographs taken by Gratton on the Goodwood and Talbot properties on the date of his inspection, some of which contain measurements, provide further evidence of his observations.

[29] In June 2013 another municipal law enforcement officer by the name of Aneta Prytula observed a dump truck dumping soil on the Goodwood Property near the greenhouse. Later that same day she attended with Pigozzo to conduct an inspection. At that time she observed a dump truck bearing the name "Quality Haulage" dumping soil on the Goodwood Property near the greenhouse. Photographs were taken by Prytula on that date which show:

- a. A dump truck dumping soil in a pile near the greenhouse;
- b. A conveyor belt anticipated to be used for moving, screening and mixing soil; and
- c. Several other piles of screened soil materials to the north of the larger pile of topsoil.

[30] Prytula estimated that the height of the large piles of soil near the greenhouse were at least 35 feet, and believed to contain more than a 100 truckloads of soil. This estimate does not include the smaller piles of screened soil material. Since each truckload contains 10 cubic metres of soils, she therefore estimated that the respondents were storing more than 1,000 cubic metres of soil materials on the Goodwood Property at that date. Based on the observations made by Prytula that day, the Township takes the position that Talbot is operating a triple mix plant on the Goodwood Property.

[31] The Township relies on the affidavit of Brian Pigozzo sworn January 21, 2014, which speaks to the efforts of the respondents to obtain a fill permit from the Township for the Goodwood Property. On or about January 29, 2013 he met with Talbot at the Goodwood Property and went to the field area on the property near Highway 47 where fill had been previously deposited. Talbot told him that he would like to bring in an additional 30 loads of fill to complete the grading of the northwest corner, and then cover the entire area with 12 inches of topsoil. Pigozzo told Talbot that any fill permit issued by the Township would have to include the fill already deposited without a permit in addition to any further fill that Talbot wanted to bring in. He was told that because the quantity of the fill already deposited exceeded 1,000 cubic metres, according to the Site Alteration by-law the fill permit would have to be approved by Council. He told Talbot that the permit application must also include a grading plan completed by a professional engineer or surveyor, which must indicate the location and amount of fill as well as the grades. It is the position of the Township that Talbot has never provided all of the information required under the Site Alteration by-law for the processing of his application. During the course of his attempts to obtain the fill permit, Talbot first advised the Township that he did not know how much fill had been deposited, which was required information. Later, on December 4, 2013 when he came into the Township office to sign the application, he told Pigozzo that he had previously brought in

about 240 truckloads of fill without a permit. When it was again conveyed to him that Council would need to approve the permit since more than a 1,000 cubic metres of fill had been brought onto the site, Talbot then changed his mind to say that he had only brought in 88 truckloads of fill.

### **The Respondents' Evidence**

- [32] Talbot notes that no further actions were taken by the Township with respect to the Talbot Property after issuing the order of June 30, 2009. He agrees that the terms of the Fill Agreement were not fully executed. Talbot criticizes the Township for dealing with this matter some three years after the Order Directing Compliance was issued, and eight years after the Fill Agreement lapsed.
- [33] Talbot argues that the Goodwood Property is a nursery. He deposed that the stockpiling of the material such as peat moss, topsoil, triple mix and manure for sale to the public has always occurred, but its location changed from being at the side of the property to now being located at the front of the property. He indicates that this was a deliberate move for marketing purposes, so that the material could be easily seen from the highway. His evidence is that the sale of landscaping materials such as triple mix and topsoil are crucial to a garden centre. Attached to his initial affidavit sworn April 22, 2012 is a copy of a contract which Talbot stated that the nursery was obligated to fulfill. Dated January 15, 2012, it is a purchase order contract from TBG Landscape Inc. to Quality Haulage and Farming, requesting delivery on a daily basis between April 1 to November 15, 2012 the following material: 120,000 cubic yards of unscreened peat loam; 40,000 cubic yards of bulk wood products; 10,000 cubic yards of triple mix planting soil composed of one-part peat, one-part manure and one-part topsoil. The machinery is utilized for the nursery business, and that a screener is used to create the material sold to the public. Talbot notes that that machinery is a necessary component of completing the contracts which the nursery business has entered into.
- [34] With respect to the Talbot Property, he disagrees that he is in breach of the 2001 Fill Agreement. Between the date of the compliance order of May 22, 2009 until commencing this application, the applicant has taken no action to enforce the order or to hold him accountable for any alleged breach of that order.
- [35] Talbot indicates that he has a business that does construction related work, and has been in such business for over 40 years, but denies that the property, which includes his residence, can be characterized as a "contractor's yard".
- [36] Talbot denies that topsoil has been spread in areas exceeding 20 centimetres, and further disputes the allegation that fill was brought in which raised the west part of the Goodwood Property by four to five feet. He does not dispute that trucks were bringing in material for sale at the nursery, including sandy till, which is used as a base on which the stockpiled materials sit in order to prevent contamination. He disputes the evidence of the Township that trucks were depositing the soil products on a daily basis. He denies that any illegal fill operation has been carried out on the Goodwood Property.

