

NORMAL FARM PRACTICES PROTECTION BOARD

IN THE MATTER OF the *Farming and Food Production Protection Act, S.O. 1998, Ch. 1.*

AND IN THE MATTER OF an Application to the Board, under Section 6 of the *Farming and Food Production Protection Act, S.O. 1998, Ch. 1*, for a determination as to whether a Municipal Bylaw has the effect of precluding a Normal Farm Practice.

Board File No.: 2014-05

Between:

Douglas Cox

Applicant

and

The Corporation of the Town of Mono

Respondent

and

Elaine Kehoe

Party

and

Mono Mulmur Citizens' Coalition

Party

Appearances:

Douglas Cox

Justin Stein, agent for Douglas Cox

Jeffrey Wilker, counsel for the Town of Mono

Elaine Kehoe

Donald McFarlane, President of Mono Mulmur Citizens' Coalition

Before:

Glenn C. Walker, Vice-Chair

Jane Sadler-Richards

Douglas Eadie

REASONS FOR DECISION

A. INTRODUCTION

An Application has been made by the Applicant, Douglas Cox, pursuant to Section 6 of the Farming and Food Production Protection Act, 1998, S.O.1998, c.1, as amended (the "Act").

The purpose of the hearing is to determine whether By-Law Number 2014-31 of the Corporation of the Town of Mono (hereinafter referred to as the "Fill By-Law") restricts the Applicants proposed importation of fill which the Applicant alleges to be a normal farm practice.

This Application came before the Board for a hearing on November 23, 24, 25, 26 and 27, 2015. By Order of the Board, Elaine Kehoe and the Mono Mulmur Citizens' Coalition had been made interested parties to the proceedings and they took part in the hearing.

The Board heard evidence from the Applicant and his witnesses Robert Iachetta and Keith Wilson. The Board also heard evidence on behalf of the Corporation of the Town of Mono from Mark Early, who was qualified as an expert witness to give opinion evidence with respect to land use planning and municipal administration; from Gord Feniak who was qualified as an expert to give opinion evidence with respect to municipal engineering and civil engineering; and from Robert Stovel who was qualified as an expert to give opinion evidence with respect to rural land use planning, agrology, aggregate planning and preparation of aggregate site plans. Elaine Kehoe called evidence from Marvin Stevenson who was qualified as an expert to give opinion evidence with respect to animal nutrition and management and Ed Kroeker who was qualified as an expert to give opinion evidence with respect to environmental impact assessments, in particular soil and water impact, environmental mitigation, water quality

assessment, surface and subsurface soil drainage issues, irrigation and drainage. The Mono Mulmur Citizens' Coalition called no evidence.

In facilitating public participation in the hearing, further to Rules 55 and 56 of the Board's Rules of Practice and Procedure, the Board heard evidence from Katherine Lindsay and Carmela Marshall. The Board also received and considered written statements from these witnesses and a number of local residents and a petition, all of which opposed the application.

For the reasons that follow, the Board dismisses the application.

B. FACTUAL BACKGROUND

(a) Fill By-Law

Prior to 2012, the Respondent municipality had minor issues (transportation and noise complaints) with smaller fill projects in the municipality which prompted Council to consider a fill or site alteration by-law for the municipality. Section 142 of the Municipal Act, 2001 provides the authority for such a by-law.

On June 26, 2012, Council for the Respondent municipality adopted By-Law 2012-17 to regulate site alterations, placement of fill and removal of topsoil within the Town of Mono. That by-law was generally prohibitive with limited opportunity for fill placement as set out in the exemptions. Council received several reasonable applications for soil/fill placement beyond the exemptions set out in the by-law.

Subsequently, in response to concerns raised by Council and by residents of the municipality, By-Law 2014-31 (Fill By-Law) was adopted on August 27, 2014 repealing By-Law 2012-17. The new By-Law is more or less identical to By-Law 2012-17 but provides for a process for requests for variance or exception and also addresses haul routes.

Section 6.2 of the Fill By-Law requires the applicant to request the variance or exception in writing and include any documents the applicant will be relying upon and all other documentation set out in Schedule "A" to the By-Law. The Schedule "A" requirements include, inter alia, an accurate plan of the site in accordance with the requirements set out in Schedule "B", a detailed report explaining how the application (source, transportation and receiving) will be in conformity with the best management practices set out in the Ministry of Environment and Climate Change (MOECC) document entitled "Management of Excess Soil – A Guide for Best Management Practices", commonly called a Fill Management Plan, and a haul route plan.

