

ISSUE DATE:

Jan. 19, 2010



PL080489

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

Capital Paving Inc. has appealed to the Ontario Municipal Board under subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from **Wellington County Council's** refusal or neglect to enact a **proposed amendment to the Official Plan** for the County of Wellington to provide the lands described as Lots 13, 14 and 15, Concession 3, for the establishment of an aggregate extraction operation known as the **Aikensville Pit** (Approval Authority File No. OP-2005-03)
OMB File No. PL080489

Capital Paving Inc. has appealed to the Ontario Municipal Board under subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, from **Puslinch Township Council's** refusal or neglect to enact a **proposed amendment to Zoning By-law 19/85 of the Township of Puslinch** to rezone lands described as Lots 13, 14 and 15, Concession 3 from Agricultural (A) Zone and Natural Environment (NE) Zone to Extractive (EXI) Zone **to permit the establishment of an aggregate extraction operation**
OMB File No. PL080917 and PL081005

At the request of Capital Paving Inc., the **Minister of Natural Resources** has referred to the **Ontario Municipal Board** under subsection 11(5) of the *Aggregate Resources Act*, R.S.O. 1990, c. A.8, as amended, **an application for a Class A licence for the removal of aggregate from lands** being composed of Part Lot 13, 14, 15 Concession 3, in the **Township of Puslinch**
OMB File No. MM090001

APPEARANCES:

Parties

Capital Paving Inc.

Cranberry Area Residents and Ratepayers Association

Township of Puslinch

Counsel

P. Pickfield and E. Donaldson (Student-at-Law)

R. Northey and K. Stavrakos

H. Murphy

DECISION DELIVERED BY N.C. JACKSON, ORDER OF THE BOARD AND DIRECTION TO THE HONOURABLE MINISTER OF NATURAL RESOURCES

Introduction

This is an epic struggle between an aggregate producer in need of additional aggregate and the residents of a rural area. There are approximately one hundred residential lots within 1 kilometre of the site proposed for extraction. Most residents reside in substantial homes on large estate type lots. Approximately one half of the hundred are members of the Cranberry Area Residents and Ratepayers Association (hereinafter CARRA) incorporated as a non profit Corporation for purposes of preserving their community. The opposing residents view the impacts of the proposed aggregate operation as so significant that their way of life will be affected. Legal Counsel for the Proponent (hereinafter Capital) and for CARRA have left no stone unturned in calling their cases with a plethora of professional expert witnesses on each side. Mr. Pickfield called expert witnesses in the areas of Aggregate site plans and landscape architecture, planning, traffic engineering, noise, dust, hydrogeology and ecology. Mr. Northey called expert witnesses in the areas of planning, noise, dust, hydrogeology and ecology. Eight members of CARRA testified. Mr. Northey then called under summons a resident and a number of provincial officials from the Ministries of the Environment and Natural Resources and a planning official from the County of Wellington. At the request of Mr. Northey the Board scheduled a public evening session of the hearing but no additional members of the public came forward other than those represented under CARRA. The Board did hear from Participant Helen Purdy, a long time resident who recounted at length background evidence.

Although the County of Wellington was represented at the Prehearing, and notwithstanding that an Appeal under section 22(7) of the *Planning Act* was made from County Council's refusal to enact an Official Plan Amendment applied for, County Council was not represented in this hearing. Two County Planning Officials did testify when called by other Parties. The Township of Puslinch was present and represented by counsel Murphy. Puslinch is a local Township within Wellington County and the site of the proposed aggregate operation. Puslinch, following the refusal of Wellington to proceed with the required Official Plan Amendment, refused to pass the required Zoning By-law Amendment. Mr. Murphy called experts in planning, hydrogeology and ecology. Although Puslinch remained opposed to the end it was made clear through its counsel and witnesses that their primary concern was the projected (established) water table which they advocated as higher than Capital. Puslinch with their own proposed vertical

zoning (limit on extraction below ground surface) and higher water table (resulting in less extraction) did support some revised hydrogeological, ecological and planning points of Capital but there was no agreement on the established water table and hence no joinder with Capital to support the Capital planning Appeals under the *Planning Act*.

The Provincial Ministries were not present as a Party. In addition to the *Planning Act* Appeals from the refusals of Wellington to pass an Official Plan Amendment and the Township of Puslinch to pass a zoning by-law amendment, the Minister of Natural Resources has in the absence of required zoning and at the request of Capital, referred the Application for a Category 1 Class A License (below the water table in part) to the Board pursuant to the *Aggregate Resources Act*. The two *Planning Act* Appeals by Capital and the referral of the License Application are consolidated.