[37] Talbot also disputes that he is running a “triple mix plant and soil screening operation”, as alleged by the Township. He has deposed that a triple mix operation and soil screening has taken place on the property for decades to facilitate sale to the public, as an incidental part of the nursery business.

[38] With respect to Gratton’s observations made on December 13, 2012, Talbot points out that there are many errors and that the piles of material such as soil or peat are much smaller than estimated by Mr. Gratton. It is unclear to this Court whether the observations being made by Talbot with respect to the state of the property are as of the date of his affidavit, September 19, 2013, or as at December 2012. No pictures or measurements are attached to support his assertions.

[39] With respect to his fill application for the Goodwood Property, Talbot indicates that he appeared before Council in order to request approval for a fill permit but his application was denied because the Township had lost or misplaced his application form. He alleges that Council denied his request to fill out another application. As a result of this experience, he retained a lawyer, Ian Wisdom, to apply for the fill permit. He alleges that his application continues to be delayed due the lack of cooperation from the Chief Building official, Pigozzo.

[40] It is Mr. Wisdom’s evidence that he has not received any cooperation from the Township and that he essentially believes that the Township is stonewalling Talbot’s fill permit. It is his evidence that the Township has expanded the scope and requirements of the fill permit application, and that it has always been his client’s intention to cooperate with the Township to deal with the issue of depositing fill at the front of the Goodwood Property in an amicable way.

### **Interlocutory Order**

[41] On May 2, 2012 the parties entered into an interlocutory injunction order (the “injunction”). The terms of the injunction prohibit the respondents from:

- 1) Placing or dumping fill, removing topsoil or otherwise altering the grade of the properties and by causing, permitting or performing any other form of site alteration on the properties and operating or permitting to be operated on the properties a triple mix plant or the storage or sale of soils from the properties.
- 2) The order would not prevent the storage and sale of topsoils, compost, manure, peat moss, gravel, sand and mulch in connection with an existing nursery business, provided that the storage and sale is limited to an area designated in Schedule A, and shall not exceed an aggregate of 1,000 cubic metres at any one time for all of the materials.

- 3) The order would not prevent the respondents from applying for a permit pursuant to the Site Alteration by-law to permit a greater quantity of material than a 1,000 cubic metres, but the order would remain in effect until such permit was granted.

## Analysis

### **Zoning By-Law Contraventions**

[42] As previously indicated, both the Talbot and Goodwood Properties are zoned Rural. Section 4.4.1 of the Zoning By-law provides that permitted uses in the rural zone allow for the following non-residential and accessory uses:

- b) Non-residential uses
  - i) Conservation, forestry and reforestation;
  - ii) A farm or nursery farm and greenhouse associated therewith;
  - iii) A farm produce retail sales outlet operated on a temporary and seasonal basis provided that the majority of such produce offered or kept for sale is the produce of the farm on which such retail sales outlet is located;
  - iv) A home occupation in accordance with provisions of the Section 5.10 hereof and a home industry use in accordance with the provisions of Section 5.30 hereof;
  - v) A public park; and
  - vi) A public use in accordance with the provisions of Section 5.18 hereof.
- c) Accessory Uses
  - i) Uses, buildings or structures accessory to any of the foregoing listed permitted uses are permitted provided such are in accordance with the provisions of Section 5.1 hereof.