The applicant is required to pay an application fee of \$2,000.00 and a refundable deposit of \$20,000.00 to recover any costs the Respondent municipality may incur for engineering and other professional peer reviews. Any monies not utilized shall be refunded to the owner. All approvals are required to contain certain conditions set out in paragraph 2 of Schedule "B". If the application is approved there is a further \$20,000.00 security deposit payable to the municipality, in a form acceptable to it, to secure performance of the work.

(b) Facts

The Applicant, Douglas Cox, purchased the subject property at 875003 5th Line in the Corporation of the Town of Mono being Part of Lot 21, Concession 6, EHS and consisting of 17.743 hectares more or less in 1990. From the time of purchase until approximately six years ago, he operated a small cow/calf operation. Since approximately 2009, he has raised sheep. The farm has flatter table land and three steep ravines at the rear of the farm.

Mr. Cox presently has approximately 200 ewes and seven rams and for approximately four months of the year the numbers increase to 500 to 550 animals due to the production of lambs. Mr. Cox wants to increase the number of adult animals on his farm to 300. At the present time, in addition to the sheep grazing on this farm, he brings in extra feed.

Mr. Cox was approached by a fill broker who wished to place approximately 15,000 to 20,000 loads of fill on Mr. Cox's farm to level an area for a sheep pasture. On March 11, 2014 Mr. Cox approached the Respondent municipality with a view to obtaining an exemption under the previous fill by-law Number 2012-17 and was advised by Council that he should provide additional information should he wish to proceed in the future. The original fill broker then lost interest in the project.

Mr. Cox then met Robert Iachetta, the President of Soilcan Inc. (hereinafter called "Soilcan") through a mutual friend and entered into a written contract with Soilcan dated July 23, 2014 to provide an unspecified number of loads of fill over a two year period commencing from the date of issuance of a permit. Mr. Cox is to receive \$20.00 per load from Soilcan. Evidence received during the hearing suggested that the project would take about 5,600 loads. The number of years it might take cannot be estimated and will depend on the availability of fill.

Soilcan then retained Bahram Amirnezhad P.Eng. from Topotec Inc. to prepare a site plan (Exhibit #10) dated August 27, 2014 setting out the fill area and other proposed details of the project for Phase I. No details concerning Phase II were presented to the Board.

The Phase 1 proposed fill area would be 2.746 hectares and the volume of fill required would be approximately 56,263 cubic metres. Mr. Amirnezhad was not called by the Applicant as a witness.

By the time the site plan was prepared, the Respondent municipality had adopted By-Law 2014-31. It is admitted by the Applicant that he has not submitted an application to the Municipality under Section 6 of the Fill By-Law. He does not object to the \$2,000.00 application fee but does object to paying the refundable deposit of \$20,000.00 to cover the costs of the Town for peer reviews. He also does not object to payment of the refundable security deposit of \$20,000.00 in the event that approval is given to an application.

Soilcan has undertaken to carry out the preliminary procedures and investigations on behalf of Mr. Cox. In addition to the preparation of the site plan, Soilcan obtained confirmation from the Niagara Escarpment Commission that the subject lands were outside of the Niagara Escarpment Plan area and the Commission's development control area. As well, Soilcan confirmed that although the property fell within the watershed and jurisdiction of the Nottawasaga Valley Conservation Authority, no part of the property is regulated by the Authority.

Mr. Cox's understanding of the project is that the fill will be placed in the ravines to provide gentler slopes resulting in him being able to increase his adult flock from 200 to 300 head.

Based on the evidence, the Board makes the following factual findings:

(1) With Respect to the Agricultural Viability of the Project

(i) The ravine area of the farm can sustain sheep without any modification. The present slopes have no effect.

(ii) Using industry standards, the proposed infilling of the ravines would enable the affected land to support only an additional 12 to 17 ewes.

(iii) A preferred alternative would be to use "cut and fill" that is bulldozing the tops of the hills into the ravines to soften the slope. Generally, the lands in question will not be improved from an agricultural perspective and will not be capable of sustaining a long term agricultural land use.

(iv) There will be a loss of productivity during the project and with the need to establish grass on the affected area, it could possibly be a further two years after the project was completed before the area could be grazed.

(v) The soil under the haul route on the farm may be compacted which will reduce the productivity of those lands for several years.