The Board otherwise constituted held two prehearing conferences and issued a Procedural Order for the Hearing. In this Hearing the Board heard from 32 professional and lay witnesses over 31 hearing days - a hearing consuming approximately 2 months in duration with a break when the hearing was not completed within earlier estimates. The hearing was recorded by a court reporter who assisted the Board with the swearing of witnesses and the filing of the 214 exhibits. The Hearing was well attended. The Board attended at the site and surrounding area with legal counsel to better appreciate the hearing evidence.

The major issue in the Hearing is local and county planning in the context of the Provincial Policy Statement. The License under the *Aggregate Resources Act* requires rezoning (section 12.1 of ARA states no license for a pit shall be issued if a zoning by-law prohibits the use. Section 34(2) of the *Planning Act* deems the operation of a pit to be a use of land under 34(1) which provides for the passing of zoning prohibiting the use of land except for the purposes set out in the by-law. Zoning requires Official Plan policy changes since section 24 of the *Planning Act* requires zoning by-laws to conform with the Official Plan. Puslinch has no Official Plan. The Township has zoning but relies on the County of Wellington for planning administration (the County planner provides advice to Puslinch). Planning in Wellington County is truly 2 tier with the Official Plan and its attendant policy considerations at the upper tier County and implementation in the form of Zoning at the lower tier Township level. That is not to forget that Planning in Ontario recognizes and requires that the Provincial Policies and in particular the Provincial Policy Statement (PPS) be followed such that planning in

both Puslinch and Wellington and indeed before this Board be consistent with the PPS (section 3(5) of the *Planning Act*) Section 1.1(b) of the *Planning Act* states that the purposes of the *Act* are *inter alia* to provide for a land use planning system led by provincial policy.

Site Context

The proposed site is located in Lots 13, 14 and 15 Concession 3 in the Township of Puslinch (Aikensville) County of Wellington. The proposed site consists of eight properties that are leased to Capital until final rehabilitation. The eight properties total 51.3 hectares (126.7 acres). The main use of the site has been agricultural - field crops. The site is within a larger block of land bounded by Concession Road 4 on the north, County road 35 on the east, County road 34 on the south and County road 12 on the west. Access to the site is to be by laneway to County road 35. A temporary access from County road 35 is in existence developed for site testing. Much of Puslinch and other parts of Wellington have natural features and aggregate deposits (31 Aggregate licenses in Puslinch in 2009, sometimes in proximity). That is true of the subject property in that aggregate deposits are in close proximity to natural features including 3 Provincially Significant Wetlands, Provincially Significant Woodlands, Provincially Significant Wildlife habitat, fish habitat on the periphery in 3 streams, non Provincially Significant Wetland and a Regionally Significant Area of Natural and Scientific Interest. Outside the proposed licensed area, the proposed pit and its access road are within 120 metres of a provincially significant wetland to the north east, 4 provincially significant wetlands on the east side of the site within 120 metres of the access route and fish habitat in Tributary C along the site access and eastern boundary. The entire area is within a provincial wetland complex known as the Cranberry Oil Well Bog. When CARRA considers the natural features themselves, together with adjacent lands considerations from the PPS-120 metres from the Provincially Significant Features to be analyzed, in photo imagery on its materials, CARRA asserts virtually all the site, including the extraction area and the balance of the site to be ecologically significant. When this is coupled with the nearby 100 residential lots or homes also depicted on CARRA imagery, CARRA suggests or implies it is a tall order that Capital has chosen to embark upon. Such implications for the Environment and the nearby residential community are to be determined however, not by speculation or conjecture,

but by the best evidence in this hearing. Capital asserts it has evaluated environmental and social concerns to the satisfaction of the County staff and provincial ministries.

The Proposal

Capital seeks approvals for a gravel extraction operation to remove 1.25 million tonnes with a maximum annual rate of 400,000 tonnes. Mathematics would suggest the site could be closed and rehabilitated in approximately 3 years. Capital used a 5 to 7 year term in writing as part of this application but then backed away from their own figure when it was suggested that might be considered a condition. CARRA also made it clear such a condition was not acceptable to it.

This site is to be used by Capital for what it calls a feeder site. Capital is a local aggregate producer and road construction company located in Puslinch for 40 years. Its head office and manufacturing facility known as the Main Plant is located several kilometres from the subject property. It is proposed that aggregate excavated and crushed on the proposed site would be hauled to the Main Plant where it would be washed and used in concrete batching and in the asphalt plant. This would be the main use of the aggregate from the proposed Aikensville site although there could be some aggregate sold directly to other users. The main haul route would be from the proposed Aikensville site to the Main Plant on County roads 35 and 34. During this hearing it became apparent that a permit to take water at the Main Plant was outstanding. That will involve an application to the Ministry of the Environment (MOE) and is not before this Board in this hearing.

