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The Ontario landscape has changed dramatically with respect to site alteration in rural areas. This is caused by a number of factors:

1. the need to dispose of excess fill from development in nearby urban areas (large building excavations, subway tunnelling, and new subdivision development;
2. the cost of disposing of excess clean fill;
3. the cost of disposing of contaminated or hazardous soils;
4. the loss of owner occupied farming operations in the surrounding rural areas, replaced by lands held by speculators, and other non-farm related individuals and corporations;
5. government attempts to protect the natural landform and environment[1]; and
6. applications for the development of unused gravel pits or other poor agricultural lands for commercial fill sites.

As a result there has been a great deal of pressure on local municipalities to regulate both private and commercial fill operations within their jurisdiction.

The Legislative Framework

In Ontario the *Municipal Act, 2001* permits municipalities to pass by-laws to prohibit and regulate site alteration:

[1] *Oak Ridges Moraine Conservation Act, 2001*; *Greenbelt Act, 2005*

142. (1) In this section,

"topsoil" means those horizons in a soil profile, commonly known as the "O" and the "A" horizons, containing organic material and includes deposits of partially decomposed organic matter such as peat. 2001, c. 25, s. 142 (1).

Powers of local municipality

(2) Without limiting sections 9, 10 and 11, a local municipality may,

(a) prohibit or regulate the placing or dumping of fill;

(b) prohibit or regulate the removal of topsoil;

(c) prohibit or regulate the alteration of the grade of the land;

(d) require that a permit be obtained for the placing or dumping of fill, the removal of topsoil or the alteration of the grade of the land; and

(e) impose conditions to a permit, including requiring the preparation of plans acceptable to the municipality relating to grading, filling or dumping, the removal of topsoil and the rehabilitation of the site. 2006, c. 32, Sched. A, s. 76 (1).

Delegation to upper-tier

(3) A lower-tier municipality may delegate all or part of its power to pass a by-law respecting the dumping or placing of fill, removal of topsoil or the alteration of the grade of land to its upper-tier municipality with the agreement of the upper-tier municipality. 2001, c. 25, s. 142 (3).

Most municipalities in Ontario surrounding large urban areas have passed site alteration by-laws. These by-laws do not just regulate the placing of fill, but also the removal of topsoil, altering the grade, or even stockpiling fill. The *Municipal Act*, 2001 only allows such by-laws to prohibit and regulate. Thus if the criteria and conditions in the by-law for permitting the site alteration are met, the municipality has no discretion to refuse the granting of the permit.

There are also exemptions in the legislation whereby the by-law cannot be used to regulate site alteration in the following circumstances:

Exemptions

(5) A by-law passed under this section does not apply to,

(a) activities or matters undertaken by a municipality or a local board of a municipality;

(b) the placing or dumping of fill, removal of topsoil or alteration of the grade of land imposed after December 31, 2002 as a condition to the approval of a site plan, a plan of subdivision or a consent under section 41, 51 or 53, respectively, of the *Planning Act* or as a requirement of a site plan agreement or subdivision agreement entered into under those sections;

(c) the placing or dumping of fill, removal of topsoil or alteration of the grade of land imposed after December 31, 2002 as a condition to a development permit authorized by regulation made under

section 70.2 of the *Planning Act* or as a requirement of an agreement entered into under that regulation;

(d) the placing or dumping of fill, removal of topsoil or alteration of the grade of land undertaken by a transmitter or distributor, as those terms are defined in section 2 of the *Electricity Act*, *1998*, for the purpose of constructing and maintaining a transmission system or a distribution system, as those terms are defined in that section;

(e) the placing or dumping of fill, removal of topsoil or alteration of the grade of land undertaken on land described in a licence for a pit or quarry or a permit for a wayside pit or wayside quarry issued under the *Aggregate Resources Act*;

(f) the placing or dumping of fill, removal of topsoil or alteration of the grade of land undertaken on land in order to lawfully establish and operate or enlarge any pit or quarry on land,

(i) that has not been designated under the *Aggregate Resources Act* or a predecessor of that Act, and

(ii) on which a pit or quarry is a permitted land use under a by-law passed under section 34 of the *Planning Act*; or

(g) the placing or dumping of fill, removal of topsoil or alteration of the grade of land undertaken as an incidental part of drain construction under the *Drainage Act* or the *Tile Drainage Act*. 2001, c. 25, s. 142 (5); 2002, c. 17, Sched. A, s. 30 (2, 3).