### Goodwood Property

[43] The evidence of Talbot is that his activities on the Goodwood Property are characterized as a “nursery business” and therefore would have to be captured under s. 4.4.1(b)(ii) of the Zoning By-law as a “farm or nursery farm and greenhouse associated therewith”. On the Talbot Property, he claims to be using it for residential use only, but does office and paperwork for his contracting business from his home.

[44] “Farm” is defined in the by-law as

[...] any farming or agricultural use and includes, but is not limited to, apiaries, aviaries, berry or bush crops; breeding, raising or training of horses or cattle; commercial greenhouses, lands devoted to the hatching, raising and marketing of chickens, turkeys or other fowl or game birds, animals, fish or frogs, lands used for grazing; flower gardening; field crops, goat or cattle dairies; growing, raising, picking, treating and storing of vegetable or fruit produce grown on the lands, mushroom farms, nurseries; orchards; riding stables; raising of sheep, goats or swine, tree crops; market gardening; bee keeping, wood lots; a slaughter house if and only for animals raised and slaughtered on the lands for the personal use only of the farmer, and such other uses or enterprises as are customarily carried on in the field of general agriculture. "Farm" shall include a single-family dwelling house and buildings and structures, such as barns and silos, which are incidental to the operation of the farm. Barns and silos for the purpose of this By-law shall be classified as principal or main buildings or structures.

[45] "Nursery Farm" is not a defined term in the by-law, but "nursery" is defined in the Oxford Dictionary as "a place where young plants and trees are grown for sale or for planting elsewhere".

[46] "Accessory use" is defined at s. 1.2 as "[...] a use customarily incidental and subordinate to, and exclusively devoted to the main or principle use or activity of the lot, building structure or excavation and located on the same lot as such main or principal use, building, structure or excavation.

[47] On the Goodwood Property the evidence satisfies me that the use made of the property since at least 2012 has been that of a storage ground for materials used in gardening and landscaping, such as soil, peat, manure, river stones, various other aggregates, and triple mix (collectively "soil products"). The soil products are transported from off-property, and either mixed on the Goodwood Property in the case in the triple mix, or placed there for sale either to residential clients or, as shown by the purchase order from TBG Landscape Inc., to commercial landscapers. It is an activity, I find, being carried on either together with or incidental to Talbot's other company, Quality Haulage and Farming Ltd., rather than being incidental to any type of farming or nursery activities of the type that were carried on by the Gribbles. The fact that the purchase order from TBG Landscape Inc. is made out to Quality Haulage and Farming rather than Goodwood Nurseries Ltd., together with the use made by Talbot that company's trucks for moving such material as observed by Prytula, supports the conclusion that a haulage operation is underway. What is occurring on the property is the supply of goods not produced by any farming activity, namely the supply of gardening and landscape products. There is no evidence that Talbot or Goodwood are growing, producing or selling nursery stock or any living plant material or produce, which was the livelihood of the Gribbles. Even after beginning their landscaping business in 2003, it is my understanding of the evidence that the Gribbles continued to operate a nursery.

[48] Accordingly, there is no activity being carried out that falls within the non-residential uses permitted by Section 4.4.1(b)(ii) of the Zoning By-law, nor any of the other non-residential uses outlined therein.

[49] Furthermore, on the Goodwood Property, the respondent's use including the storage of waste piles, construction debris, clothing donation and/or waste bins, and tires is in contravention of the Zoning By-law.

[50] The respondents argue that the activity engaged in, which they characterize as being the storage of soil product and mixing of triple mix, is a legal non-conforming use. The respondents take the position that they have expanded that use; Goodwood's business simply expanded beyond that operated by the Gribbles, yet the use remains consistent.