Extraction is proposed on 31.2 hectares of the site total 51.3 hectares. Of the 31.2 hectares, extraction will take place to 0.5 metres above the water table for 25.9 hectares (standard conditions for extraction above the water table only is 1.5 metres) and below water table is proposed in 2 areas totalling 5.3 hectares. The below water table extraction areas will, in rehabilitation, result in additional wetland features connecting existing wetlands on the site.

Extraction is proposed in four phases with sequencing shown on operational site plans. Following the phased extraction, rehabilitation is to be progressive with 25.9 hectares rehabilitated to agricultural use and 5.3 hectares being additional wetlands. The lands rehabilitated to agriculture will have 1 metre above the water table.

Applications Process

The *Aggregate Resources Act* (ARA) Application was filed first on February 17, 2005 followed by the Applications to amend the County Official Plan (OP) and to amend the Township Zoning By-law both made on April 25, 2005. The OP Application requests that the subject property be included within the Mineral Aggregates Area. Field work dates back to 2003. As a result of agency circulations further field work took place and conditions for the license revised. When CARRA questioned before the OMB, public consultation in the ARA process, Capital refiled the ARA License Application in 2008. CARRA was unsuccessful in a Motion for costs it brought against the MNR. Based on the technical circulations to the provincial ministries of the Environment, Natural Resources and Municipal Affairs and responses elicited, Capital takes the position that Provincial Ministries have signed off. The evidence in this hearing, both documentary and oral from summonsed provincial officials, generally confirms that position.

The Planning Framework

Current Zoning on the subject property in Puslinch By-law 19/85 is Agricultural and Natural Environment. Residential uses are permitted. Extraction is not permitted and is covered in other zoning applicable elsewhere in Puslinch. Capital proposes amending this By-law to permit extractive use. The proposal combines zoning to a depth of the 2006 ground water elevations, zoning without depth where extraction is to go below the water table and an exception to the Agricultural zoning outside the extractive area to permit the temporary haul route, scale house, entry signage and landscape berms. The Township in evidence and submissions proposes further zoning amendments refinements re the vertical depth from a more elevated water table. No extraction is to be permitted on the Provincially Significant wetlands.

The current Wellington Official Plan designates the subject property as Greenlands, Core Greenlands and Natural Environment. The Capital Official Plan Application asked for change to show the subject property within the Mineral Aggregates Area. The Mineral Aggregates Area is on an Overlay in the Official Plan. The current Aggregate Area Overlay in the Official Plan does not show aggregate resource on the subject property. Subsequently Capital's Application evolved to change designations in the Official Plan on the subject property, to change a small .6 hectare area from Core Greenlands (Cedar knoll) to Secondary Agriculture and a .16 hectare

unevaluated wetland from Core Greenlands to Secondary Agriculture. Mineral Aggregate Extraction is permitted under the Official Plan in Secondary Agriculture and Greenlands designations if shown on the Mineral Extraction Overlay, but not in the Core Greenlands designation.

The Provincial Policy Statement 2005 is a Provincial planning document covering many issues that must be considered in lower tier planning both at the County level and Township level for consistency. Although the PPS must be read in its entirety, the planning evidence in this hearing from 4 professional planners covered the following sections in particular:

1.0 Building Strong Communities

- 1.1 Managing and Directing Land Use to Achieve Efficient Development and Land Use patterns
- 1.7 Long Term Economic Prosperity
- 2 Wise Use and Management of Resources
 - 2.1 Natural Heritage
 - 2.2 Water
 - 2.5 Mineral Aggregate Resources

These sections are reproduced in relevant parts as follows:

1.0 Building Strong Communities

Ontario's long term prosperity, environmental health and social well being depend on wisely managing change and promoting efficient land use and development patterns. Efficient land use and development patterns support strong, liveable, and healthy communities, protect the environment and public health and safety and facilitate economic growth.

Accordingly:

- 1.1 Managing and directing land use to achieve efficient development and land use patterns
 - 1.1.1 Healthy, liveable and safe communities are sustained by:
 - a) promoting efficient development and land use patterns which sustain the financial well being of the Province and municipalities over the long term
 - b) accommodating an appropriate range and mix of residential, employment (including industrial, commercial and institutional uses), recreational and open space to meet long term needs;

- c) avoiding development and land use patterns which may cause environmental or public health and safety concerns;
- d) avoiding development and land use patterns that would prevent the efficient expansion of settlement areas in those areas which are adjacent or close to settlement areas;
- e) promoting cost effective development standards to minimize land consumption and servicing costs;
- g) Ensuring that necessary infrastructure and public service facilities are or will be available to meet current and projected need

1.1.4 Rural Areas in Municipalities

1.1.4.1 In rural areas located in municipalities:

- a) permitted uses and activities shall relate to the management or use of resources, resource-based recreational activities, limited residential development and other rural land uses;
- c) new land uses, including the creation of lots, and new or expanding livestock facilities, shall comply with the minimum distance separation formulae;
- e) locally-important agricultural and resource areas should be designated and protected by directing non-related development where it will not constrain these uses;
- f) opportunities should be retained to locate new or expanding land uses that require separation from other uses;
- g) recreational, tourism and other economic opportunities should be promoted.

