

**Normal Farm Practices
Protection Board**

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**Commission de protection des pratiques
agricoles normales**

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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
By-law has the effect of restricting a normal farm practice.

Board File No. 2015-04

BETWEEN

Marc Reid and Andrea Reid

Applicants

And

The Corporation of the Township of Puslinch

Respondent

Appearances:

Marc Reid for the Applicants
Tom Halinski, Counsel for the Respondent

Before:

Glenn C. Walker, Vice-Chair
Jane Sadler Richards
Robert Brander

REASONS FOR DECISION

A. INTRODUCTION

An application has been made by the Applicants, Marc and Andrea Reid, pursuant to Section 6 of the Farming and Food Production Protection Act, S.O. 1998, Ch. 1, as amended, (the "Act").

The purpose of the hearing is to determine whether By-law No. 31/12 of the Corporation of the Township of Puslinch (the "Municipality") being a by-law for prohibiting or

regulating the alteration of property within the Township of Puslinch (Site Alteration By-law), (the “By-law”) and amendments to the By-law, restrict the Applicants’ proposed importation of fill, which the Applicants allege is a normal farm practice.

The original application, dated July 25, 2015, was amended by an Order of the Board dated June 16, 2017 due to the fact that some importation of fill had already occurred pursuant to the provisions of a building permit issued by the Municipality since the application was accepted by the Board. The amendment to the application states as follows:

“Our Horse and Crop farm operation is being restricted by the Townships Site Alteration By-Law (31/12 and related amendments, 11/15, 45/15, 49/15) from leveling out approximately a 4.5-acre field (within the Township’s jurisdiction – as of May 2017, now about 2.2 -acres not covered by building permit 0145/2015 extending northerly to County Road 36) of our 95-acre Agricultural zoned property. The site alteration we propose is consistent with proper and acceptable standards for growing of crops (currently Hay/forage) and raising/training of Horses. Due to the gradients and poor soil coverage, the proposed area has suffered poor productivity for hay, and cannot serve as a training area or grazing/pasture lands. In many places the bedrock is only a few inches below the soil, therefore, the only method to improve the agriculture use of this field is to remove what little topsoil is present, import clean fill (as per our proposed, and approved control plan by multiple professional engineers, including the Township’s), level out the area and finish with putting back the native topsoil where appropriate. The Township’s by-law and council are preventing this normal farming activity.”

The application came before the Board for a hearing on January 8, 9, 10 and 11, 2018 and was heard at Guelph, Ontario.

The Board heard evidence from the Applicant, Marc Reid, and his witnesses, Dr. Laura Frost DVM who was qualified to give opinion evidence with respect to equine health and safety; Kenneth Niles, horse facility manager and horse trainer; Robert Kelly, former Chief Building Official for the Municipality and Adam French, another former Chief Building Official for the Municipality. The Board also heard evidence on behalf of the Corporation of the Township of Puslinch from Robert Alton, an agrologist, agronomist and certified crop specialist who was qualified to give opinion evidence with respect to field crop production; Gordon Feniak, a civil engineer, who was qualified to give opinion evidence with respect to municipal engineering pertaining to site alteration; Margaret Walton, who was qualified as a professional land use planner to give opinion evidence with respect to rural planning; David MacGillivray, a civil engineer, who was qualified to give opinion evidence with respect to hydrogeology and site contamination in the context of site alteration and Nicole Robertson, a horse trainer.

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 Jeremy Devries, an adjacent landowner, and Carmela Marshall from the Ontario Soil Regulation Task Force. The Board also received and considered written submissions from local residents, all of whom opposed the application.

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

B. FACTUAL BACKGROUND

(a) Site Location and Description

The Applicants' farm is located at Part Lot 31, Concession 10, in the Township of Puslinch, in the County of Wellington and is known municipally as 7827 Wellington Road 36, R.R. # 1, Moffat, Ontario. It consists of approximately 95 acres. A portion of the farm, approximately 35 acres, is made up of wetlands and is under the regulation of Halton Region Conservation Authority ("HRCA"). The remainder is used for growing hay and for pasture, buildings and riding arenas used in conjunction with the Applicants' business of raising and training horses.