Exception
(6) A by-law 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. 2001, c. 25, s. 142 (6).

Exclusion
(7) The exception in subsection (6) respecting the removal of topsoil as an incidental part of a normal agricultural practice does not include the removal of topsoil for sale, exchange or other disposition. 2001, c. 25, s. 142 (7).

By-law ceases to have effect
(8) If a regulation is made under section 28 of the *Conservation Authorities Act* respecting the placing or dumping of fill, removal of topsoil or alteration of the grade of land in any area of the municipality, a by-law passed under this section is of no effect in respect of that area. 2001, c. 25, s. 142 (8).

In the area surrounding the City of Toronto (known as the GTA), site alteration is discouraged in the Oak Ridges Morraine. The *Oak Ridges Moraine Conservation Act, 2001* ("Act") establishes the Oak Ridges Moraine Conservation Plan[2], whose objectives include:

(a) protecting the ecological and hydrological integrity of the Oak Ridges Moraine Area;

...

(d) ensuring that the Oak Ridges Moraine Area is maintained as a continuous natural landform and environment for the benefit of present and future generations;

[2] s.4, *Oak Ridges Moraine Conservation Act, 2001*

> *(e) providing for land and resource uses and development that are compatible with the other objectives of the Plan;*
>
> *…*

The Act provides that it prevails over all other Acts, and that no municipality may pass a by-law for any purpose that conflicts with the Plan.[3]

The Plan expressly prohibits site alteration in the Oak Ridges Moraine Area except as permitted by the Plan. The Plan defines "site alteration" as[4]:

> *activities such as filling, grading and excavation that would change the landform and natural vegetative characteristics of land, but does not include,*
>
> *(a) the construction of facilities for transportation, infrastructure and utilities uses, as described in section 41, by a public body, or*
>
> *(b) for greater certainty,*
>
> > *(i) the reconstruction, repair or maintenance of a drain approved under the* Drainage Act *and in existence on November 15, 2001, or*
> >
> > *(ii) the carrying out of agricultural practices on land that was being used for agricultural uses on November 15, 2001;*

The "Illegal Dumping" Problem

Most municipalities with rural areas close to large urban areas have had a great deal of difficulty in the policing and enforcement of their site alteration by-laws. Since most municipal regulatory by-laws are enforced on a complaints only basis, large scale abuses have occurred where owners of large parcels have permitted dumping on their lands in order to collect "tipping fees" from haulers. In more recent cases, contractors and haulers have bought cheap farm properties (primarily in poor agricultural areas or abandoned gravel pits) to use as fill sites.

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[3] ss. 7(2) and 25, *Oak Ridges Moraine Conservation Act, 2001*

[4] ss. 3 and 5, *Oak Ridges Moraine Conservation Plan*

Rural municipalities have struggled with this concept. In some cases they have simply prohibited the use of any lands in the municipality for a "commercial fill operation". Notwithstanding such prohibitions, owners, tenants, haulers and contractors will bring in large quantities of fill on to lands without a site alteration permit before any enforcement can occur.

Even where site alteration permits were granted pursuant to the by-law, a great deal of abuse has occurred. The conditions of permit were not adhered to, drainage patterns were altered with a detrimental effect on neighbouring properties, or the fill contained prohibited, contaminated or even hazardous materials, which could potentially affect the ground or surface water. Often haulers would produce a soil report (as may be required by the by-law) to prove that the source site contained clean fill. However, there was no guarantee and no soil management practice in place to ensure that the receiving site was only obtaining fill from the source site. Subsequent testing would often show that the soil at the receiving site contained prohibited materials, was contaminated, or in some cases contained hazardous materials.

The cost of tipping fees for non-hazardous soil to an approved receiving site for haulers can range from $40 to $50 per tonne. Tipping fees for hazardous soil are $400 per tonne. One dual axle truck can carry 12 to 15 tonnes of soil. Thus every load of hazardous soil dumped illegally is worth as much as $6000 in saved tipping fees.

