CITATION: Township of Uxbridge v. Corbar Holdings Inc. et al., 2012 ONSC 3527
COURT FILE NO.: CV-12-109233-00
DATE: 20120627

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
The Corporation of the Township of Uxbridge	)	Charles M. Loopstra, for the Applicant
Applicant	)	
– and –	)	Terrance Green, for the Respondents
Corbar Holdings Inc., Corrado Bartolo and Concetta Bartolo	)	
Respondent	)	
	)	**HEARD:** June 14, 2012

REASONS FOR DECISION

EDWARDS J.

Overview

[1] Is it normal farming practice to alter the topography of lands by the depositing of large quantities of fill? This is one of the issues that this court is called upon to decide as it is suggested by the respondents, that the depositing of upwards of 300,000 cubic metres of fill, (approximately 30,000 dump truck loads) onto lands located on the Oak Ridges Moraine ("The Moraine") falls within the definition of "normal farm practice." The Oak Ridges Moraine Conservation Plan, (hereinafter "The Plan") Ontario Regulation 140/02, a regulation to the *Oak Ridges Moraine Conservations Act*, 2001, ("The Act"), provides in Section 13(1) that the purpose of "Countryside Areas" is to encourage agricultural and other uses that support the Plans objective by:

(a) protecting prime agricultural areas;

(b) providing for the continuation of agricultural and other rural land uses and ***normal farm practices*** (emphasis added).

[2] The lands in question fall within the definition of The Plan's "Countryside Areas." For the reasons that follow, I do not accept that the dumping of large quantities of fill particularly quantities that would approximate 30,000 dump truck loads, fall within the definition of normal farm practice.

The Facts

[3] On June 17, 2008 the property described as 1389 Brock Road in the Township of Uxbridge (hereinafter "the property"), was purchased by Corbar Holdings Inc. (hereinafter "Corbar"). The Respondent Corrado Bartolo ("Bartolo") is an officer and director of Corbar. Concetta Bartolo ("Concetta") is married to Corrado Bartolo and together they reside on the property. The property consists of 108 acres and as previously noted is located on the Moraine.

[4] On July 29, 2008 the respondents submitted a fill permit application to the Corporation of the Township of Uxbridge (hereinafter "the Township") to deposit 300,000 cubic metres of fill on the property.

[5] In oral argument it was submitted on behalf of the respondents that they had in discussions with representatives of the Township made clear prior to the purchase of the property that it was always their intention to deposit fill on their property for the purposes of enhancing their ability to farm the property.

[6] The respondents intention to deposit fill on the property for the purposes of enhancing their ability to farm their property, is inconsistent with sworn evidence of Concetta reflected in an affidavit sworn on November 12, 2008, in support of an Application ("The First Application") brought by the respondents to quash what is described as the 2008 Township bylaw which had been passed on August 5, 2008. In The First Application the respondents not only sought an order to quash the bylaw, but also an order in the nature of mandamus compelling the Township to issue a fill permit to the respondents, as well as an order for a mandatory injunction compelling the Township to issue a fill permit to the respondents.

[7] In Concetta's affidavit of November 12, 2008 she stated "we were interested in purchasing the property for the purposes of using it as a ***"fill site" for clean fill"*** (my emphasis). Nowhere in Concetta's affidavit, or for that matter in any of the affidavit material filed before the court in support of the first Application, is there any reference whatsoever to the stated intention of the respondents to use the property as a farming property. The only mention made in the pleadings filed before this court, with respect to the first Application as it relates to the question of the farming of the property, is found in an affidavit of Brian Pigozzo ("Pigozzo") sworn December 23, 2008 Mr. Pigozzo is the chief building official employed by the Township. At paragraph 32 Mr. Pigozzo states in his affidavit:

> On or about April 1, 2008 I spoke on the telephone with Cindy Battons, the real estate agent for the Bartolos, who advised me that the Bartolos were interested in purchasing the property. Later the same day, I met with Ms. Battons and the Bartolos. The Bartolos advised that they were interested in farming the property for cash crops and would need to bring fill onto the property for that purpose.

[8] As a result of the aforesaid discussion between Pigozzo and the respondents, Pigozzo advised the Bartolos that "a fill permit would be required if the Bartolos intended to deposit fill on the property."

[9] The first Application to quash the 2008 fill by-law was dismissed with costs payable by the respondents in the amount of $25,000.00 without prejudice to the right of the respondents to seek an order to proceed by way of a trial of an issue. The Application for orders compelling the Township to issue a fill permit to the respondents was moved to the Divisional Court.

[10] On October 1, 2010 the Township and the respondents entered into a consent order which abandoned all of the relief that had been sought by the respondents in the first Application.