1.2 Coordination

1.2.1 A coordinated, integrated and comprehensive approach should be used when dealing with planning matters within municipalities or which cross lower, single and/or upper tier municipal boundaries, including:

- a) managing and/or promoting growth and development;
- b) managing natural heritage, water, agricultural, mineral and cultural heritage and archaeological resources;

1.7 Long-Term Economic Prosperity

1.7.1 Long term economic prosperity should be supported by:

- a) optimizing the long term availability and use of land, resources, infrastructure and public service facilities;

- e) planning so that major facilities (such as airports, transportation/transit/rail infrastructure and ----/corridors, intermodal facilities, sewage treatment facilities, waste management systems, oil and gas pipelines, industries and resource extraction activities) and sensitive land uses are appropriately designed, buffered, and/or separated from each other to prevent adverse effects from odour, noise and other contaminants and minimize risk to public health and safety;

Sensitive land uses are defined in the PPS as: means buildings, amenity areas, or outdoor spaces where routine or normal activities occurring at reasonably expected times would experience one or more adverse effects from contaminant discharges generated from a nearby major facility. Sensitive land uses may be part of the natural or built environment. Examples may include, but are not limited to: residences, day care centres, and educational and health facilities.

Adverse effects are defined in the PPS to mean: as defined in the *Environmental Protection Act*, means one or more of

- a) impairment of the quality of the natural environment for any use that can be made of it;
- b) injury or damage to property or plant or animal life;
- c) harm or material discomfort to any person;
- d) an adverse effect on the health of any person;
- e) impairment on the safety of any person;
- f) rendering any property or plant or animal life unfit for human use;
- g) loss of enjoyment of normal use of property; and
- h) interference with normal conduct of business.

2.0 Wise Use and Management of Resources

Ontario's long term prosperity, environmental health and social well being depend on protecting natural heritage, water, agricultural, mineral and cultural heritage and archaeological resources for their economic, environmental and social benefits.

Accordingly:

2.1 Natural features and areas will be protected for the long term.

- 2.1.2 The diversity and connectivity of natural features in an area, and the long term ecological function and biodiversity of natural heritage systems, should be maintained, restored or, where possible, improved, recognizing linkages between and among

natural heritage features and areas, surface water features and ground water features.

2.1.3 Development and site alteration shall not be permitted in:

- a) significant habitat of endangered species;
- b) significant wetlands in Ecoregions 5E, 6E and 7E; and
- c) significant coastal wetlands.

2.1.4 Development and site alteration shall not be permitted in:

- a) significant wetlands in the Canadian Shield north of Ecoregions 5E, 6E and 7E;
- b) significant woodlands south and east of the Canadian Shield;
- c) significant valley lands south and east of the Canadian Shield;
- d) significant wildlife habitat; and
- e) significant areas of natural and scientific interest unless it has been demonstrated that there will be no negative impacts on the natural features or their ecological functions

2.1.5 Development and site alteration shall not be permitted in fish habitat except in accordance with provincial and federal requirements.

2.1.6 Development and site alteration shall not be permitted on adjacent lands to the natural features and areas identified in policies 2.1.3, 2.1.4 and 2.1.5 unless the ecological function of the adjacent lands has been evaluated and it has been demonstrated that there will be no negative impacts on the natural features or on their ecological functions.

2.1.7 Nothing in policy 2.1 is intended to limit the ability of existing agricultural uses to continue.

2.2 Water

2.2.1 Planning Authorities shall protect, improve or restore the quality and quantity of water by:

- a) using the watershed as the ecologically meaningful scale for planning;
- b) minimizing potential adverse negative impacts, including cross-jurisdictional and cross-watershed impacts;
- c) identifying surface water features, ground water/features, hydrologic functions and natural heritage features and areas which are necessary for the ecological and hydrological integrity of the watershed;

- d) implementing necessary restrictions on development and site alteration to:
 - 1. protect all municipal drinking water supplies and designated vulnerable areas; and
 - 2. protect, improve or restore vulnerable surface and ground water, sensitive surface water features and sensitive ground water features, and their hydrologic functions;
 - e) maintaining linkages and related functions among surface water features, ground water features, hydrologic functions and natural heritage features and areas;
 - f) promoting efficient and sustainable use of water resources, including practices for water conservation and sustaining water quality; and
 - g) ensuring stormwater management practices minimize stormwater volumes and contaminant loads, and maintain or increase the extent of vegetative and pervious surfaces.