The focus of the hearing is on a small 2 acre portion of the farm abutting Wellington County Road No. 36. In Exhibit # 21, this area is designated as "Existing Area to Remain Unaltered" and shall be referred to throughout as the "subject lands". The subject lands can be described as uneven and sloping toward the road with very shallow soil over bedrock.

(b) Previous Site Alteration

The Applicants had previously made application in October 2013 to the Municipality, under the process set out in the By-law, for a Site Alteration Permit to allow the importation of fill to level out a farm field in order to improve the efficiency of farming the land. In accordance with the provisions of the By-law, a Site Alteration Agreement was prepared and signed by the Applicants, necessary reports and studies done and the Chief Building Official certified to Council that all requirements had been met and reviews completed by the Township's consultants and outside agencies. However, the Township did not pass a by-law to authorize the signing of the Site Alteration Agreement. It is important to note that this application under the By-law specifically excluded the subject lands.

On August 25, 2015, the Applicants were issued a Building Permit by the Municipality to construct an addition to an existing indoor riding/exercise arena on their property. The addition was built on an area which had been the subject of the previous Site Alteration Permit application and required the importation of approximately 7500 loads of fill. No permit was required under the By-law as the importation of fill was done as part of a site control plan, a condition of the Building Permit.

(c) Mr. and Mrs. Reid's Proposal

The proposal is to level the subject land by bringing in approximately 1500 loads (Mr. Reid's estimation) of fill to increase the productivity of the land for growing hay and to permit the use of a portion of the land for pasture and exercise area for the horses. They submit that, as it is, the land produces poor crop yields due to the soil condition and gradient. Dr. Frost testified that there are health and safety issues for horses

trained on uneven ground and that the subject land was not appropriate for riding as it is. This evidence was countered by that of Nicole Robertson.

In support of the proposal, the Applicants did not submit any Site Alteration Management Plans, grading plans, groundwater monitoring plans or call any expert witnesses to testify with respect to these issues.

(d) Site Regulation

The Site Alteration By-law No. 31/12 was passed by the Corporation of the Township of Puslinch on April 4, 2012. It contains a permitting process and a number of exemptions. As at the date of this hearing, it has been amended three times by By-laws Nos. 11/15, 45/15 and 49/15. Relevant to these proceedings is the amendment made by By-law No. 45/15 passed on August 12, 2015, which provides that the Municipality shall temporarily cease to accept applications for Site Alteration projects greater than 1000 cubic metres. Shortly thereafter By-law No. 49/15 increased the maximum to 10,000 cubic metres.

C. THE ACT

The objectives of the Farming and Food Production Protection Act, 1998, are set out in the 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 in agricultural areas, that agricultural uses and normal farm practices be promoted and protected in a way that balances the needs of the agricultural community with the provincial health, safety and environmental concerns.”

“Agricultural Operation” means an agricultural, aquacultural, horticultural or silvicultural operation that is carried on in the expectation of gain or reward.

“Farmer” means the owner or operator of an agricultural operation.

Subsection 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 who 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 uses of innovative technology in a manner consistent with proper advanced farm management practices.”

D. DISCUSSION AND ANALYSIS

Issues to be Determined

The issues to be determined by the Board are:

- 1. Is the proposal a necessary but ancillary part of an agricultural operation?
- 2. Do the applicants have demonstrable plans?
- 3. Is the proposed practice a normal farm practice?
- 4. If the practice is a normal farm practice, is it restricted by the By-law?

(1) Necessary But Ancillary Part of an Agricultural Operation

Counsel for the Respondent argues that the proposal to bring in a substantial amount of fill is not ancillary to the agricultural operation of the Applicants. The raising of livestock is included in the definition of agricultural operation. No one is disputing that the Applicants have an agricultural operation. However, it is not just the bringing in of fill that is the proposed practice, but the bringing in of fill to create additional usable space for the purposes of the agricultural operation.

The definition of “ancillary” in the Oxford Dictionary is: “providing necessary support to the primary activities or operation of an organization, system, etc.”. The practice must also be necessary and there was evidence led that, for example, it is not necessary to have level ground for the riding and exercising of horses. There was also evidence that level ground was necessary for the riding and exercising of horses.

