

VIA EMAIL: ksmyth@king.ca

August 22, 2013

Kathryn Smyth, Town Clerk
Township of King
2075 King Road
King City, ON L7B 1A1

Dear Ms. Smyth,

RE: DEVELOPMENT OF PRIVATE AERODROMES

Please be advised that the above-noted matter was placed before Council at its meeting held on August 13, 2013.

Council passed the following resolution:

- 1) THAT Council send a resolution to the Minister of Transport, Infrastructure and Communications requesting that the Minister require all proponents of aerodrome development to undertake pre-development consultation with area residents and the municipality in the same manner that Industry Canada requires proponents of communication towers to follow a local land authority established public consultation process.
- 2) AND THAT Council send a copy of this report to the local Member of Parliament, Paul Calandra, the Township of King **and resident Mr. M. Mezzarobba**, for information.

CARRIED AS AMENDED

Enclosed is a copy of the staff report for your information.

Yours truly,



Isabel Leung
Council Coordinator

Encl.



Council in Committee Report
August 13, 2013

DEVELOPMENT OF PRIVATE AERODROMES (D00)

Report prepared by: Director of Engineering & Capital Projects

RECOMMENDATION:

The Director of Engineering & Capital Projects recommends:

- 1) THAT Council send a resolution to the Minister of Transport, Infrastructure and Communications requesting that the Minister require all proponents of aerodrome development to undertake pre-development consultation with area residents and the municipality in the same manner that Industry Canada requires proponents of communication towers to follow a local land authority established public consultation process.**

- 2) AND THAT Council send a copy of this report to the local Member of Parliament, Paul Calandra, and the Township of King, for information.**

1. PURPOSE:

The purpose of this report is to respond to Council's request for a report on the development of a private aerodrome located at 13282 Ninth Line, Stouffville.

2. EXECUTIVE SUMMARY:

A private airstrip is currently under construction at 13282 Ninth Line for the purpose of the owner flying light aircraft for pleasure. Council received a copy of a letter from Mr. M. Mezzarobba to the Minister of Transport, Infrastructure and Communications opposing the construction (appended as Attachment #1) and Council referred this letter to staff for a report.

Aerodromes are strictly under federal jurisdiction. The Town has limited ability to impose its policies and by-laws on aerodrome development and cannot actually prevent the aerodrome from being constructed and operated. Staff, in discussion with the Town Solicitor and based on recent case law, have taken the position that earthworks associated with an aerodrome are subject to the Town's site

alteration By-law 2013-007-RE. The Town requires public consultation for site alterations importing more than 5000 cubic meters of material or greater than one (1) acre disturbed.

Currently there are no requirements in the Aeronautics Act or regulations for owners to advise the Town or neighbours about their plans to develop an aerodrome. Staff recommends that Council send a resolution to the Minister of Transport, Infrastructure and Communications requesting that the Aeronautics Act be amended to require public notification and consultation by proponents of aerodromes in the same manner as Industry Canada does for communication towers.

In the interim, staff has issued a Notice to Comply to the owner of the property at 13282 Ninth Line requiring him to apply for a Site Alteration Permit. Further, and subject to greater than 5000 m³ being dumped or the work occurring in an area greater than one (1) acre, staff will ensure that a public meeting is incorporated into the approval process for the site alteration to advise the public of the Owner's plan to develop and operate an aerodrome and the associated earthworks.

3. BACKGROUND:

A private airstrip is currently under construction at 13282 Ninth Line north of Bethesda Road for the purpose of flying light aircraft for pleasure for which staff have issued a Notice to Comply under the Town's Site Alteration By-law. Mr. Mel Mezzarobba, whose property is in close proximity to the site has, sent a letter to the Minister of Transport, Infrastructure and Communications opposing the construction and approval of the airstrip on the basis that it would generate excessive noise, reduce property values of the surrounding lands, create safety issues for residents in the area including Bloomington and Stouffville and in the future could evolve into a commercial airstrip.

Since the construction of airstrips is under federal jurisdiction, provincial and municipal laws, regulations and by-laws have limited application in the final approval process. Mr. Mezzarobba has requested the Minister to consider amendments to the current regulations that would take into account local by-laws and local factors, as well as the basic rights of the people that may be affected by the project.

The Town Solicitor has advised that based on recent case law relating to construction of aerodromes, the Town's Site Alteration By-Law would apply to the earthworks portion of the work. The Town's By-Law enforcement officer has attended the site and, on the basis that the owner was undertaking site grading to construct the airstrip without first having received a site alteration permit as required by the Town's site alteration By-law 2013-007-RE, has issued a Notice to Comply. The notice requires the owner to apply for a Site Alteration Permit for

the proposed work. Staff can, provided that the criteria in Section 4.2 of the Site Alteration By-law are met, require a public meeting as part of the permit application process.

Council may recall that on January 22nd, 2013 Council supported a resolution from the Township of King that “requested the Minister of Transport, Infrastructure and Communications to review and amend the existing Aeronautics Act and regulations, policies and procedures such that construction of new or expanded aerodromes is regulated in a manner that the host municipality can execute their responsibilities to protect both their citizens and the water sources in their jurisdiction without the encumbrance of ambiguity regarding the authority of the Aeronautics Act and its regulations and specifically to incorporate requirements to comply with relevant municipal environment and zoning by-laws and provincial laws”. A copy of the staff memo supporting the resolution is appended as Attachment #2.