[51] In order to prove a legal non-conforming use, a party must establish that: a) the use of the land, building or structure was lawful at the time of the enactment of the relevant zoning restrictions; and b) the previously lawful use has continued thereafter: *Feather v. Bradford West Gwillimbury (Town)*, 2010 ONCA 440, 2010 CarswellOnt 3986 (Ont. C.A.) at para. 27: *Planning Act*, R.S.O. 1990, c.P.13, s. 34(9)(a).

[52] In considering the legal non-conforming use exemption, the court is to look at "[...] the essential purpose for which the property is being used to determine if the change of activities is beyond the scope of that purpose": *Watts v. Benvenuti*, 2005 CanLII 63810 (Ont. S.C.J.), para. 35, aff'd 2006 CanLII 17920 (Ont. C.A.). If a subsequent owner merely expands a pre-existing use or engages in a different activity which is within the generic description of the pre-existing use, the owners protection will not be lost: *Glenelg (Township) v. Davis*, (1992) CarswellOnt 487 (Ont. C.A.), at para. 13.

[53] The factors that the court should look at in determining whether a party has proven legal non-conforming use were outlined in *Saint-Romuald (Ville) v. Olivier*, 2001 S.C.C. 57 at para. 39, and paraphrased by this Court as follows:

- a. First characterize the purpose for which the premises were used prior to the new by-law restrictions. Use is a function of the activities actually carried on at the site;
- b. If the current use is merely an intensification of the pre-existing activity, the protection will not be lost. When the intensification goes beyond a matter of degree and constitutes, in terms of community impact, a difference in kind, the protection may be lost;
- c. To the extent activities are added, altered or modified within the scope of the original use, the court has to balance the landowner's interest against that of the community;

- d. Neighbourhood effects should not be assumed by must be established by evidence;
- e. The characterization of the acquired right should not be so narrow as to rob the land owner of some flexibility in the reasonable evolution of prior activities;
- f. The court is to look at the facts objectively, not subjectively with personal value judgments, when characterizing the acquired right and changes to the original purpose.

[54] The Gribbles had small amounts, being one to two truckloads at most according to the evidence, of soil products stored on the property at any given time. Even after beginning their landscaping business, the sale of such soils was clearly accessory to the main or principle activity of operating a nursery and greenhouse. Accordingly, I find that the Gribble's sale of soil products was lawful. There were entitled, under Section 9 of the Township's prior Restricted Area By-Law number 1517, to operate a seasonal fruit, vegetable, flower, or farm produce sales outlet, provided such produce is the product of the farm on which such sales outlet is located. Alternatively, as a farm, the Gribbles were entitled to use it for flower gardening. I agree with the respondents' argument that sale of soil product is an integral aspect of nurseries or garden centres and farms selling plant material, none of which the respondents are doing. However, the use by the Gribbles as of 2007 when the Goodwood Property was acquired was just that, and therefore was in conformity with the by-law.

[55] Again, the respondents cannot establish that that lawful use has continued. The use now made of the property has changed to something tangibly different, being a commercial landscape supply outlet. It is not just the case of a garden centre or nursery farm expanding in size or popularity; it is an altogether different use. One has only to look at the quantity of material being delivered to a single customer as outlined in the 2012 purchase order to understand the scope of this enterprise. The amounts outlined in the purchase order translate into 92 cubic metres of unscreened peat loam, 31 cubic metres of wood products, and 7 cubic metres of triple mix. That is a total of 190 cubic metres of soil products, on a single day, for a single customer – approximately 19 truckloads. That this has had negative effects on the community is supported by Gratton's evidence that complaints were received about the soil haulage activities/truck traffic.

[56] The transition to a non-conforming commercial use from a farming use, which is the case here, is aptly described in *St-Romuald (Ville) v. Olivier*, at para. 25:

In general, merely continuing the precise pre-existing activity even at an intensified level, is clearly protected, but the intensification maybe of such a degree as to create a difference in kind. A family farm which has few pigs on the fringe of town may continue as a legal non-conforming use, but the result maybe otherwise if it sought to expand its pork operation into "factory in the country" type intensive pig farming. While in one sense the "use" has

continued, in another sense its character has been so altered as to become, in terms of its impact on the community, and altogether different use.