Ontario Soil Management Guidelines

Recently, Ontario produced voluntary soil management guidelines[5] for municipalities to adopt to try to regulate and ensure that only clean fill would be deposited on receiving sites. The Ontario Ministry of the Environment is encouraging municipalities to implement them by by-laws in connection with any permits or approvals required which involves the removal, movement, temporary storage and placement of excess soil. Unfortunately, this only works with compliant applicants who are also prepared to pay (as a condition of permit) the expensive cost of monitoring the fill being brought on site from a source site to a receiving site.

For the purpose of the Guidelines, "excess soil" is soil that has been excavated and moved off site, either permanently or temporarily. "Soil" is defined by Ont. Reg. 153/04 which is the Records of Site Condition Part of the *Environmental Protection Act*. The Guidelines do not apply to materials not caught by the two definitions, such as compost, engineered fill products, asphalt, concrete, re-used or recycled aggregate product and/or mine tailings, other products, including soil mixed with debris such as garbage, shingles, painted wood, ashes or other refuse. Soil removed from brownfield sites, often include materials that do not qualify as "excess soil" and should be prohibited in any event by local site alteration by-laws.

All municipalities that may the target of commercial fill operations, whether applied for or not, should have detailed Site Alteration By-laws which give the municipality strong regulatory oversight and control over approved fill operations. An application for a fill permit where significant quantities of fill are being imported from an unknown source should be like a

[5] **Management of Excess Soil – A Guide for Best Management Practices,** Ontario Ministry of the Environment

development application, and require an agreement which includes provision for a soil management plan to ensure that the fill is tested and there is adequate supervision by a qualified person. Municipalities run the risk of being sued in cases where contaminated or even clean soil may be deposited on private or public lands if they fail to use their enforcement powers available to them. Increasingly, the private law duty of care concerning negligent enforcement is being applied more broadly if the harm is forseeable, even if enforcement is not mandatory.

Even though it has been held that there is not duty to enforce subdivision grading provisions[6], or ensure that haulers when removing fill to construct public roads are hauling it to an approved location[7], the risk of liability is becoming more realistic and municipalities are well advised to take the appropriate preventative measures through by-law regulation, the *Planning Act* approval process, and enforcement to minimize the risk.

If the governmental authority is directly responsible for the depositing of the fill, different considerations apply. In that case, the governmental authority owes a private law duty of care that no contamination will occur.[8] In *Berendsen*[9], the Ontario Department of Highways, now the Ministry of Transportation Ontario (MTO), reconstructed a highway near the Berendsens' farm, generating waste asphalt. A contractor was responsible for the removal of the waste asphalt. The contractor entered into an agreement with the previous owner of the farm to bury the waste asphalt on the farm. The waste asphalt contaminated the farm's water supply and

[6] *Southorn v. Gauley* ONSC 7518
[7] *Northmarket v. Newmarket* 2011 ONSC 4657; 2012 ONCA 149
[8] *Berendson v. Ontario* 2009 ONCA 845; *Berendsen v. Ontario*, [2001] 2 S.C.R. 849
[9] *supra*

the Berendsens commenced an action against the government. The Court found that the disposal of waste asphalt in that instance was an operational decision of a predominately private character and therefore not subject to the six-month limitation period set out in section 7 of the *Public Authorities Protection Act*.

The Court in *Berendsen* did not find that a duty of care arose with respect to the disposal of the waste asphalt. It only decided on the issue of whether the limitation period applied. The Court directed the Berendsens' action to be restored to the trial list and specifically stated that "[n]othing in these reasons is to reflect on the merits of the negligence claim against the [government]."

The Ontario Court of Appeal subsequently found that the government was not negligent when it deposited the waste asphalt on the farm.

In an appeal to the Supreme Court of Canada the Court wrote:

> *23 Looking at all the relevant circumstances, I conclude that the [Berendsens'] position should prevail, and that the decision regarding the manner in which the waste asphalt was disposed of is predominantly of an operational nature, as I will now discuss.*
>
> *24 In the first place, while the MTO may owe a duty to every member of the public to repair highways, the disposal of waste asphalt on private land gives rise to a duty of care owed only to the landowner involved and possibly a few other individuals who could be impacted by the disposal. In other words, the courts must examine who could bring an action against the government for the negligent disposal of waste asphalt. When asphalt has been disposed of on private land, and is only causing harm to a restricted number of individuals, it is only those individuals affected, not any member of the public, who could bring such a claim.*

When the Court states that "[t]he disposal of waste asphalt on private land gives rise to a duty of care owed only to the landowner involved and possibly a few other individuals who could be

impacted by the disposal," it is doing so in the context of an analysis of whether the act complained of is public or private in nature. The Court is not making a statement as to whether or not there is a duty of care, but rather to whom the duty of care is owed.