Aerodromes and Airports

The Aeronautics Act defines an aerodrome as follows: “Any area of land, water (including the frozen surface thereof) or other supporting surface used, designed, prepared, equipped, or set apart for use either in whole or in part for the arrival, departure, movement or servicing of aircraft. This includes land aerodromes, heliports and water aerodromes.”

Aerodromes are under federation jurisdiction as set out in the Aeronautics Act. The federal Minister of Transport, through his department, is responsible for administering the Aeronautics Act and the Canadian Aviation Regulations (C.A.R.). In Canada, Canadians have the right to build their own aerodrome and fly from it subject to following a few basic rules. Registration and certification of an aerodrome is voluntary unless it is located in a built-up area, used for scheduled service for transport of passengers, deemed by Transport Canada to be in the public interest or the owner wishes it to be certified. In fact, only about one-third of the estimated 6000 aerodromes in Canada are registered. An airport is an aerodrome that meets the requirements of C.A.R. 302 and is registered and certified by Transport Canada. Transport Canada only conducts regular audits and inspections of certified airports.

While aerodromes may be within federal jurisdiction and there is no legal requirement to inform municipal officials or neighbours about the development of a private aerodrome, the Canadian Owners and Pilots Association (C.O.P.A.) encourages owners to have discussions with parties that may be affected. C.O.P.A. actively provides help and information to its members interested in developing their own private aerodromes and in particular protects personal aviation in Canada and the freedom to fly.

There have been a number of legal challenges concerning provincial and municipal involvement in aerodromes which resulted in the Supreme Court of

Canada confirming the exclusive federal jurisdiction over aviation, including location of aerodromes. However, local laws may apply if they do not significantly or seriously intrude on the federal aeronautics power.

The Canadian Owners and Pilots Association's Guide to Private Aerodromes provides general information on aerodrome development and includes a discussion on court decisions that confirm federal jurisdiction. Staff was also given a copy of a letter from Ian A. Blue of Gardiner Roberts LLP addressed to the Lakeridge Citizens for Clean Water that provides an excellent overview of court decisions on the applicability of provincial and municipal law to aerodromes. A copy of the letter is appended as Attachment #3. Mr. Blue has examined the applicability of local fill or site alteration by-laws and concluded that a municipality can enforce its fill by-law to ensure that the adverse affects of the site alteration process on residents are minimized. The Town Solicitor supports this conclusion. The site alteration by-law requires proponents to protect the natural environment including ground water and surface water, and minimize the disruptive effect of dust, noise, mud tracking and truck traffic.

As a general rule, if a provincial or municipal law significantly or seriously intrudes on the exercise of federal power, it is rendered inapplicable.

Examples of court decisions where provincial and local laws intruded on federal power include:

- Greater Toronto Airport Authority v. Mississauga (City) where the Court of Appeal concluded that the Ontario Building Code Act did not apply to all new buildings to be constructed at Pearson Airport since the design and construction of the buildings is an integral part of the aeronautic undertaking.
- Province of Quebec v. Canadian Owners and Pilots Association where Quebec planning legislation prohibited the building of aerodromes on designated agricultural land unless prior authorization had been obtained by a provincial agency. The Supreme Court of Canada held that the Quebec legislation was inapplicable because it intruded on federal power.

The above decisions highlight the point that provincial or municipal laws cannot prohibit the creation of aerodromes or specify where or how they may be constructed. Examples of court decisions which have upheld provincial or municipal laws include:

- Construction Montcalm Inc v. Minimum Wage Commission where the Supreme Court of Canada concluded that wage rates paid to contractors' employees engaged in the construction of an airport had nothing to do with aeronautics and should be regulated by the province.

- Earthworx v. The Corporation of the Township of Scugog where the Ontario Divisional Court concluded that the Township's fill by-law did not prohibit the use of lands as an airport, but instead prohibited the site alteration unless certain conditions were met, such as the need for a topographic survey, description of fill and haul routes proposed, public consultation, and submission of financial securities and agreements to ensure compliance.

4. ANALYSIS & OPTIONS:

The regulation and approval of aerodromes are under federal jurisdiction and the Planning Act and Municipal Planning processes thus have limited effect on aerodrome development. The Aeronautics Act is structured to protect Canadians' freedom to fly subject to following a few basic rules. This right is rigorously protected by the aviation community, in particular the Canadian Owners and Pilots Association (C.O.P.A.). Most attempts to impose provincial or municipal requirements relating directly to the development and operation of aerodromes have been found by the Supreme Court of Canada to be invalid as they infringe on federal jurisdiction.

However where municipal requirements do not prevent the use of the land for an aerodrome or the future construction of an aerodrome on the site, these requirements may be applicable. This has been exemplified in the Ontario Divisional Court's decision in the Township of Scugog case noted above, where the Court confirmed the Township's right to apply its fill by-law at the proposed aerodrome site.