2.2.2 Development and site alteration shall be restricted in or near sensitive surface water features and sensitive ground water features such that these features and their related hydrologic functions will be protected, improved or restored.

Mitigative measures and/or alternative development approaches may be required in order to protect, improve or restore sensitive surface water features, sensitive ground water features and their hydrologic functions.

2.5 Mineral Aggregate Resources

2.5.1 Mineral Aggregate Resources shall be protected for long term use.

2.5.2 Protection of Long-Term Resource Supply

2.5.2.1 As much of the mineral aggregate resources as is realistically possible shall be made available as close to market as possible.

Demonstration of need for mineral aggregate resources, including any type of supply/demand analysis, shall not be required, notwithstanding the availability, designation or licensing for extraction of mineral aggregate resources locally or elsewhere.

- 2.5.2.2 Extraction shall be undertaken in a manner that minimizes social and environmental impacts.
- 2.5.2.3 The conservation of mineral aggregate resources should be promoted by making provision for the recovery of these resources, wherever feasible.
- 2.5.2.4 Mineral Aggregate operations shall be protected from development and activities that would preclude or hinder their expansion or continued use or which would be incompatible for reasons of public health, public safety, or environmental impact. Existing mineral aggregate operations shall be permitted to continue without the need for official plan amendment, rezoning or development permit under the *Planning Act*. When a license for extraction or operation ceases to exist, policy 2.5.2.5 continues to apply.
- 2.2.2.5 In areas adjacent to or in known deposits of mineral aggregate resources, development and activities which would preclude or hinder the establishment of new operations or access to the resources shall only be permitted if:
 - a) resource use would not be feasible; or
 - b) the proposed land use or development serves a greater long-term public interest; and
 - c) issues of public health, public safety and environmental impact are addressed.

2.5.3 Rehabilitation

- 2.5.3.1 Progressive and final rehabilitation shall be required to accommodate subsequent land uses, to promote land use compatibility, and to recognize the interim nature of extraction. Final rehabilitation shall take surrounding land use and approved land use designations into consideration.

Discussion of Issues

Aggregate Resources

Aggregate Resources are given a privileged position in the PPS section 2.5.2. As much of the mineral aggregate resources as is realistically possible shall be made available as close to markets as possible. The Board accepts the evidence of Capital

that the proposed site is in an advantageous location close to Highway 401 and markets. The Aggregate resource is part of an Outwash deposit from Glacier activity. The deposit is described in the Ontario Geological Survey as of secondary significance. Capitol is an important employer in the context of the language of the Wellington Official Plan. Aggregate extraction is the only use in the wide ranging PPS where need is not specifically required. The word realistically may be a qualification as is section 2.5.2.2 which requires extraction be undertaken in a manner which minimizes social and environmental impacts. The word minimizes suggests the acceptance of some impact. Section 2.5.2.4 takes the protection of aggregates further in that incompatible uses are restricted so that aggregate operations may continue or expand. Such existing aggregate operations may continue without *Planning Act* approvals. Under section 2.5.2.5 in areas adjacent to or in known deposits of mineral aggregate resources, development which could hinder or preclude the establishment of new operations is restricted. Compatibility is referred to in terms of the interim nature of extraction and progressive and final rehabilitation. While residential sensitive uses would be restricted in locating near to existing or expanding aggregate operations and in the area of known deposits, the PPS also provides protection in buffering and or separation when the residential use is in place first (PPS 1.7.1 e). More later in this decision on residential prior use and the minimization of social and environmental impacts. It is fair to say the PPS speaks to the incompatibility of sensitive residential use with earlier aggregate operations and the reverse is also true that a proposed pit may be incompatible with the prior residential use.

Water and Ecology

Water is a central issue because of what exists on the site an understanding of the hydrology and hydrogeology is critical if existing provincially significant wetlands, woodlands and wildlife habitat are to be preserved (no development permitted under the PPS) but also because of their relationship to the ecology of the area and the need to maintain links and connectivity under the PPS. From the evidence it is clear that there is surface water drainage on site at certain times of the year and that that surface water must be understood in terms of its interaction if any with ground water - both terms used in the PPS. The subject lands are part of the Paris Moraine which contains high quality aggregate resources but is also the home of the head waters of the Irish Creek. A watershed study is planned but has not been undertaken in part due to cost constraints.