Enforcement

Municipalities generally pursue enforcement by laying charges under the *Provincial Offences Act* ("POA"). The Provincial Offences Judge has the power to impose fines under the originating statute (such as the *Municipal Act, 2001* or in the case of zoning contraventions, the *Planning Act*), the Judge also is granted the following powers with respect to site alteration[10]:

> Additional order to discontinue or remedy
> **431.** If any by-law of a municipality or by-law of a local board of a municipality under this or any other Act is contravened and a conviction entered, in addition to any other remedy and to any penalty imposed by the by-law, the court in which the conviction has been entered and any court of competent jurisdiction thereafter may make an order,
>
> (a) prohibiting the continuation or repetition of the offence by the person convicted; and
>
> (b) in the case of a by-law described in section 135 or 142, requiring the person convicted to correct the contravention in the manner and within the period that the court considers appropriate.

Although the POA judge is given the authority by this section to impose prohibitory orders as well as mandatory cleanup orders with respect to site alteration by-laws passed under section 142, where you have a large scale repeat offender, this method of enforcement becomes mostly ineffective. One of the reasons is that it is a criminal statute which means laying an information and proceeding in Provincial Offences Court with numerous adjournments and delays. In addition there are disclosure requirements only available to the accused. The prosecution will not know of the nature of the defence until the trial. The burden on the municipality is to prove the offence beyond a reasonable doubt, and the judge hearing the

[10] *Municipal Act, 2001*

matter is often not familiar with or sympathetic with municipal issues such as illegal fill. What may have started as a few truck loads of illegal fill, may well have escalated to thousands of loads by the time the matter comes up for trial. By that time, the municipality has lost its opportunity to stop a large scale commercial fill operation and is looking for a different type of relief, with the possibility that the operator responsible is either gone or insolvent.

In addition, to obtain a mandatory order for remediation may require extensive expert evidence with respect to the quantity, nature and effects of the fill. The POA courts are not equipped to deal with this kind of evidence, and are unlikely to impose the type of sophisticated orders required to bring about proper remediation.

Another problem that often arises is when the POA proceedings have resulted in a dismissal, and the municipality subsequently wishes to pursue injunctive relief in the Superior Court of Justice. Invariably, the defendant will raise the evidentiary estoppel argument and even the reasons for dismissal as evidence of bad faith.

In *Uxbridge v. Corbar*[11] the Ontario Court of Appeal on an application to admit fresh evidence of the POA dismissal reasons stated:

> On the issue of the admissibility of the fresh evidence, namely a …transcript and reasons for judgment in a *Provincial Offences Act* prosecution, …the reasons are not relevant. The *Provincial Offences Act* proceedings dealt with different orders to comply, engaged a different burden of proof, and do not deal with injunctive relief.

[11] 2012 ONSC 3527; upheld at 2013 ONCA 561; leave refused by SCC March 13, 2014

If the municipality is pursuing a mandatory order to remove the illegal fill and impose full remediation, it should resort to seeking injunctive relief in the Superior Court of Justice by way of an Application pursuant to section 440 of the *Municipal Act, 2001*:

> 440. If any by-law of a municipality or by-law 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 by-law, the contravention may be restrained by application at the instance of a taxpayer or the municipality or local board.

The statutory authority in s. 440 of the *Municipal Act, 2001* to "restrain" the contravention of a bylaw includes the authority to grant a mandatory order for the respondents to remedy the contravention by removing the thing(s) that contravene the bylaw. The municipality need not prove that there is no other adequate remedy.[12]

The court then has the discretion to grant interim, interlocutory, and permanent injunctive relief pursuant to section 101 of the *Courts of Justice Act* on such terms as the court considers just, which includes mandatory relief. Where a municipal authority seeks an injunction to enforce a bylaw which it establishes is being breached, irreparable harm should be presumed and the courts will refuse the application only in exceptional circumstances.[13]

There are also the added benefits that the municipality only needs to establish on a balance of probability that the contravention has occurred and where there is a contravention, it is prima facie entitled to the relief sought, and if successful, is entitled to costs.