(2) With Respect to Protection of Ground and Surface Water from Contamination

(i) The soils at the Cox farm are identified as “Ice-contact stratified deposits – sand and gravel, minor silt, clay and till”. In areas such as this with sand and gravel soils, ground water moves relatively easily, giving contaminants greater mobility and putting neighbouring properties at higher risk.

(ii) The MOECC - Best Management Practices contains guidelines for the management of excess soil and suggests that there should be a fill management plan, prepared by a “Qualified Person” as defined in Ontario Regulation 153/04 to provide for continuous monitoring to exclude contaminated soil.

(iii) The Applicant’s site plan, which specifically notes that inspection and monitoring would be done every two weeks, is wholly inadequate when compared with the recommendation for continuous monitoring made in the Guide for Best Management Practices. The Applicant’s proposal as set out in the site plan prepared by Topotec Inc. will put neighbouring water quality at risk.

(3) With Respect to Drainage Issues

(i) The ravine furthest to the east on the subject property and referred to in evidence as “Ravine 3” presently directs surface water to the northwest.

(ii) The site plan proposes that Ravine 3 will be filled to a depth of slightly over eight metres thereby impeding the water that naturally flows through the ravine from the neighbouring property upstream and creating a dam which will cause water to occasionally pond on the lands of the upstream landowner (the Baker/Kehoe property).

(iii) The ponding will cover an area of just under 6,000 square metres and will have a maximum depth of 4.9 metres.

(4) With Respect to Erosion Issues

(i) A significant portion of the northern part of the site will have final land slopes in the range of 40% to as high as 58%. These slopes will accelerate run-off erosion toward the north side of the site and onto neighbouring lands to the north of the Cox property.

(ii) The proposed use of a silt fence barrier to contain silt and run-off will not be sufficient in the event of a large rain fall event.

(5) With Respect to the Impact on Municipal Roads

(i) The proposed entrance location for truck traffic is located in an area where visibility of south bound traffic is limited to about 130 metres which is considered unsafe and is inadequate for new entrances in the Town of Mono.

(ii) The Applicant's proposal does not contain a traffic and transportation management plan as recommended by the MOECC Best Management Practices guidelines. Such a plan would address the following considerations where applicable: location and configuration of site entrances; truck queuing and parking; dust control; mud/tracking preventions/truck cleaning and haul routes between source sites, receiving site and temporary soil storage sites.

C. THE ACT

The objectives of The Farming and Food Production Protection Act, 1998 are set out in its preamble, which states as follows:

“It is desirable to conserve, protect and encourage the development and improvement of agricultural lands for the production of food, fibre and other agricultural or horticultural products.

Agricultural activities may include intensive operations that may cause discomfort and inconveniences to those on adjacent lands.

Because of the pressures exerted on the agricultural community, it is increasingly difficult for agricultural owners and operators to effectively produce food, fibre and other agricultural or horticultural products.

It is in the provincial interest that in agricultural areas, agricultural uses and normal farm practices be promoted and protected in a way that balances the needs of the agricultural community with provincial health, safety and environmental concerns.”

Subsections 6(1) through 6(3) provide as follows:

“6(1) No municipal by-law applies to restrict a normal farm practice carried on as part of an agricultural operation.

(2) A person described in Subsection (3) or a municipality may apply to the Board, in a form acceptable to it, for a determination as to whether a practice is a normal farm practice for purposes of the non-application of a municipal by-law.

(3) An application may be made by,

(a) Farmers were are directly affected by a municipal by-law that may have the effect of restricting a normal farm practice in connection with an agricultural operation; and

(b) Persons who want to engage in a normal farm practice as part of an agricultural operation on land in the municipality and have demonstrable plans for it.”

Subsection 6(15) sets out the factors which must be considered by the Board in determining whether or not a practice is a normal farm practice. It states as follows:

“In determining whether a practice is a normal farm practice, the Board shall consider the following factors:

1. The purpose of the by-law that has the effect of restricting the farm practice.
2. The effect of the farm practice on abutting lands and neighbours.
3. Whether the by-law reflects a provincial interest as established under any other piece of legislation or policy statement.
4. The specific circumstances pertaining to the site.”

“Normal farm practice” is defined as meaning a practice that:

(a) is conducted in a manner consistent with proper and acceptable customs and standards as established and followed by similar agricultural operations under similar circumstances; or

(b) makes use of innovative technology in a manner consistent with property advanced farm management practices.”