A Wellington County Study of Environmentally Sensitive Areas in 1978 did identify the Cranberry Bog "as an Environmentally Sensitive Area consisting of dry uplands, swamps and enclosed bogs. Most of the area contains wetlands located in depressions among the hills of the Paris Moraine. The ponds, bogs and swamps retain water throughout the year. In the summer much of the ground is covered by a rich, thick growth of moisture-loving plants. This area has a high diversity of plants considering its small size." The Study lists farming, groundwater changes and resource extraction as negative impacts on critical elements.

In 1985 the MNR studied the area and identified the Oil Well Bog-Little Tract and the Cranberry Bog as a Provincially Significant Wetland Complex with a total size of 329.8 hectares. The Little Tract is a 200 acre plot containing 100 acres of woodland including old growth forest, bequeathed to the County. Capital had informally proposed an expansion of its Pit 5 into the Little Tract but this was rejected by the County of Wellington in late 1997. Subsequently Capital in 2003 began assembling leases for the proposed pit in nearby Aikensville.

Water and the ecology are directly related in the PPS and in practice. Water serves the ecological landscape and in turn the significant woodlands and wildlife habitat. Too much or too little water, as a result of changes in the land gradient, directly affects the ecology including significant woodlands and wildlife habitat. When excavation takes place for up to an estimated 5 to 7 year period, the impact on the surface and ground water and ecology must be carefully analyzed. Section 2 of the PPS contains strong language respecting the protection of the quality and quantity of water, identifying surface and ground water features and hydrologic functions and maintaining linkages among surface water features and ground water features, hydrologic functions and natural heritage features. Development is not permitted in the significant wetlands on site. Nor is development permitted in adjacent lands unless the ecological function of the adjacent lands has been evaluated with a demonstration of no negative impacts on the natural features or on their ecological functions.

Capital has endeavoured to work around the three provincially significant wetlands on the site and has analyzed, by drilling test pits, drive point piezometers and monitoring wells, the hydrology of the area to be excavated in adjacent lands. Capital is to be commended for the significant number of drill holes and with the related extensive

ecological review undertaken. The Board finds that recommendations to be implemented in site plan conditions and on the site plans themselves could improve connectivity and links through the 2 new ponds proposed and vegetation to be planted on a bordering stream. However, the assumptions made by Capital and their consultants re surface and ground water cloud their water analysis. The assumptions relate to existing surface and groundwater inputs and those same outputs. Evapotranspiration together with the effects of removed trees and new ponds were studied. However, assumptions respecting the ground and surface water not changing cannot be accepted in this complex sensitive natural environment recognized by the Province. The Board prefers the more extensive water balance methodology suggested in the testimony of Dr. Bradford for CARRA. She referenced the Oak Ridges Moraine Conservation Plan Technical Paper Series wherein the MOE set out the inputs and outputs of a typical water budget. Inputs would include Precipitation, Surface Water flow in and Groundwater flow in, while outputs include evaporation and transpiration, surface water flow out and groundwater flow out. This type of water budget analysis is more reflective of an ecosystem approach particularly in an area where there is a moraine including headwaters that have not been evaluated in a Watershed study. In 2005 the Grand River Conservation Authority recommended for reasons of the significance of the groundwater system and ecological complexity that a sub watershed study be undertaken of the Irish Creek regionally significant watershed and this was supported by the Council of Puslinch.

The Board prefers this more straight forward moraine methodology for use upon another Moraine (Paris Moraine) to show the impacts of excavation and the creation of two new ponds rather than the MOEE Hydrogeological Technical Information for Land Development Applications which is intended for use in rural sewage systems and for peak runoff for storm water management purposes. The Board has carefully considered Mr. Pickfield's able attack on Dr. Bradford's qualifications, experience and her failure to attend at the site. Her work, however, is as a peer reviewer with experience at the MOE and in related academic fields. Her credibility versus Mr. Pickfield's witness, the Township and Provincial hydrogeologists, has been weighed carefully and upheld in coming to the conclusion on the merits.

Also in the evidence on water is the water table to be established for the purpose of measuring excavation limits for most of the site (90%) which is to be above the

established water table. Significant work has been undertaken through testing to analyze where the water table should be. When the Aggregate License was first applied for in 2005 a water table was proposed. A higher water table was proposed with re-filing of the Application in 2008 reflecting higher than normal precipitation in 2006.