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[12] *Suprun v. Bryla*, 2007 CanLII 56089 (ON S.C.J.), aff'd 2008 ONCA 94

[13] *Newcastle Recycling Ltd. v. Clarington (Municipality)* (2005), 204 O.A.C. 389; *RJR-MacDonald Inc. v. Canada,* [1994] 1 S.C.R. 311

Three Cases with Three Novel Approaches

Because of the substantial monetary stakes involved, large illegal fill operations are not easily deterred by By-law Contravention Orders and POA prosecutions. The following 3 recent cases illustrate the point.

Scugog (Township) v. Earthworx Industries[14]

2241960 Ontario Inc. o/a Earthworx Industries ("Earthworx") is the owner of a former gravel pit property, located in the Oak Ridges Moraine in the Township of Scugog. Earthworx had applied for and been granted a fill permit by the Township to operate a commercial clean fill dump site, which was revoked because of concerns over the quality of fill being deposited on the property. After the fill permit was revoked, Earthworx informed the Township that it would not be applying for a new permit because its filling activity would continue for the purpose of constructing a runway on the property. Earthworx continued to operate the fill site despite a stop work order. The Township was successful in obtaining an interlocutory injunction against Earthworx.

The Township also passed a new site alteration by-law in an attempt to strictly regulate commercial fill operations. Earthworx did not obtain a permit under the new by-law and continued to use the property as a commercial fill site earning approximately $20,000 per day in tipping fees. Earthworx brought an application for judicial review seeking a declaration that the Township's fill by-law was constitutionally inapplicable to it because it was in the process of constructing a runway on the property.

[14] 2011 ONSC 1598 and 2011 ONSC 2337 (Div.Ct.)

The federal aviation regulations differentiate between “airports” and “aerodromes”. There is significant regulation of airports, which require an airport certificate to be issued by Transport Canada, but there is very little regulation of local “aerodromes”, which are defined very broadly as any place used or set apart for the arrival, departure, movement and servicing of aircraft. Essentially, any area of land could be declared an “aerodrome” by any person without any further regulation or authorization from Transport Canada. An aerodrome operator has the option of complying with some minimal requirements regarding lighting and marking of the runways at an aerodrome and then being listed in the public Canadian Flight Supplement, but it is perfectly acceptable to operate a completely private aerodrome not meeting any federal standards.

In its application, Earthworx relied upon the doctrine of interjurisdictional immunity, which provides for immunity to federal undertakings from the application of provincial or municipal laws which impair core federal powers. The doctrine of interjurisdictional immunity was recently revived in a pair of decisions from the Supreme Court of Canada, which dealt with the application of land use laws to already operating aerodromes in Quebec. Earthworx relied upon the *COPA*[15] decision of the SCC and the *GTAA v. Mississauga*[16] case from the Ontario Court of Appeal relating to the redevelopment of Pearson airport. These cases were among a long line holding that aeronautics is a federal power, and that the location and construction of aerodromes is at the core of that federal power.

[15] *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536
[16] *Greater Toronto Airports Authority v. Mississauga (City)*, [2000] O.J. No. 4086 (C.A.)

The Divisional Court found that Earthworx was not at present, by filling up the gravel pit hole, engaged in the construction of an aerodrome – it is engaged in the operation of a commercial fill site. The Court expressed some skepticism about Earthworx's sincerity given the history between the parties and the fact that there was evidence that Earthworx earned up to $20,000 per day in "tipping fees" from the operation of the fill site.

The Court also held that even if Earthworx were engaged in an aeronautics undertaking, interjurisdictional immunity would not apply because the impact of the fill by-law does not impair the federal power over the location of aerodromes. The *COPA* decision was distinguished on the basis that the fill by-law is not a land-use by-law. The regulatory provisions in the fill by-law relating to the quality of fill, drainage patterns, etc. do not prevent the use of the property as an aerodrome. Similarly, the Court held that the by-laws did not prevent Earthworx from selecting appropriate fill materials to form the base of a runway, and therefore do not impair the federal power over the construction of aerodromes.