Since most aerodrome construction would involve some site alteration work, the Town's site alteration by-law could be used to require the owner to submit his plans and supporting documentation for review by the Town and, in the circumstances described in Section 4.2 of the By-law, to follow the public consultation process required by the by-law. By-Law 2013-007-RE requires that, where site grading involves more than 5000 cubic metres of materials or the work occurs in an area greater than one (1) acre, public consultation is mandatory. The site alteration by-law would not prohibit the use of the lands as an aerodrome, but could prohibit the site alteration unless certain requirements are met. This is considered to be the best tool currently available to provide public notice and consultation regarding the owner's intention to conduct the site alteration necessary in order to construct and operate an aerodrome.

It is likely that the Town's Noise By-Law would not apply as it could prevent planes from taking off and landing. C.O.P.A. believes the best way to deal with noise issues is for owners to speak with their neighbours and try to understand the concerns and if possible voluntarily limit operations to minimize impact on the residents. If this does not resolve the issue, residents can apply to Transport Canada and go through a formal process to address the noise issue. Potential

safety issues on a neighbour's property would be a federal matter that would require their inspection and follow-up.

The lack of consultation with residents and municipal officials for aerodrome planning and construction is a major concern. Currently the Aeronautics Act does not require owners to communicate their development plans with the Town or their neighbours prior to constructing and operating their private aerodrome.

Although the site alteration by-law is a mechanism that may, in certain circumstances, provide for public consultation, it would be better if there were specific notice and public consultation requirements associated with the construction of an aerodrome. Other federal government agencies, such as Industry Canada, which has jurisdiction over the regulation and approval of telecommunication towers and related facilities, have a protocol that requires proponents to follow the local land use authorities' established consultation process. Industry Canada requires the proponent to provide written verification from the local land use authority that the local processes and any other requirements have been satisfied before they grant approval. In addition to addressing Industry Canada's general and technical requirements for communications towers, proponents are required to examine the potential for utilizing existing infrastructure before proposing new towers; to contact the local land use authority to determine local requirements and to notify the public and address any concerns.

The Town's protocol for the implementation of a communications tower requires the proponent to hold a community information meeting with area residents. Notice is given by the proponent by regular mail to the Town, and to all owners of properties within a radius of 500 meters in a rural area. A notice in the local community newspaper and a sign erected along the street frontage of the property notifying the public of the proposal are also required. Following the community information meeting, the Town's protocol requires the proponent to:

- Provide a record of names, address and phone numbers of those in attendance at the meeting;
- Provide the minutes of the meeting to identify any issues and concerns;
- Provide a follow-up letter to the Municipality indicating their formal response to concerns raised during the meeting;
- Respond to the public and/or agencies in writing within 14 days acknowledging receipt of the concern/question/issue, addressing in writing all reasonable concerns within 60 days and providing the party with 21 days to reply to the proponent's response;
- Provide the Town with copies of all correspondence received.

Once this process is completed staff prepares an information report to Council.

Industry Canada's protocol for telecommunication towers could be applied to Transport Canada for the development of new or expanded aerodromes. This approach would give the Town and affected residents an opportunity to hear first-hand about the proposal and express their concerns or comments.

5. FINANCIAL IMPLICATIONS:

There are no financial implications on the 2013 Operating and Capital Budget arising from the consideration of this report.

6. ALIGNMENT WITH STRATEGIC PLAN:

This report is aligned with the Town's Strategic Plan in the following manner:

1. *Community Prosperity and Sustainability*
Balanced growth, environmental protection, economic development, tourism, community character and identity
 - 1.2 *Balanced land use planning – environment, economic and social considerations*

For further information on this report, please contact Mike Molinari, Director of Engineering & Capital Projects at 905-640-1910 or 1-855-642-8697 ext. 2359, mike.molinari@townofws.ca

7. ATTACHMENTS:

1. Letter from Mr. M. Mezzarobba
2. Staff Memo RE: Township of King Correspondence "Amending the Existing Aeronautics Act and the Regulation of the Construction of New or Expanded Aerodromes"
3. Letter from Ian A. Blue, Gardiner Roberts LLP, RE: Fill Sites at Municipal Airports

February 4, 2013

The Honourable Denis Lebel
Minister of Transport, Infrastructure
and Communications
Tower "C" – 330 Sparks St.,
Ottawa, Ontario
K1A 0N5

Dear Sir:

An airstrip is currently under construction at 13282 Ninth Line in Stouffville for the purpose of flying light aircraft for pleasure. This site is less than one kilometre from the Hamlet of Bloomington and just over one kilometre from downtown Stouffville. Also, this airstrip is in close proximity to a number of homes in the immediate area. This does not appear to be an ideal location for an airstrip. Flights from this airstrip will affect the people living in the area and their right to the peaceful tranquility of living in the country. Consequently, I am writing to oppose the construction and approval of this airstrip for the following reasons:

- The excessive noise created by airplanes would disturb the peaceful serenity otherwise enjoyed by the neighbourhood. These neighbours have the right to the quiet enjoyment of their property.
- Property values in the surrounding area would undoubtedly decrease.
- Safety issues would be created for the neighbours, the Hamlet of Bloomington and the Town of Stouffville which are all in close proximity to the airstrip. The Markham Airport and Buttonville Airport are located within a reasonable distance, and are better equipped and organized to handle personal aircraft and flights.
- Once the airstrip is built and operating, it could continue to impact the community negatively well into the foreseeable future and beyond. For example, once the current owner no longer uses the airstrip for personal pleasure, it could conceivably be converted to a business venture such as flight training or public joy rides. This would not be a pleasant outcome for the homeowners in the area.