D. DISCUSSION AND ANALYSIS

Issues to be Determined

The issues to be determined by the Board are:

1. Is the proposed practice part of or ancillary to an agricultural operation?
2. Does Mr. Cox have demonstrable plans for the proposed practice?
3. Is the proposed practice a normal farm practice?
4. If the practice is a normal farm practice, is it restricted by the Fill By-Law?

Agricultural Operation

Mr. Cox' use of the property for the producing and raising of sheep is an agricultural operation as defined in Subsection 1(2)(b)(i) of the Act. However, the proposed practice does not fall under any of the other headings in the Subsection and can only be justified under Subsection 1(2)(j) which states that it must be a necessary but ancillary part of an agricultural operation.

In order to qualify, the Applicant must prove on the balance of probabilities that the importation of fill for the purpose described by the Applicant is necessary to improve the land for sheep grazing. The evidence provided by the Respondent municipality through its expert witnesses, Mr. Feniak and Mr. Stovel, which evidence was uncontradicted by the Applicant, shows that the improvement to the land for sheep grazing would be minimal and that a cut and fill operation would be a reasonable alternative. For this reason alone, the application would be dismissed.

Counsel for the Respondent municipality urged us to find that the large scale importation of fill does not constitute a part of an agricultural operation, but rather a commercial fill operation, based on decisions of the Environmental Review Tribunal and the Superior Court of Ontario. The Board is not prepared to make such a broad statement based on the two cases cited, namely: *Livingston v. Niagara Escarpment Commission* [2014] O.E.R.T.D. no. 9 and *Uxbridge (Township) v. Corbar Holdings Inc.* [2012] O.J. no. 3558.

This Board deals with site specific issues and therefore it would be dangerous for the Board to make such a broad statement based on other fill operations without similar circumstances. The purpose of this Board is to determine what is and what is not a "normal farm practice". In particular, the latter decision disposes of the normal farm practice argument in one paragraph, does not consider Subsection 6(15) of the Act and concludes that since the farmer had not sought relief from this Board the Court was open to infer that the farmer was not in a position to establish that the depositing of fill on the property fell within the definition of normal farm practice.

Consequently, cases involving the large scale importation of fill and site alteration by-laws must be dealt with on a case by case basis. The decisions of specialized tribunals such as this Board should be given deference by other decision makers.

Demonstrable Plan

"Demonstrable" is defined by the Oxford Dictionary as meaning "clearly apparent or capable of being logically proved".

The only evidence of the proposed practice before the Board consists of the site plan prepared by Mr. Amirnezhad supported by evidence from Mr. Cox and Mr. Iachetta. Details of the proposal are merely set out as 13 points notated on the site plan itself. Mr. Amirnezhad was not called as a witness by the Applicant to provide further details for the proposal.

The Respondent municipality has provided evidence which proves to the satisfaction of the Board that some of the details of the proposed plan are incorrect and lacking in specificity.

The Board finds that the evidence presented by the Applicant falls short of logically proving the plan for the proposed fill operation. Where the impact on the farm itself, abutting neighbours and other residents of the Municipality could be at risk, the Board finds that the Applicant has a duty to provide as much detail as possible in order to allow the Board to address these concerns.

The Board therefore finds that the Applicant has failed to show that he is a person who has demonstrable plans for the purported normal farm practice. For that reason as well, the application would fail.

Proposed Fill Operation as a Normal Farm Practice

Other Fill Operations

The Applicant called Keith Wilson as a witness to provide evidence with respect to a fill operation on a gravel pit which is being rehabilitated with importation of fill by Soilcan. This is a pit rehabilitation which is governed by the Aggregate Resources Act. Mr. Iachetta also provided information concerning other fill operations in which he had been involved.

With respect to the issue of normal farm practice, the focus of the Board is site specific. Subsection 6(15)(4) of the Act states that one of the factors the Board must consider are the specific circumstances pertaining to the site in question. In other words, what might be a normal farm practice on one site may not be a normal farm practice on another.

The public should realize that if the Board finds that a fill operation or proposal is not a normal farm practice in any particular case, it may, depending on the circumstances, find it to be a normal farm practice in another. Notwithstanding this fact, evidence of comparable operations in similar circumstances can be of assistance to the Board where circumstances are similar in an attempt to show that the proposal or practice is consistent with proper and acceptable customs and standards as established and followed by similar agricultural operations.

The Wilson fill operation is not a similar agricultural operation. The rehabilitation of the pit is governed by the Aggregate Resources Act and monitored by the Ministry of Natural Resources and Forests. Furthermore, all drainage remains on-site on the Wilson property; whereas on the Cox property, all drainage will drain off-site.