The outcome of this case is being watched carefully by other small municipalities in the GTA because many of these municipalities have started to run into more and more applications for large-scale fill operations as a result of development in the GTA. Prior to the past few years, if a municipality had a fill by-law in place, most fill applications were for leveling a farmer's field or creating a berm, or some similar purpose. These small, rural municipalities are now faced with how to manage and regulate the potentially great environmental impacts of "clean fill", including the prospect of having several hundred dump trucks driving down rural roads each day. In this particular case, there was significant pressure from neighbouring residents to

protect an aquifer located in the area of the Earthworx property, and to control the noise and dust impact of the operation.

It should be noted that the Township called for reinforcements from the Ministry of the Environment when the soil quality problems were discovered. The MOE had been involved in making orders against Earthworx for ongoing soil testing and well-head protection, but it is clear that MOE was also struggling with how to address testing of clean fill soil to be dumped using the Table standards intended for brownfield development.

As the litigation between Scugog and Earthworx got underway, word of Earthworx's strategy had spread, and in several neighbouring municipalities, windsocks were erected at operating clean fill sites indicating that they too were dumping for the purpose of constructing aerodromes. Although that loophole appears to have been shut down by the *Earhworx* decision, other new novel arguments have appeared as is illustrated by the following decisions.

Uxbridge (Township) v. Talbot[17]

Talbot owned a property in the Township that he used for his haulage and earth moving business. He had previously applied for a site alteration permit and was in default of the conditions of the permit. He then purchased a property adjacent that had been partially used for a nursery retail sales outlet which constituted a legal non-conforming use. Talbot then filled in a large area of the property adjoining the nursery retail facility and formerly used as a hay field with approximately 2m of fill without a site alteration permit. Talbot claimed he had to create a level area to operate a triple mix plant in conjunction with the nursery business. He

[17] 2014 ONSC 1276

argued he had a right to do so as a result of the legal non-conforming use. Talbot admitted he had brought in about 240 truck loads of fill on to the property (approximately 3600 tonnes) without a fill permit. Talbot then began to establish an industrial triple mix operation on the property and brought in large stockpiles of materials. He also expanded his haulage and earth moving business on to the new property, further removing agricultural lands from production. The Township brought an Application for injunctive relief and were granted an interlocutory order preventing any further dumping or filling on the two properties, limiting stockpiles to 1000m3 and preventing the operation of a triple mix plant from the property. At the direction of the Township, Talbot had the illegal fill tested and it was established to be "clean fill". Accordingly, Talbot was encouraged to apply for a site alteration permit to regularize the illegal fill, something that Talbot refused to do. Instead, he started to use the filled area as a waste transfer station on which were located large industrial disposal bins.

The Township then proceeded to obtain a final order which included the follow relief:

1. A Declaration that commercial and industrial uses such as stockpiling for a triple mix operation, operating a landscape supply operation, parking and storing vehicles and equipment for a contracting and haulage business, operating a contractor's yard and waste disposal business, storing waste disposal bins are all illegal uses under the zoning by-law.

2. A Declaration that importing fill without a fill permit is contrary to the provisions of the Site Alteration By-law.

3. A Declaration that using the properties for a waste disposal business, including the handling, storage, and processing of waste and construction debris is contrary to the Environmental Protection Act.

4. A mandatory order requiring the removal of all of the fill deposited without a permit and restore the property in a manner suitable for agricultural purposes. (This would apply to the illegally filled area to a depth of about 5 to 6 feet as well as the piles stored on the property that do not qualify for an exemption under the site alteration by-law or contravene the zoning by-law.)

5. A permanent injunction restraining the owners and others with knowledge of the order from:

    a. placing or dumping fill on the property unless a site alteration permit has been obtained;

    b. Operating a landscape supply business or storing or selling soils from the property;

    c. Using the property as a contractor's yard or storing goods, equipment and materials used in a general contracting, excavation and haulage business;

    d. Using either the properties as a waste disposal site or for a waste disposal business or for the storage of waste disposal bins.

What started out as a complaint about illegal fill being brought on to a property which had historically been used as a garden centre ended up in court order whereby a claim for an existing as well as an expansion of a legal non-conforming use was denied and effectively prohibiting the use of the two properties for a contracting, landscaping and triple mix business as well as requiring the removal of a large quantity of fill and restoring the property to an agricultural use.