[11] On September 11, 2009 Corbar applied for and was issued a building permit. The permit was issued pursuant to a site and grading Plan dated July 2009 which had been prepared by Masongsong Associates Engineering Limited and amended February 2010 and approved by the Township in conjunction with the building permit. I will refer to this permit as "the site grading plan". On August 26, 2010, the respondents entered into an agreement with the Township, pursuant to which the respondents agreed that fill could only be placed on the property in accordance with the lot grading requirements pursuant to the building permit and as permitted by the site grading plan. I will refer to the August 26, 2010 agreement as the Agreement throughout these reasons.

[12] The agreement was signed by Bartolo, his wife Concetta and by Bartolo on behalf of Corbar. The agreement provided amongst other things as follows:

> The owners acknowledge and agree that fill may only be placed upon the Corbar parcel in accordance with the lot grading requirements associated with building permit #2009-149, and no other fill shall be permitted to be dumped or placed on the Corbar parcel without a permit being issued by the Township. The owners acknowledge and agree that no fill shall be permitted to be dumped or placed on the Bartolo parcel, save and except for fill that be permitted as part of an approved grading plan associated with the building permit issued by the Township. The amount of fill permitted on the Bartolo parcel and the extent of grading permitted must be approved by the Township, acting in its sole and unfettered discretion, prior to the issuance of a building permit. No other fill shall be permitted to be dumped or placed on the Bartolo parcel without a fill permit issued by the Township.

[13] Where the agreement refers to "the owners" the owners are defined to include all of the respondents before this court. Where the agreement refers to the Bartolo parcel it relates to the property.

[14] An issue arose during the course of argument as to the validity of the agreement. Counsel for the respondents took the position that the agreement had been entered into under duress and therefore was not enforceable. This issue had not been raised whatsoever in any of the written material before me. I allowed counsel for the respondents to call viva voce evidence as it relates to the duress issue, and after hearing the evidence of Mr. Bartolo, gave brief oral reasons indicating that the respondents had the benefit of independent legal advice prior to the signing of the agreement and that there was no evidence before me that would meet the legal definition of duress.

[15] On May 10, 2010 the Township enacted bylaw number 2010/084 which is a site alteration bylaw to prohibit or regulate the removal of topsoil, the placing or dumping of fill and the alteration of the grade of land in areas of the Township. This site alteration bylaw requires a fill permit if the amount of fill dumped or placed pursuant to a building permit exceeds 500 cubic metres. No Application for a fill

permit was ever made by the respondents nor has any fill permit ever been issued pursuant to the site alteration bylaw.

[16] In November of 2010 the Township became aware that large quantities of fill were being deposited onto the property which would exceed 500 cubic metres. Such dumping would, argues the Township, be contrary to the site alteration bylaw and the agreement. The Township also became aware that large quantities of fill were being dumped and site alterations were being made on the property in areas for which no fill permit could be issued given the designation of the property as a "landform conservation area" pursuant to the Act and The Plan.

[17] As a result of the depositing of large quantities of fill on the property the Township issued an order on November 10, 2010 directing the respondents to;

(a) comply with the site alteration bylaw;

(b) cease depositing fill on the property;

(c) cease altering the grade on the property;

(d) and to restore the property to its former condition prior to the grade alterations.

[18] Representatives of the Township conducted site visits in December 2010 and January 2011. During these site visits, observations were made that additional fill was being brought to the property.

[19] As a result of the observations made by the Township in December 2010 and January 2011, an order to comply was issued pursuant to the *Building Code Act, 1992,* on January 26, 2011. This order specifically required Corbar and Concetta to cease depositing fill on the property unless authorization had been given by the Chief Building Official. The order also required the respondents to provide a report from a professional engineer on the status of the existing grades in relation to the approved grading plan.

[20] The Township received a survey from a surveying company, retained by the respondents, on February 28, 2011 which amongst many items, indicated that fill had been deposited beyond the approved limit for fill pursuant to the approved site and lot grading plan.

[21] Further orders were made by the Township in July 2011 and August 2011 the effect of which was to require compliance with the site alteration bylaw and to direct no further work to be undertaken on the property. The evidence before this court leaves little doubt that the respondents have not complied with any of the orders issued by the Township. Whether there has been compliance with the various Township bylaws is to be determined when various charges laid under the *Provincial Offences Act* are heard on July 28, 2012. These reasons should not be seen as a factual determination of any of the issues to be heard regarding those charges.

[22] Further observations have been made by Township staff with respect to the continuing activities of the respondents in dumping large quantities of fill on their property. These observations were made on various occasions in April 2012.