We have been told that the owner is receiving guidance for the airstrip construction from COPA with a completion date of August, 2013. After inspection and all federal regulations and requirements are met, registration would be granted for the airstrip and flight operations could begin. We have also learned that because the building of personal airstrips falls under federal law, no approvals are required from local authorities and that local by-laws (zoning, noise level, impact on neighbours, etc.) are not applicable. This approval process does not appear to treat the rights of all parties equitably.

I find it disconcerting that approval for this project could be granted to an individual for his hobby when it could negatively affect the lives of many people in the neighbourhood. Furthermore, approval could be granted without consultation with Town officials and without communication and feedback from the residents of Stouffville. In this day and age, such an approval process seems unusual since consultation with all parties involved would invariably result in the best outcome.

Based on discussions with the Aviation Department, there are few rules governing the construction and operations of private airstrips. Individuals can proceed with few restrictions subject only to final inspection by the department.

Please consider amendments to the current regulations that would take into account local by-laws and local factors as well as the basic rights of people that may be affected before federal approval is granted on such projects.

Yours truly,



M. MEZZAROBBA

c.c. Mr. Wayne Emmerson
Major of Stouffville



TOWN OF
WHITCHURCH-STOUFFVILLE

MEMORANDUM

TO: Mayor Emmerson and Members of Council

FROM: Mike Molinari, Director of Engineering and Capital Projects

CC: Dave Cash, CAO
Marc Pourvahidi, Treasurer

DATE: January 22, 2012

SUBJECT: Township of King correspondence

Amending the Existing Aeronautics Act and the Regulation of the Construction of New or Expanded Aerodromes

The January 22, 2013 Council Agenda includes correspondence from the Township of King generally requesting support for their request to the Minister of Transport, Infrastructure and Communities to amend legislation to allow a host municipality of an aerodrome to regulate the fill that may be imported onto an aerodrome site. While it was at one time generally thought that an aerodrome site could import fill on the portion of the site servicing the aerodrome without having to comply with any requirements from the lower levels of government, the law is developing in a manner that recognizes the stake municipalities have in controlling the quality of fill that may be used for this purpose. Nevertheless, the Township of King is concerned that fill could be imported without the scrutiny that the municipality would require and potentially result in negative impacts to the environment, drinking water and the health and safety of residents.

The Aeronautics Act defines an Aerodrome as follows:

Any area of land, water (including the frozen surface thereof) or other supporting surface used, designed, prepared, equipped or set apart for use either in whole or in part for the arrival, departure, movement or servicing of aircraft and includes any buildings, installations and equipment situated thereon or associated therewith.

Staff supports the correspondence from King Township especially since there are lands in the Town of Whitchurch-Stouffville that currently fall under the above definition. As a result, Staff recommends that Council endorse the correspondence from King Township.



TOWNSHIP OF KING

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L7B 1A1

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December 11, 2012

Denis Kelly
Regional Clerk
Regional Municipality of York
17250 Yonge Street
Newmarket, ON L3Y 6Z1

Dear Mr. Kelly:

RE: Amending the Existing *Aeronautics Act* and the Regulation of the
Construction of New or Expanded Aerodromes

At its meeting of November 26, 2012, Council received and passed the enclosed Resolution advising of a request to amend the existing *Aeronautics Act* and the Regulation of the construction of new or expanded aerodromes;

"WHEREAS municipalities have authority under the Municipal Act to enact regulatory bylaws in respect of a wide range of activities;

WHEREAS on occasion, municipal bylaws may impact subject matters that are within the jurisdiction of the provincial or federal government;

WHEREAS the principle of inter-jurisdictional immunity is often cited to assert that municipal bylaws do not apply to matters that are within the jurisdiction of the provincial or federal government, including in recent months in the context of aerodromes that are subject to federal government authority and the enforcement of municipal site alteration (fill and grading) bylaws;

WHEREAS it is now well established that the application of the principle of inter-jurisdictional immunity does not necessarily result in an inability by municipalities to enforce their bylaws;

WHEREAS municipalities and Conservation Authorities, in addition to protecting their citizens, have responsibility to protect water sources in their area including the 32 municipalities charged with the protection of the aquifers, well heads and cold water streams in the Oak Ridges Moraine (ORM) under the Oak Ridges Moraine Conservation Plan;

WHEREAS municipalities rely on their regulatory bylaws, such as site alteration bylaws, to protect their citizens and the physical environment in general and water sources in particular;

WHEREAS Township of King and other rural municipalities in Ontario are fiscally challenged to meet the needs of their communities and are seeking to eliminate waste and duplication of work processes;