The establishment of a water table is indeed a variable problem dependent on precipitation in a year and years and indeed by the season. The Board is aware from the evidence of the Township, its intent to provide a zoning by-law that will be effective in regulating the depth of excavation in accordance with what is applied for. Section 66 of the *Aggregate Resources Act* provides for an override as to regulation rather than use. The intent of the Township is worthy and enforceable to the degree that use is permitted to certain depth. The Township has looked to a higher yet precipitation year in 2008 reflecting yet a higher water table. The Township at that point seems to have gone too far moving to different water table levels in different areas of the site picking variable high water years so as to reflect the highest water levels possible. The Capital approach is more consistent. However, the failure of Capital to establish a water table reflective of more recent high water levels (from the year 2008) could mean flooding on the pit floor (it may be below the actual water table). Such water table may then not reflect the license and site plan and conditions. In Exhibit 37D, water was evident on the pit floor in 2002, in the Mast pit in Puslinch where extraction was not permitted within 1 metre of the water table. Under the ARA the Minister may amend conditions without a further hearing or Appeal rights.

The failure of Capital to reflect 2008 high water levels in its proposed established water table is not good planning given its intent to stay above the established water table for approximately 90 percent of the site. The Board bears in mind counsel Murphy's repeated reference that it was the decision of Capital to proceed with the 2006 water levels as the established water table rather than their hydrogeologist who maintained the need to be .5 metres above the high water table (Exhibit 13 page 56).


The Board finds that Capital has failed to satisfactorily analyze ground and surface water on the site as a whole and in adjacent areas and, as a result, the Board cannot accept the Capital assertions that there will not be impacts harmful to an existing high level environmental regime.

Based upon the close degree that the Capital ecologist worked with and supported the Capital hydrogeologist and the close relationship of water with ecology, the finding of the Board on ecology must reflect the same failure of Capital to prove the protection of the ecology on site and off both in the provincially significant features and in the adjacent areas. Specific examples of ecological concern are:

- a) The proposed use of 15 metre buffers from provincially significant wetlands , 8 metres from tree trunks and 1 metre from the drip line when 30 metre buffers have been used by Capital in two other pit applications in Puslinch in accordance with the Grand River Conservation Authority manual and MNR practice (Exhibit 7d page 94).
- b) In the phasing of operations a proposed internal haul route will run through such a buffer.

Buffer areas are intended as no touch whereas Adjacent areas are for analysis based upon their sensitivity. The Adjacent Areas as set out in the Wellington Official Plan are 120 metres from the Significant Features.

Traffic

 Although raised by CARRA, the only qualified expert evidence on traffic was called by Capital. Helen Purdy did flesh out in her Participant Statement and evidence her traffic concerns emanating in part from difficulties between Capital and her brother on another Pit. The Board is satisfied that major County roads (principally County roads 35 and 34) which are proposed for haul route purposes, are sufficient with regard to road capacity considerations. The County, after engineering review, has entered into an Agreement with Capital for improvements that may be necessary.

Good Planning Test

The findings of the Board must apply the PPS in its entirety notwithstanding that Policies may when applied to the same project differ. In this case the Board has applied the Aggregate Policies - but not as an override. Rather those policies are applied to determine whether extraction proposed is realistic and whether social and

environmental impacts can be minimized. The Board concludes extraction proposed is not realistic given that the possible environmental impacts have not been minimized.

Social impacts involve consideration of the approximate 100 residents in the area. Mr. Dorfman, as planner for Capital, reviewed his previous experience in the mapping of aggregate resources elsewhere in the Province. It was his evidence that because of incompatibility he had recommended that existing aggregate resources not be mapped in settlement areas and their vicinity. The proposed pit is not within a settlement area as designated or mapped under the County Official Plan. There are however some similarities with a settlement area in terms of the number of residents (testimony of Nick Macdonald CARRA planner) and the reference by Helen Purdy to the history of Aikensville. It is not realistic to consider a pit in terms of the social impact on nearby residents (proximity 200 metres to nearest property line, 20 residential properties within 300 metres and 100 residential properties within 1000 metres). Capital has used these distances in another pit to argue minimum separation distance and zone of influence for an existing pit when residential development was planned. Capital correspondence suggests a 500 metre buffer may not be sufficient. The MOE in its Noise Screening Process for Section 9 Applications (Exhibit 7B page 132) suggests in the questionnaire that the minimum separation distance to achieve compliance with the Ministry noise guidelines is 1000 metres from Aggregate Crushing operations. What is proposed in Aikensville is a land assembly of 8 lots for an aggregate operation reversing the existing dominant form of rural residential development.