[23] As a result of the observations made by the Township employees of ongoing dumping of fill, and the complete failure on the part of the respondents to comply with any of the orders to comply, a motion seeking injunctive relief was brought before this court that was heard by Gilmore J. on May 2, 2012. At that time an order in the form of an interlocutory injunction was made restraining the respondents from placing or dumping any fill on their property. Since the issuance of the order by Gilmore J. no additional fill has been deposited on the property.

Legislative Framework

[24] The parties do not dispute that the property falls within the jurisdiction of the Act and the Plan. The dispute between the parties is whether or not the depositing of large quantities of fill on the property amount to a normal farm practice as provided for in Section 13(1)(b) of the Plan. If this court concludes that the depositing of fill on the property was a "normal farm practice" then the prohibition contained in Section 5 of the Plan would not apply. Section 5 of the Plan provides:

> No person shall, except as permitted by this Plan,
>
> (a) Undertake development or site alteration with respect to land.

[25] "Site alteration" is defined in the Plan as meaning "activities such as filling, grading and excavation that would change the landform and natural vegetative characteristics of the land, but does not include (ii) the carrying out of agricultural practices on the land that was being used for agricultural uses on November 15, 2001."

[26] While this court had limited information with respect to the agricultural practices on the property as of November 15, 2001 it is now argued by the respondents that the depositing of the fill on the property was to increase the arable amount of land that could be used for cultivation purposes. On the evidence before me I am satisfied that the quantity of fill that has been deposited, and which the respondents intend to deposit, falls squarely within the definition of site alteration which is prohibited by Section 5(b) of the Plan. The activities of the respondents can only be saved if in fact the depositing of the fill falls within the definition of "normal farm practices" as provided for in Section 13(1)(b) of the Plan.

[27] The respondents argue that the Township by virtue of its various stop work and compliance orders is interfering with the normal operation of a farm in contravention of the *Municipal Act*, 2001, which the respondents argue protects farmers from bylaws which would prevent farmers from the practice of a normal agricultural operation. In that regard the respondents rely on Section 142(6) of the *Municipal Act*, 2001 which provides:

> A bylaw respecting the removal of topsoil does not apply to the removal of topsoil as an incidental part of a normal agricultural practice including such removal as an incidental part of sod farming, greenhouse operations and nurseries for horticultural products.

[28] The respondents suggest that the intent of Section 142(6) of the *Municipal Act*, 2001, quoted above applies to a farmer like the respondents who are seeking to improve the quality of their lands for

the purposes of farming. The respondents further rely on Section 14(1) of the Municipal Act, 2001 which essentially provides that any bylaw of a municipality which conflicts with a Federal/Provincial Statute is without effect. The respondents asked this court to conclude that the bylaws relied upon by the Township in these proceedings are in conflict with Section 142(6) of the *Municipal Act* and are therefore of no force and affect.

[29] The respondents point to Section 3.2(f) of the Townships bylaw 2010-84 in support of their argument that the Township itself has allowed for the activity undertaken by the respondents. Section 3.2(f) of bylaw 2010-84 provides:

> No fill permit is required for:
>
> (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 products which shall not exceed 20 cm annually, or at the discretion of the CEO. Storage of such topsoil shall not exceed 1000 cubic metres.

[30] In reliance on Section 3.2(f) the respondents argue that their actions are to restore the cultivatable usefulness of the property and as such do not require fill permits.

[31] Finally the respondents argue that provincial legislation, specifically the *Farming and Food Production Protection Act*, 1998, and Section 6(1), makes clear that a municipal bylaw cannot apply so as to restrict a normal farm practice. Section 6(1) of the *Farming and Food Production Protection Act*, 1998 provides:

> "No municipal bylaw applies to restrict a normal farm practice carried on as part of an agricultural operation."

[32] Very simply put the respondents argue that the bringing in of the fill that is the subject matter of the motion before me is nothing more than an attempt by the respondents to improve the land that is available for cultivation and as such is part of a normal farm operation.

[33] A significant difficulty with the respondents argument where they rely on the *Farming and Food Production Protection Act* arises out of the fact that Section 6(2) provides for a dispute resolution mechanism whereby someone like the respondents, who suggest that they fall within the definition of being a farmer affected by a municipal bylaw, can apply to the *Normal Farm Practice Protection Board* for a determination of whether a municipal bylaw conflicts with and restricts a normal farm practice in connection with an agricultural operation. The respondents have not sought any relief from this Board and it is open therefore to this court to infer that the respondents are not in a position to establish that the depositing of the fill on the property falls within the definition of a normal farm practice.

[34] The governing provincial legislation as it relates to the respondents property is the Act. To the extent that there is any reliance on the *Municipal Act* by the respondents there is an obvious potential conflict with Section 25 of the Act which provides:

> In the event of conflict between this Act and any other general or special Act, this Act prevails.