WHEREAS there is a projection of a significant displacement of soil within at least one urban municipality (City of Toronto) adjacent to ORM, as new infrastructure is built such as subways and light rail transit, as well as the redevelopment of Brownfields, and that sustainable management of the displaced soils could increase cost for the City's developers and builders;

WHEREAS such deposition of displaced soils represents a risk to the water sources in the area of placement and hence requires due assessment and possible remediation;

WHEREAS the operation of such aerodromes do fall within the authority of Minister of Transport, Infrastructure and Communities;

WHEREAS the *Aeronautics Act* does not require the owners of land intending to construct and/or expand aerodromes to consult with the host municipality;

WHEREAS other federal government agencies, such as the CRTC do have a protocol for municipal consultation prior to approving applications for such things as telecommunications towers;

WHEREAS neither the Governor in Council nor the Minister of Transport, Infrastructure and Communities has authority under the *Aeronautics Act* to regulate an aerodrome operator with respect to the use or movement of fill unless the soil/fill has an impact on the location, safety and security of aeronautics;

WHEREAS several municipalities located on the Oak Ridges Moraine and several other rural municipalities are potential hosts for aerodromes, they are each required to deal with the absence of a Federally legislated requirement to consult with and to respect the municipal bylaws when considering construction and/or expansion of an aerodrome and accordingly, each of these municipalities incurs costs for legal fees and court actions to support their actions to protect aquifers, well heads and cold water streams;

THEREFORE, be it resolved that:

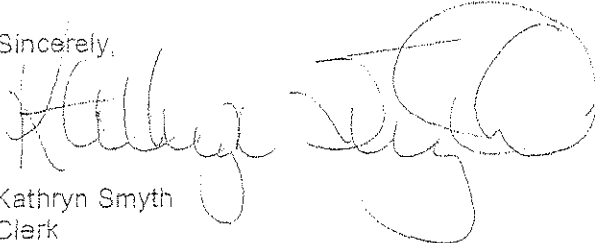
1. King Township requests that the Minister of Transport, Infrastructure and Communities review and amend the existing *Aeronautics Act* and regulations, policies and procedures such that construction of new or expanded aerodromes is regulated in a manner that the host municipality can execute their responsibilities to protect both their citizens and the water sources in their jurisdictions without the encumbrance of ambiguity regarding the authority of the *Aeronautics Act* and its regulations and specifically to incorporate a requirement

to comply with all relevant municipal environmental and zoning bylaws and provincial laws.

2. The Mayor be authorized and directed to submit a letter to the Minister of Transport, Infrastructure and Communities indicating the Township of King's request.
3. That this resolution be circulated to York Region and its lower tier municipalities seeking their support as well as to the Greater Toronto Countryside Mayors Alliance municipalities;
4. The Township of King requests the Association of Municipalities of Ontario (AMO) to support the request to the Minister of Transport, Infrastructure and Communities and to circulate and to request support of this resolution from all Ontario Rural Municipalities.
5. The Township of King requests the Federation of Canadian Municipalities (FCM) to work with the Minister of Transport, Infrastructure and Community to resolve these concerns."

Motion Carried, as amended.

Sincerely,



Kathryn Smyth
Clerk

- c.c. John Leach, Clerk, Town of Aurora
Jeffrey Abrams, Clerk, City of Vaughan
Michele Kennedy, Clerk, Town of Whitchurch-Stouffville
Kathleen Foster, Clerk, Town of East Gwillimbury
Andrew Brouwer, Clerk, Town of Newmarket
Roland Chenier, Clerk, Town of Georgina
Kim Kitteringham, Clerk, City of Markham
Donna McClarty, Clerk, Town of Richmond Hill
Greater Toronto Countryside Mayors Alliance
Association of Municipalities of Ontario (AMO)
Federation of Canadian Municipalities (FCM)



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Ian A. Blue, Q.C.
 Direct Line: 416 865 2962
 iblue@gardiner-roberts.com
 File No.: 95,669

January 14, 2013

Mr. Ian MacIntosh
 Lakeridge Citizens for Clean Water
 70 Oakdene Crescent
 Little Britain, ON
 K0M 2C0

Dear Mr. MacIntosh:

Re: Fill-sites at Municipal Airports

INTRODUCTION AND SUMMARY

Lakeridge Citizens for Clean Water have asked for our opinion on whether a municipality faced with a fill-site established at an airport may enforce its fill or site-alteration by-law against the owners with respect to the fill entering the site. In this opinion we conclude that a municipality is legally entitled to and should do so in order to insure that adverse effects of the fill operation on ratepayers are minimized. While an owner can always try to challenge the municipality's actions in court, such a challenge is likely to fail.

BACKGROUND¹

Recently municipalities have either received applications for or have experienced non-compliance with their fill or site-alteration by-laws from owners of large-scale fill operations at local airports. By *large-scale fill operations* we mean operations where the fill originates outside the municipality, most likely in the Greater Toronto Area. As we show below, these airport fill-sites are not subject to provincial planning legislation and owners, such as Earthworx Industries, sometimes try to use that fact to escape municipal regulation.