Innovative Technology

The other branch of the normal farm practice definition allows the Board to find that a practice is a normal farm practice where it makes use of innovative technology in a manner consistent with proper advanced farm management practices. There is no evidence before the Board that the fill proposal of Mr. Cox is consistent with proper advanced farm management practices. In fact, there is no evidence that there are any proper advanced farm management practices for this kind of situation.

What we do have is the MOECC – Best Management Practice document that deals broadly with the management of excess soil. The Board accepts this document as the best evidence available to it in the nature of a proper advanced farm management practice.

Consideration of Subsection 6(15) Factors

Purpose of the Fill By-Law

The purpose of the Fill By-Law is to control and regulate the placing or removal of fill or otherwise performing a site alteration. In his evidence, Mr. Feniak opined that municipalities enact site alteration by-laws that are used for engineering purposes to preserve topsoil on farmlands, to prevent drainage disputes, to protect downstream properties and water courses from sedimentation damage and erosion, to protect ground and surface water from contamination, to avoid dust complaints, to protect municipal roadways and to ensure operations are conducted within business hours that are in keeping with local expectations. He further gave the opinion that his review of the Fill By-Law provides adequate, appropriate and suitable protection in these areas.

Effects on Abutting Lands and Neighbours

The Board has found that the proposal as presented by Mr. Cox at this hearing will put water quality on neighbouring lands at risk of contamination. The proposed plan will also create drainage issues with respect to the upstream lands of Baker and Kehoe. The Board has further found that the proposed plan will also negatively affect the lands to the north of the Cox property by subjecting them to run-off erosion. The issue of dust control has not been properly dealt with in connection with the haul route on the Cox farm and the residence to the immediate west of the Cox farm.

Without a traffic and transportation management plan as recommended by the MOECC - Best Management Practices Guidelines, there will be no control on delivery times, trucking queuing and parking.

The 5th Line is land which abuts the Cox farm. It is a municipal right of way owned and maintained by the Town of Mono. The proposal will have two significant impacts on this road. Firstly, the proposal for the entrance location for truck traffic is unsafe and inadequate for new entrances in the Town of Mono. Secondly, the proposal will generate substantial volumes of truck traffic with no provision for load limits, the clean-up of spills or the tracking of soil onto the road surface.

Provincial Interest

The Fill By-Law reflects a provincial interest by incorporating a requirement for a detailed report in conformity with the best management practices set out in the MOECC – Best Management Practices Guidelines. Although this document is not legislation or a policy statement, it is an extension of the mandate of MOECC under the Environmental Protection Act whose stated purpose is “to provide for the protection and conservation of the natural environment in matters relating to potential impacts on ground water and surface water quality.”

The Fill By-Law also reflects provincial interest under the Ontario Water Resources Act whose stated purpose is “to provide for the conservation, protection and management of Ontario’s waters and for their efficient and sustainable use, in order to promote Ontario’s long term environmental, social and economic wellbeing relating to drainage of surface waters and erosion control.”

The Fill By-Law also reflects the provincial interest as established by the Municipal Act under whose jurisdiction the by-law was passed.

Specific Circumstances Pertaining to the Site

The Board has made a finding that the proposed fill operation will not significantly affect the agricultural viability of the farm. The present use for the pasture of sheep will not be enhanced with the proposed changes in contour, only enabling the affected land to support an additional 12 to 17 ewes.

Because of the nature of the soil on this farm, the risk of contamination to the water table is increased by the fact that the proposal only requires inspection and monitoring every two weeks.

Because of the changes to the contours of the land, the evidence discloses that there is the risk of changing the natural flow of surface water and causing flooding on abutting lands.

Because of the steep slope of Ravine 3 as proposed by the site plan, there is a risk of accelerated run off erosion on neighbouring lands to the north of the Cox property.

E. CONCLUSION

The Board therefore concludes that the Applicant's proposal is not a normal farm practice for the purposes of the non-application of the Fill By-Law. Further, the Applicant does not have standing to bring this Application as he has failed to prove that the proposal is ancillary to an agricultural operation or that he has demonstrable plans. As a result of these determinations, it is not necessary for the Board to consider whether or not the proposal is restricted by the Fill By-Law.

For the above reasons, the Application is dismissed.

DATED: February 22, 2016

A handwritten signature in black ink, appearing to read 'Glenn C. Walker', written over a horizontal line.

Glenn C. Walker, Vice-Chair