[35] Furthermore as noted by the Township any bylaw that the Township might pass cannot conflict with the Plan, see Section 7(2) of the Act.

[36] For that reason the Township in recognition that its bylaws cannot conflict with the Act or the Plan, enacted bylaw 2010-84 which provides in Section 2.5 as follows:

> 2.5 Notwithstanding anything else contained in this bylaw except for Section 3.1, no person shall cause, permit or perform a site alteration on any lands in the *Oak Ridges Moraine* that are designated by the *Oak Ridges Moraine Conservation Plan* as:
>
> > c) areas of high aquifer vulnerability or landform conservations areas in lands designated as "Countryside Area".
>
> unless such site alteration is directly associated with a building permit issued by the Corporation, or unless such site alteration is directly associated with activities described in section 3.2 of this bylaw.

[37] Fundamentally, therefore the respondents are prohibited from depositing any fill on the property or making site alterations as to do so would be in conflict with the Plan and the bylaw provisions quoted above set forth in Bylaw 2010-84. The only exception in that regard would be the depositing of fill and site alterations that the respondents are permitted pursuant to the building permit that was issued to them in 2009.

[38] Based on the evidence that was placed before this court I am not satisfied that the depositing of the quantity of fill that has been observed, and specifically the intent of the respondents to ultimately deposit upwards of 30,000 truckloads of fill, in any way remotely resembles a normal farming operation. The actions of the respondents cannot be saved by Section 6(1) of the *Farming and Food Production Protection Act* nor do they fall within the exception to Section 3.2(f) of Bylaw 2010-84. The depositing of fill in the quantities evidenced to date on the property and the additional fill which the respondents seek to continue to deposit are not the operations of a farming operation but rather are akin to a commercial fill operation.

Injunctive Relief Sought

[39] The Township seeks a permanent injunction restraining the respondents from performing site alterations on the property. On May 2, 2012 Gilmore J. granted an interim injunction restraining the respondents from placing or dumping fill, removing topsoil or otherwise altering the grade of the property pending further order of the court. The only exception to the further depositing of fill was that the respondents would not be prevented from the completion of the grading on the property in accordance with the building permit 2009-149 and the provisions of the Agreement.

[40] The Court heard little argument from counsel for the respondents, as it relates to the question of whether or not injunctive relief should follow in the event that this court determined that the respondents' actions in the depositing of fill on the property did not fall within the definition of a normal farm operation. The focus of the argument by counsel for the respondent was on the fundamental issue from the respondents' perspective that their actions did not

infringe the Township Bylaws or Provincial Legislation because their actions fell within the definition of a normal farm operation. Having found against the respondents in that regard this court must nonetheless still consider whether or not permanent injunctive relief is appropriate.

[41] The Township seeks the injunctive relief arguing that the activities of the respondents must be restrained because such activities are in contravention of its bylaws. Section 440 of the *Municipal Act*, 2001 allows the Township to seek such relief. Section 440 provides:

> If any bylaw of a municipality or bylaw of a local board of a municipality under this or any other Act is contravened, in addition to any other remedy and to any penalty imposed by the bylaw, the contravention may be restrained by application at the instance of a taxpayer or the municipality or local board.

[42] The actions of the respondents are clearly in contravention of the site alteration bylaw, building permit and the Agreement. The issue therefore is whether a permanent injunction under the circumstances is appropriate. The respondents chose to ignore all prior orders of the Township and further chose to ignore the terms and conditions of the Agreement. Only when confronted with the order of Gilmore J. did the respondents cease and desist their fill operation. An order shall therefore issue in the form of a permanent injunction restraining the respondents from performing any further site alterations on the property and specifically restraining the respondents from depositing any further fill or altering the grade of the property other than as permitted by building permit 2009-149, the agreement and the site alteration bylaw 2010-084.

[43] As to the further relief sought in this matter in the nature of a mandatory order requiring the respondents to remove all fill that has been placed on the property, contrary to the site alteration bylaw 2010-084, and for an order restoring the property in a manner that would be suitable for the use as permitted by the Township zoning bylaw, the parties are in agreement that part of the relief sought should be adjourned so as to allow the respondents an opportunity to provide a remediation plan to the Township for consideration. If the respondents are either unable, unwilling or cannot satisfy the Township with respect to an appropriate remediation plan the Township may apply to the trial coordinator for a date to argue this issue before me.

[44] As to the question of the costs of the motion, if this issue cannot be resolved between counsel than submissions may be made to this court, through the trial coordinators office limited to five pages in length and to be received within fifteen days from the receipt of these reasons.

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Justice M. Edwards

Released: June 27, 2012