On November 19, 2012 the Ontario Ministry of the Environment (**MOE**) placed its draft *Soil Management – A Guide for Best Management Practices (November, 2012)* (**GBMP**) on the Environmental Registry for public consultation. The GBMP states that those handling excess soil must meet all applicable legal requirements including adherence to current provincial regulations, *bylaws and permitting regimes established by local municipalities and/or conservation authorities (emphasis added)*. The GBMP has specific *Best Management Practices for Commercial fill and Other Large Receiving Sites* which would include fill-sites at municipal airports.

While the GBMP does not deal with airports explicitly, the ministry says that it expects that all sites that manage excess soil will be constructed, operated and maintained in a manner that ensures the health

¹ Thanks to CENTRAL LAKE ONTARIO CONSERVATION AUTHORITY's April 10, 2012 Memo for some of the information under this heading.

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and safety of all persons and prevents adverse effects to the environment or impairment to water quality. Prior to establishing a fill-site, it recommends that the owner undertake public consultation sufficient to ensure that the local community and land owners are aware of the proposal and have an opportunity to comment. It also expects the owner to undertake an assessment to establish the pre-fill-site conditions for soil and ground water.

It also recommends that owners retain the services of a Qualified Person (Q.P.) as described in O/Reg. 153/04 (*Records of Site Condition regulation*) to design and implement a Fill Management Plan (FMP). The FMP should include a rationale for site location, including considerations related to future use of agricultural lands, source water protection areas, and groundwater recharge areas. MOE recommends that the FMP include the detailed information set out in the excerpt from the GBMP attached as the APPENDIX.

While transportation of fill to fill-sites is not a new issue for rural municipalities, the recent increase in scale and number of large-scale fill operations is. The movement of fill represents a significant commercial activity with the potential for large profit. This profit potential, fill traveling further afield and the use of brokers all result in a convoluted chain of custody. This situation becomes even more troublesome when fill is moved to an airport because municipal officials and staff-lawyers are sometimes uncertain about whether their by-laws even apply to airports. These factors have resulted in municipalities being reactive.

For rural municipalities, this situation is only going to get worse. Excess fill is generated as a result of infrastructure projects and site development. In the coming years we anticipate growth in the demand for fill placement sites due to the large number of Greater Toronto Area projects such as Pan Am Games facilities, Highway 407 expansion and the expansion of the subway system to say nothing of commercial construction. Airport sites are seen as ideal for fill-sites because of the confusion over their legal status and the opportunities that presents for avoiding municipal oversight.

In our opinion, the belief that owners of airport fill-sites do not need to comply with local fill or site-alteration by-laws is legally incorrect and completely off base. As we will demonstrate, litigation-averse municipalities may now take heart because they are fully entitled to enforce their by-laws proactively! If the owners go to court, they most likely will loose.

COURT DECISIONS

Quite simply, there is no hard and fast rule that provincial law does not apply to airports. Airports are under federal jurisdiction because of Parliament's undisputed power over aeronautics. However provincial law may apply to activities at airports unless it significantly or seriously intrudes on the federal aeronautics power. When does a provincial law so significantly or seriously intrude? Let's look at the court decisions on constitutional law and the federal aeronautics power to see.

The rule that the provincial law must *significantly or seriously intrude* (**SSI test**) on the exercise of the federal power before it is rendered inapplicable is important because if a provincial law fails this test, the activity may be effectively unregulated and create unacceptable effects for ratepayers. The SSI test was adopted in 2007 in *Canadian Western Bank v. Alberta* [2007] 2 S.C.R. 3, at paragraphs 47-49.



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Alberta had enacted changes to its Insurance Act making federally chartered banks subject to provincial licensing of the selling of their insurance products. The Banks claimed that the new law did not apply to them because it impinged on the federal banking power. The Supreme Court of Canada (SCC) held that the provincial provisions did not affect the core of the federal banking power. It said that in this era of cooperative federalism the only situations in which federal powers are properly immune from valid provincial laws is where the intrusion *impairs* the federal power; not merely *affects* it, but *impairs* it; thus the SSI test. Provincial laws may apply to a federal undertaking as long as they do not jeopardize some vital or essential part of it.

In *Greater Toronto Airports Authority v. Mississauga (City)*, 50 O.R. (3d) 641 (C.A.) (*Mississauga case*), the City of Mississauga contended that Ontario's Building Code Act applied to all new buildings to be constructed at Pearson Airport. The question was whether the aeronautics power prevented the building code regime from applying. The Court of Appeal held that:

[49] ... The Building Code Act and the Ontario Building Code prescribe the design of buildings, the manner of their construction, the types and quality of materials to be used and when buildings may be altered or demolished. According to Construction Montcalm, these are the very matters that, for an aeronautics undertaking, lie within Parliament's exclusive jurisdiction and are immune from provincial regulation. As Beetz J. said, decisions on these matters "will be permanently reflected in the structure of the finished product" and will "have a direct effect upon its operational qualities, and, therefore, upon its suitability for the purpose of aeronautics" (at p. 771).

[50] ... a municipality cannot regulate the physical construction of airport buildings because to do so would affect a vital part of an aeronautics undertaking.