[57] Accordingly, the use by the respondents of the Goodwood Property is in contravention of the existing Zoning by-law and does not satisfy the test for legal non-conforming use.

#### The Talbot Property

[58] The evidence establishes that Talbot is using this property as a parking lot/storage yard for the vehicles and equipment used in his contracting and/or haulage business.

[59] Talbot admits that he is a contractor, and admits that the vehicles and equipment found on the Talbot Property are used for his business. The definition in the by-law which best captures the use is found at s.1.36 – “Contractor’s Yard” which is a “[...] yard of any general contractor where goods, equipment and materials are stored or where a contractor performs shop or assembly work”. Alternatively, the vehicles and equipment are captured under the definition of “outside storage”, which is defined to mean “accessory storage in a yard outside the principle or main building on the lot of goods, materials and equipment”. Neither use as a contractor’s yard nor outside storage are permitted uses in the Rural zone, and accordingly Talbot is in contravention of the By-law.

[60] Talbot has owned the Talbot Property since 1994, and it is his uncontradicted evidence that he has been in business for 40 years doing construction related work. Although he has failed to provide evidence saying as much, I infer that he has likely caused such equipment to be parked and stored on his property for the term of his ownership. He has not provided evidence of the former owner’s use. Nothing turns on this, however, because there was no such permitted use under the former Zoning by-law either.

[61] Accordingly, Talbot has failed to establish legal non-conforming use with respect to the Talbot Property as well.

#### Site Alteration By-Law

[62] The Township’s Site Alteration by-law 2010-084 provides:

2.2 No person shall place or dump any fill, remove any topsoil or otherwise alter the grade of land by causing, permitting or performing any other form of site alteration on land within the Township without the owner first receiving a permit issued under this By-Law by the CBO unless otherwise exempt.

[63] “Site alteration” is defined in the By-law as:

Dumping, the removal of topsoil from land, or the alteration of the grade of land by any means including placing fill, clearing and

grubbing, the compaction of soil or the creation of impervious surfaces, or any combination of these activities.

[64] An exemption is provided for restoration of agricultural lands used for normal agricultural practices as follows:

3.2(f) Replacement of topsoil for restoration of agricultural lands used for normal agricultural practices, as an incidental part of sod farming, greenhouse operations and nurseries for horticultural practices which shall not exceed 20 centimetres annually, or at the discretion of the CBO. Storage of such topsoil shall not exceed one thousand (1000) cubic metres.

[65] The Township alleges that with respect to the Goodwood Property, the respondents have contravened the Site Alteration by-law by: i) depositing and spreading fill, including various types of soil, on the Goodwood Property in the “illegally filled area”; ii) creating numerous stockpiles of fill on the Goodwood Property in various locations; iii) depositing fill to create a large berm of fill material on the Goodwood Property to the north of the greenhouses; iv) depositing fill on the Goodwood Property in contravention of an order to comply; and v) failing to comply with an order to comply requiring the respondents to remove fill deposited illegally on the Goodwood Property.

[66] With respect to the Talbot Property, the Township alleges that Talbot has also failed to comply with an order to comply issued pursuant to the 2000 Site Alteration By-Law, requiring Talbot to comply with the 2001 Fill Agreement between Talbot and the Township.

[67] Leaving aside the question of whether the respondents’ use would even fit within the exemption, which was not argued by the applicant, the question becomes whether the Township has established on the balance of probabilities that the respondents are storing topsoil in excess of 1,000 cubic metres on the properties.

[68] With respect to the Talbot Property, the 2001 Fill Agreement and the Order Directing Compliance are both made pursuant to a previous by-law, being By-law 2000-073, as amended.