The Act is remedial legislation and, as such, the meaning of the words “ancillary” and “necessary” is entitled to a broad interpretation, an interpretation made in the context of not only the whole of the Act but in the context of the agricultural operation. Is it for the Board to decide whether or not the Applicants’ horses should be exercised on level or uneven ground? If the owner of the land and the animal is of the opinion that the creation of suitable land for exercising horses is needed and will make use of land presently of little use, is that not a decision that the Board should accept. Certainly, that is not the focus of Section 6 of the Act.

The Board finds that the proposal is a necessary but ancillary part of the agricultural operation of the Applicants.

(2) Demonstrable Plans

Subsection 6(3) of the Act provides that an application may be brought by farmers who are directly affected by a municipal by-law that may have the effect of restricting a normal farm practice and 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.

Where the practice is not already ongoing, then demonstrable plans are required. The previous importing of fill by the Applicants does not qualify as an ongoing practice as it took place under different circumstances, that is, pursuant to the terms of a site control plan. It should be noted that in site alteration by-law matters, where there is a high degree of regulation, demonstrable plans may always be required.

If the proposed normal farm practice is to import fill onto the subject lands for the purpose of growing hay and to permit the use of a portion of the land for pasture and an exercise area for horses, then the Applicants require demonstrable plans.

“Demonstrable” is defined in the Oxford Dictionary as meaning “clearly apparent or capable of being logically proved”.

The only evidence before the Board of the proposed plan is Mr. Reid’s verbal description of what he wants to do and his estimate that it would require approximately 1500 loads of fill. The documentation entered into evidence by the Applicants with respect to the application under the By-law in 2015 is of no assistance to the Board with respect to the present proceedings as the subject lands were specifically excluded from those studies and reports. The Applicants failed to provide any reports, studies or grade plans relevant to the subject lands or to call any expert witnesses in that regard.

In *Cox v. The Corporation of the Town of Mono*, 2016 CanLII 10661 (ON NFPPB), the Board stated:

“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.”

In the present case, even less detail of the proposed site alteration was tendered in evidence than in the *Cox* case.

The Board therefore concludes that the Applicants do not have demonstrable plans for this project.

(3) Normal Farm Practice

Evidence of Normal Farm Practice

With respect to the issue of normal farm practice, the focus of the Board is site specific. Subsection 16(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.

Kenneth Niles testified for the Applicants that he had managed a large fill importation project at the Iron Horse facility to improve the site for horse events at the Pan American Games held in 2015. Approximately 10,000 loads were brought in over a two year period pursuant to a permit issued under the Burlington Site Alteration By-law. The Applicants relied upon this sole example as evidence that their proposal would be conducted in a manner consistent with proper and acceptable customs and standards as established and followed by similar agricultural operations under similar circumstances. No evidence was called to show that the proposed fill project was using innovative technology in a manner consistent with proper advanced farm management practices.

Consideration of Subsection 16(15) Factors

Purpose of the By-law

The purpose of the By-law is to control and regulate the placing or removal of fill or otherwise performing a site alteration. The By-law contains a process for applying for a permit; however, the By-law was amended by By-law Number 45/15 passed on August 12, 2015 and By-law Number 49/15 passed on September 16, 2015 which had the effect of placing a moratorium on applications for site alteration projects greater than 10,000 cubic metres.

Effects on Abutting Lands and Neighbours

No evidence was presented by the Applicants to assist the Board with determining the effects of the fill proposal on abutting lands and neighbours.

Provincial Interest

The By-law reflects a provincial interest in Section 5 and Schedule "B" by requiring a control plan and supporting documentation to ensure compliance and conformity with the requirements of the Ontario Water Resources Act and best management practices established by the Ontario Ministry of the Environment and Climate Change.

Specific Circumstances Pertaining to the Site

Aside from Marc Reid's description of the subject lands, the Board was not provided with enough evidence by the Applicants, with respect to present gradients and drainage, for example, or proposed changes to the site to make a determination about the specific circumstances pertaining to the site.

E. FINDINGS

The Board finds that the Applicants have failed to prove that they have demonstrable plans for the proposed fill project in accordance with Subsection 6(3)(b) of the Act. Because of the lack of evidence, the Board is unable to make a determination of whether or not the proposed fill project is a normal farm practice. The onus of proof with respect to these issues rests with the Applicants. As a result of these findings, it is not necessary for the Board to decide whether or not the proposal is restricted by the By-law.

For the above reasons, the Application is dismissed.

DATED: May 25, 2018



Glenn C. Walker, Vice-Chair

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