In *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 (*COPA case*), at paragraphs 28-41, Quebec planning legislation prohibited the building of aerodromes on designated agricultural land unless prior authorization had been obtained from a provincial agency. The SCC held that the Quebec legislation was inapplicable because it seriously impaired or intruded on the federal aeronautics power. Applying the SSI test, it said:

...In an era of cooperative, flexible federalism, the application of the doctrine of interjurisdictional immunity requires a significant or serious intrusion on the exercise of the federal power. The test is whether the provincial law impairs the federal exercise of the core competence. Here, in prohibiting the building of aerodromes on designated agricultural land unless prior authorization has been obtained [the law] may prevent the establishment of new aerodromes or require the demolition of existing ones.

In *Quebec (Attorney General) v. Lacombe* [2010] S.C.R. 453 (*Lacombe case*), at paragraph 66, the SCC also found that a Quebec municipal by-law, by law No. 210, had the effect of prohibiting water aerodromes and held that it was inapplicable to the extent it did so because it would unacceptably narrow Parliament's legislative options. Applying the SSI test, the SCC said this would impair the core of the federal aeronautics power.

The Mississauga, COPA, Lacombe and earlier lower court cases to the same effect are regarded by lawyers as standing for the proposition that provincial planning legislation may not prohibit the creation of airports or specify where or how airports may be constructed; no dispute with that. But let's now



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examine decisions which have upheld the applicability of provincial laws which have touched upon the federal aeronautics power in some way.

In *Construction Montcalm Inc. v. Min. Wage Com.*, [1979] 1 S.C.R. 754 (*Construction Montcalm case*), at pp. 770-772, the SCC said that the not every aspect of airport construction is an integral part of the aeronautics power. It said the decision of whether to build an airport and where to build it are not subject to municipal regulation or permission. Similarly, it said that the design of a future airport, its dimensions, building materials, runways and structures, and other specifications are matters of exclusive federal jurisdiction because decisions on those matters would directly affect the airport's suitability for aeronautics.

But it also said that the regulation of construction decisions at airports was not part of the federal aeronautics power. It gave as an example the requirement that workers wear a protective helmet and said that this had everything to do with construction and with provincial safety regulations and nothing to do with aeronautics. Similarly, it said the ability to regulate wages paid by an independent contractor to employees engaged in runway construction was not part of the federal aeronautics power and should be regulated by the province.

In *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581, the SCC held that the provincial liquor monopoly in Ontario was constitutionally applicable to Canadian Airlines because regulation of the provision of liquor to passengers in Ontario was not an integral part of the federal aeronautics power. Many disagree, but that is what the SCC held.

This brings us to *2241960 Ontario Inc. v. Corporation of the Township of Scugog*, May 19, 2011 (Div. Ct.) (*Earthworx Case*). Here the Divisional Court considered the decisions that we have just reviewed and held that the Township of Scugog's fill and site-alteration by-laws did apply to and could regulate the fill at Earthworx's purported airport site. While the Court expressed doubt whether Earthworx's fill-operation was really at an airport at all, at paragraphs 39-42 it stated that it would decide the case on the assumption that the site was an airport. It concluded that the federal aeronautics power did not prevent the application of Scugog's by-laws. It said:

[41] The applicant argues that the fill by-law is also an impermissible regulation of the location of airports, because the Township requires a permit for the fill activity and imposes certain requirements for that permit to be obtained.

[42] In my view, the Township's fill by-law does not prohibit the use of lands for use as an airport, as in COPA. Rather it prohibits site alteration unless certain requirements are met. For example, the old by-law prohibits the dumping of refuse. The new one has more detailed requirements for a survey showing relevant topographic and drainage patterns, description of the fill and a requirement to meet certain soil contamination standards, a description of proposed haul routes and requirements of financial security- for example, in relation to the maintenance of roads. However, these measures are all regulatory of the fill process. They do not prevent the use of the land for an airport or the future construction of an airport on the site.



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CONCLUSION

In our opinion these decisions make it almost certain that municipalities may enforce their fill and site-alteration by-laws against owners of airport fill-sites who are reluctant to comply with them.

Fill and site-alteration by-laws do not prevent or hinder the establishment or improvement of airports, specify how they should be constructed or impair or prevent the receipt of legal fill. They instead ensure that the fill to be received is legal, regulate its movement within the municipality and monitor fill operations in order to minimize adverse environmental effects on ratepayers. These are by-laws of general application and are not aimed specifically at airports. They are valid municipal by-laws made under the authority of section 142 of the Municipal Act, which is not a planning statute.

MOE's draft *GBMP for Commercial fill and Other Large Receiving Sites* provides municipalities with a valuable template that should expedite new fill or site-alteration by-laws and FMPs and the ability to enforce them on fill operations at airports. We understand that certain Ontario Municipalities are also proposing a standard set of such by-laws. There is no good reason why owners of airport fill-sites should not comply with them.

The Divisional Court's decision in the *Earthworx* case holding that the Township of Scugog's fill and site-alteration by-laws did not fail the SSI test was not appealed so it stands as a binding Ontario precedent. In our opinion, the decision of the Divisional court was correct and would be upheld by higher courts because it was soundly based upon decisions of the highest authority and unanswerable analysis. This is probably why *Earthworx* did not appeal it.