[69] There is no evidence before the court as to how Talbot has breached that by-law, or how he has failed to comply with the Order Directing Compliance, in respect to the specific provisions of that former by-law. Given the passage of time, the absence of evidence may be understandable, but an inspection was done on the Talbot Property on December 13, 2012 and nothing arose out of that inspection other than the evidence relating to the prohibited storage of construction vehicles and machinery. Therefore the court infers that such evidence may not exist. Accordingly, that aspect of the Township’s application fails for want of evidence.

[70] With respect to the Goodwood Property, the question becomes one of whether the Township has proven that more than 1,000 cubic metres of soil products are stored on the property.

[71] The best position put forward by Talbot is that, as of December 13, 2012, there were 88 truckloads of soil on the agricultural field to the west of the greenhouses according to his revised fill permit application (880 m<sup>3</sup>), 30 truckloads of peat type material stockpiled (300 m<sup>3</sup>), two to five truckloads of screened soil ready for sale (20-50 m<sup>3</sup>), and a pile of 20 truckloads of mulch (200 m<sup>3</sup>). I accept the evidence of the Township, which the respondents have not disagreed with, that a “truckload” is approximately 10 cubic metres. Added together these amounts are between 1,400 and 1,430 cubic metres of soil products. On Talbot’s own evidence, the respondent Goodwood is in contravention of the by-law.

[72] However, I do not accept that this is the extent of the soil material on the Goodwood Property. It is suspicious, to say the least, that Talbot first indicated that he was unsure how much soil had been brought onto the property and placed in the “illegally filled area”. He then indicated that it was 240 truckloads, and only after hearing that an amount in excess of 1,000 cubic metres would require Council’s approval of the permit, did he revise his application to indicate 880 cubic metres.

[73] Where the evidence of the Township on measurements or even estimates conflicts with that of the respondents’, I prefer that of the Township. It was argued that Pigozzo’s evidence in particular should be rejected because of the issue concerning emails sent by Mr. Wisdom, who deposed in his affidavit of September 18, 2013 that he had left voicemail and email messages to the attention of Pigozzo, but was unable to make contact with respect to the completion of the fill application. In support, the respondents have included evidence by way of emails from Mr. Wisdom to Pigozzo sent November 22, 2013, responded to that same day by Pigozzo, another sent November 25, 2013, responded to Pigozzo on November 29, 2013. There is no evidence of emails or messages having gone unanswered over the spring or summer of 2013 prior to what Mr. Wisdom says was his first meeting with the Pigozzo on August 13, 2013. It was Pigozzo’s evidence that he had no such record of any emails from that earlier period, which is the period addressed in Mr. Wisdom’s first affidavit. Accordingly, there is no basis upon which to attack the Township’s credibility in this regard.

### **Contempt**

[74] The injunction prohibits the respondents from:

- a) Operating a triple mix plant on the Goodwood Property;
- b) Storing more than a 1,000 cubic metres of materials in the aggregate on the Goodwood Property at any one time;
- c) Storing materials outside the designated area in Schedule A to the Order; and
- d) Dumping fill or performing site alteration on the Goodwood Property.

[75] The authority for a civil contempt motion is found in Rules 60.05 and 60.11 of the *Rules of Civil Procedure*. The test on a motion for contempt is set out in *Hobbs v. Hobbs*, 2008 ONCA 598 at para. 26 as:

- a) The order that was breached must state clearly and unequivocally what should and should not be done;
- b) The party who disobeys the order must do so deliberately and willfully; and
- c) The evidence must show contempt beyond a reasonable doubt.

[76] The onus is on the Township to establish the contempt beyond a reasonable doubt.

[77] In respect of the allegation that the respondents are operating a triple mix plant on the property contrary to paragraph 1(b) of the order, I find that the term “triple mix plant” which is not defined in the order, is too uncertain a term to assist the court in understanding the prohibited conduct. As such, the court is unable to find that the wording of the order offers clear and unequivocal direction to the alleged contemnor.