Uxbridge (Township) v. Corbar[18]

The owner Corbar Holdings Inc. and the principals of the owner operate an excavating and haulage business. They bought a rolling 108 acre property in Uxbridge Township. They proposed to use it as a commercial fill site and submitted an application for 300,000 m3 of fill or approximately 30,000 loads. The Township shortly thereafter passed a by-law prohibiting the depositing of fill in the Oak Ridges Morraine and refused to grant a permit. Corbar brought an Application to quash the by-law and sought a mandatory order compelling the Township to issue the permit. It was unsuccessful on the Application.[19]

Corbar then sought a severance of 10 acres for a building lot and also applied for building permit for the remaining 98 acres. As a condition of severance, Corbar signed an agreement prohibiting any fill from being placed except as permitted by an approved grading plan in conjunction with a building permit. A grading plan was submitted and approved which allowed for approximately 26,000 m3 (approximately 2600 truck loads) of clean fill to create a driveway

[18] 2012 ONSC 3527; upheld at 2013 ONCA 561; leave refused by SCC March 13, 2014

[19] ONSC (unreported) Ct. File No. 57733/08 (Oshawa)

access and usuable space for a rural residence and septic field. The fill area was also clearly delineated. Before commencement of construction, Corbar started to bring in fill beyond the limits of the grading plan without a site alteration permit and contrary to the severance agreement. The Township issued orders which were ignored and commenced POA proceedings. Corbar continued to bring great amounts of fill on to the property in excess of what was permitted by the site alteration plan and outside the permitted fill limits. Corbar now asserted that it was bringing in clean fill because it was necessary to do so to level the lands to pursue agricultural activities. It claimed that without bringing in such large quantities, the lands were not suitable for farming. It should be noted that the lands were in a landform conservation protection area and high aquifer vulnerability under the ORMCP and had not been actively farmed for some years.

The Township brought an application for injunctive and mandatory relief to prevent the illegal fill operation. Corbar took the position that the fill was exempt as a "normal farm practice" protected by s.6 of the *Farming and Food Protection Act*.

Justice Edwards of the Ontario Superior Court of Justice granted a permanent injunction preventing any further fill operations except in accordance with the approved grading plan and subject to complying with a Township Order that required up to date survey and engineering information regarding the illegal fill and proposed remediation work required to bring the property into compliance. He held that depositing upwards of 30,000 loads of fill does not in any way remotely resemble a normal farming operation. He reserved the right to make further orders with respect to remediation of the property. The Normal Farm Practices Board dismissed

an application by Corbar on the grounds they had no jurisdiction to hear the matter given the decision by Justice Edwards.

Corbar refused to comply, and continued to bring fill on to the property and also appealed the Edwards order to the Ontario Court of Appeal. The Ontario Court of Appeal dismissed the appeal and concurred with Edwards that the fill operation was not protected by the FFPA as a normal farm practice. A further leave to appeal application was dismissed by the Supreme Court of Canada.

The Township then sought to pursue remediation. Due to Corbar's refusal to comply with the outstanding order to provide survey and engineering information for the purpose of remediation, the Township had no alternative but to conduct its own surveying and testing. Corbar refused entry, and the Township was required to obtain an inspection order pursuant to s. 438 of the Municipal Act, 2001, which provides that a provincial judge or justice of the peace may issue an order for inspection in certain circumstances. As a result, it was determined that approximately 152,000m3 of illegal fill (15,200 dual axle truckloads) was brought on to the site in addition to the 26,266m3 of fill that had been permitted. It was also determined that the fill was contaminated with brick, asphalt, concrete, plastic, wood, foam, and putrescible materials. Based on the testing, the fill must be disposed of as contaminated non-hazardous fill to an approved site. The Township has proposed that 87,756m3 of uncontaminated fill can remain on the site, but that 90,642m2 of contaminated non-hazardous fill should be removed. The estimated cost of removal, transportation, disposal and monitoring of this contaminated non-hazardous fill is $9,745,541.

At the time of this article, a hearing for a remediation order is still pending.

Conclusion

Illegal site alteration can take on many forms, from removing top soil, filling in old pits or other depressions, raising the elevations of properties, creating berms or stockpiling fill materials. Effectively, any significant landform change can constitute a site alteration for which a permit may be required.

Even where municipalities have passed site alteration by-laws, often significant contraventions have occurred before the municipality can respond with the result that unscrupulous operators may have dumped thousands of loads of contaminated fill on property before they are stopped.

Municipalities need to become more pro-active to ensure that such illegal activities do not result in serious damage to the environment or to innocent third parties who may become affected.