One way to test correctness of the *Earthworx* decision is to compare it with the *Construction Montcalm* case. In the latter, the SCC held that jurisdiction over labour relations governing airport construction was provincial and not a core part of the federal aeronautics power. For over thirty years this is what has been understood to be its effect. If jurisdiction to resolve labour unrest during airport construction is not a core component of the federal aeronautics power, it is difficult to know what provincial jurisdiction short of prohibiting airports at specific locations as in the Lacombe and COPA cases, or, specifying how they should be constructed as in the Mississauga case, would be. Fill and site-alteration by laws and best management practice for fill-sites are a lot further removed from the aeronautics power than labour relations during airport construction.

In our opinion therefore, the *Earthworx* decision should be viewed as a bright beacon lighting the way for municipal enforcement of fill or site-alteration by laws against owners of airport fill-sites. It tells municipal officials and in-house lawyers that they may enforce those by laws and should not be litigation-averse about doing so because if they are taken to court they are likely to win. And, the MOE's GBMP tells them that they should be proactive rather than reactive about doing so.



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For these reasons, we reached the conclusion stated in the Introduction and Summary.

Let's discuss.

Yours truly,

GARDINER ROBERTS LLP

Ian A. Blue



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APPENDIX

Excerpt from MOE's DRAFT - For Consultation Only, *Soil Management- A Guide for Best Management Practices*, Environmental Bill of Rights Draft Version, November, 2012

Best Management Practices for Commercial Fill and Other Large Receiving Sites

The ministry expects that all sites that manage excess soil will be constructed, operated and maintained in a manner that ensures the health and safety of all persons and prevents adverse effects to the environment or impairment to water quality.

Prior to establishing a site for the purpose of receiving excess soil, it is recommended that the owner of the site undertake public consultation sufficient to ensure that the local community and land owners are aware of the proposal and have an opportunity to comment on the proposal. The owner of the site should also undertake an assessment to establish the pre-fill site conditions for soil and ground water.

The ministry recommends that all sites established to receive excess soil retain the services of a QP, as described under Ontario Regulation 153/04 (O. Reg. 153/04), to design and implement a Fill Management Plan.

The Fill Management Plan should include a rationale for site location, including considerations related to future use of agricultural lands, source water protection areas, and groundwater recharge areas.

It is recommended that the Fill Management Plan include the following:

- Copies of applicable permits/zoning Municipalities, Conservation Authorities, and Provincial Ministries (where applicable)
- Appropriate Soil Quality Parameters for excess soil to be received at the site to be determined by the QP, based on site location/sensitivity, anticipated land uses, ground water use/sensitivity, pre-existing site concentrations or other factors as determined by the QP to ensure that there is no likelihood of adverse effect based on the importation of soil to the site.



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- Characterization and pre-approval by the receiving site owner of all soil Source site locations prior to acceptance of any soil;
- Dust and Noise Controls;
- Traffic and Transportation Management;
- Receiving Soil
 - It is recommended that fill receiving sites not receive any excess soil from a Source Site without confirmation of a Soil Management Plan from the Source Site, which includes documentation from the Source Site QP with the analysis for the quantity and quality of soil being brought to the site;
 - Visual inspections of all incoming loads to screen for odours, visible staining or debris.
- Record Keeping
 - A system be established that provides written documentation for the tracking of all incoming loads of soil. This documentation should include, but is not limited to:
 - Date and Time of arrival to the site;
 - Name and Location of the Source site;
 - Quantity of excess soil received;
 - Analytical records from the Source site signed by a QP;
 - Written confirmation by the Receiving Site QP acknowledging that the soil is acceptable for receipt at the site;
 - Rejections of any loads of soil due to visual inspection or review of analytical results
 - Once excess soil is received, written documentation must be provided to the Source site, confirming the soil was received and the quality was appropriate.
- Appropriate Signage at the site which identifies the Company Name, Hours of Operation, and, Daily and After-hours contact telephone numbers.
- Public Notification.
- Stormwater Management (to prevent ponding and flooding)
- Erosion control and run-off controls to address potential impacts to drainage and to ensure materials remain where placed.
- Audit Sampling Protocols
 - A sampling protocol be designed by a QP that would be representative of the volume of excess soil that is being shipped from a Source site and include a minimum of but not



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limited to monthly audit sampling from each source prior to deposit at the fill site.

- Soil Placement/Segregation Plan.
 - This Plan will include provisions to ensure soil from each Source site is deposited in segregated locations within the Fill area such that it can be assessed and, if necessary, remediated.
- Contingency Plan to identify actions that are to be taken in the event that audit sampling or other information identifies concerns with soil quality from a Source site
- Owners/Operators may need to establish Financial Assurance, with the appropriate Municipality or Conservation Authority, against the site in advance of establishing operations to address any issues that may arise.

Similar provisions related to Receiving Soil, Record Keeping and Audit Sampling Protocols, should also be included in the Fill Management Plan when excess soils are received from soil treatment or soil recycling facilities.