[78] In respect of the allegation that, in the aggregate, more than a 1,000 cubic metres were stored on the property within the designated area, as earlier stated I accept the Township’s evidence as to the quantity of materials seen on the property in June 2013, being a pile of soil 35 feet in height. However, it is noted that this is an estimate. While the pictures attached to Prytula’s affidavit taken on June 21, 2013 appear to depict very large mounds of soil, particularly when viewed in relation to the truck and loader shown next to them, much more precise measurements of the soil piles would be required to prove beyond a reasonable doubt that the total quantity exceeded 1,000 cubic metres. More than a “guestimate” is required to meet the standard of proof.

[79] As previously indicated, large quantities of soil were described in Gratton’s affidavit arising from the inspection done on December 13, 2012. As described by him, the amount of soil material would constitute a breach of the order. By the time of Ms. Prytula’s inspection in June 2013, she does not state whether the large berm of soil located to the north of the nursery buildings within the designated area, which Gratton estimated contained 100 truckloads of fill, still remained. If it did not, any contempt existing on December 13, 2012 would have been remedied. The evidence provided remains unclear, at the date of the hearing of the motion for contempt, whether such berm still existed and if so, its then-existing size. Accordingly, the evidence is insufficient to meet the standard of proof.

[80] In respect of the allegation that the respondents stored material outside of the designated area, the undisputed evidence is that there was manure so stored, which has since been moved. At the time of Ms. Prytula’s inspection on June 21, 2013, no material was found outside the designated area.

[81] Accordingly, the Court must find that any acts not in compliance with the injunction that may have existed in December 2012 had been remedied by June 2013. On the facts, the Township has failed to prove contempt.

**Order**

[82] Judgment shall issue in the following terms:

1. This court declares that
  - a) The stockpiling of fill on the Goodwood Property for the purpose of mixing triple mix for sale or resale is contrary to the provisions of the Zoning and Site Alteration By-laws of the Township;
  - b) The use of the Goodwood Property for industrial and commercial uses by operating a landscape supply operation is contrary to the provisions of the Zoning By-law of the Township;
  - c) The use of the Talbot Property for industrial and commercial uses by parking and storing vehicles and equipment used in a contracting and hauling business is contrary to the provisions of the Zoning By-law of the Township;
  - d) The use of both Properties for industrial and commercial uses by operating a contractor's yard and waste disposal business, and the storage of waste disposal bins, is contrary to the provisions of the Zoning By-law of the Township;
  - e) The use of the properties for the operation of a waste disposal site and transfer station, including the depositing, disposal, handling, storage, transfer, treatment or processing of waste and construction debris is contrary to the Zoning By-law of the Township and the provisions of the *Environmental Protection Act*;
  - f) The importation of fill on the Goodwood Property without a permit is contrary to the provisions of the Site Alteration By-law of the Township.
2. Goodwood Nurseries Ltd. is required to remove all fill placed on the Goodwood Property without a permit granted pursuant to the Site Alteration By-law of the Township and shall restore the property in a manner suitable for agricultural purposes.
3. A permanent injunction shall issue restraining the respondents and their employees, agents, invitees and anyone else having knowledge of the terms of the order from:
  - i) Placing or dumping fill, removing topsoil or otherwise altering the grade of the Goodwood Property and by causing, permitting or performing any other form of site alteration on the Goodwood Property except in accordance with the terms and conditions of a permit granted pursuant to the Site Alteration by-law of the Township;

- ii) Operating or permitting to be operated on the Goodwood Property a landscape supply operation, or the storage upon or sale of soils from the Property;
- iii) Using the Talbot Property as a contractor's yard or storing goods, equipment and materials used in general contracting, excavation and haulage business; and
- iv) Using either the Goodwood Property or the Talbot Property as a waste disposal site or for a waste disposal business and for the storage of waste disposal bins.

**Costs**

[83] If the parties are unable to reach an agreement on costs of the application and motion, they may make brief submissions in writing not exceeding two double-spaced pages, together with any cost outline or offers on which they rely. The Township's submissions are due March 14, 2014 and the responding parties' submissions are due by March 21, 2014, and any reply by March 26, 2014, to be filed with my judicial assistant in Barrie.

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HEALEY J.

**Released:** February 28, 2014