Normally the County has planned for aggregate expansion through an aggregate overlay in the County Plan. The evidence is that such an overlay in Wellington is in respect of primary aggregate deposits of quality and quantity only. The evidence of Nick Macdonald, planner for CARRA, is that in his professional planning experience he has and does recommend primary and secondary aggregate deposits be identified in the Official Plan. The County of Wellington has not identified secondary deposits which must be the subject of both Official Plan amendments and Zoning By-law amendments. Both amendments would be to recognize in policy and then implement approval in zoning for a secondary aggregate deposit. This duplicitous test deprives the public of the more general notice of the secondary deposit in the Official Plan before the residential development or purchase. The protection of aggregate in the PPS is specific to established operations and known deposits. It is piecemeal planning to consider

additional secondary deposits other than by inclusion on the overlay generally, perhaps with consideration of what land uses already exist. Coordination in an integrated comprehensive approach is a requirement of section 1.2.1 of the PPS. Section 1.1.4.1 of the PPS states locally-important resource areas should be designated. Of 11 aggregate extraction areas requiring approval in South Wellington - 9 of which are in Puslinch - 9 were approved by Zoning without an OPA on the basis that they were within the Aggregate Overlay in the Official Plan. Of the 9 in Puslinch only 1 required an OPA and that was Capital's Wellington Pit 5 for a second phase with the Permit to reflect amalgamation (Exhibit 143). The undertaking (Exhibit 152) of Mr. Salis, County planner, confirmed the Capital Pit 5 second phase was of tertiary significance in resource ranking and that outside Puslinch, in Wellington County, 3 pits with OP amendments were of tertiary significance of the resource.

The OP amendment is also to change designations underlying the overlay for an unevaluated wetland and an AINSI on site. The Board finds the planning exercise that seemed to evolve as a correction in boundaries and an informal evaluation of an unassessed wetland from what was first applied for as a change in the Aggregate overlay, to be insufficient to warrant the changes sought in designation. Correspondence shows after the planning applications were made, access became an issue with the unevaluated wetland (existing designation as Core Greenlands) and access through that designation was unavoidable due to surrounding wetland locations. Mr. Pickfield is correct that the ARA legislated process is intended to be iterative. However, when the hearing stage is reached and positions are taken, the Appellant is expected to be consistent. Throughout this hearing Capital amended its conditions for the site plans in Exhibits 18-1e) June 9, 2009, 18-2e) June 11, 2009 and 18-3e) November 4, 2009.

More specifically social impacts have been explored in depth in respect of noise and dust having regard initially to MOE Guidelines. It is appropriate so to do given the definition of adverse impact in the PPS referring to the *Environmental Protection Act*. Indeed the County Official Plan makes reference to Provincial standards, guidelines and regulations processes. No Certificate of Approval has been applied for in respect of noise or dust. Such processes will involve Ministry policies and guidelines under the *Environmental Protection Act*.

The Board concludes from the evidence before it that at sensitive receptor three (the closest residential property to the excavation site) that there will be a doubling of noise level in an amenity area (rear yard). This is recognized as amenity area or outdoor space where routine or normal activities at reasonably expected times under the definition of sensitive land use in the PPS. The evidence is that this area has been in regular use for a pool, gazebo and for walking trails. The proposed noise level in that area was described as a doubling of ambient natural sound to the point where one would have to shout to be heard. This, the Board finds, could be an exceedance to MOE guidelines - in particular NPC -232: Sound Level Limits for Stationary Sources in Class 3 Areas (Rural) limit 45dBA but projected to be 50dBA, an increase of 10dBA over current ambient 40dBA. In the rural circumstances the Board prefers the use of the rural guideline as more reflective of a predictable worst case basis rather than the urban guideline. The Board does not condone a process wherein CARRA asked to participate in the noise analysis and was excluded from a meeting when noise was discussed and where the municipal noise consultant changed his concluding opinion to agree with the Capital noise consultant.

With regard to dust the Board finds possible discharges of fine particulate matter and crystalline silica in excess of MOE guidance documents (Ambient Air Quality Criteria) that will not be cured under the Capital Best Management Practices Plan. That Plan suggests awaiting for visual dust clouds to appear the size of one third of a commercial vehicle before watering takes place (no water taking at this site is proposed). There is questionable coordination with admitted subcontracting and with the exemption condition sought to permit night loading and shipping to meet urgent provincial contracts and specifications. The Board's finding is that public health concerns may result inconsistent with policy 1.1.1(c) of the PPS. The Board in evaluating *Planning Act* applications is not restricted to MOE guidelines since it must determine if an undertaking is good land use planning. *Ottawa v. Sample* (2001) 43 O.M.B.R. 1444(SCJ) at 1492. *Gold Mountain Springs Inc. Re* (2002) 44C.E.L.R. (N.S.287 (OMB) at 2963. *Grey Association for Better Planning v. Artemesia Waters Ltd.* (2002), 62 O.R. (3d) (Div.Ct.) at 203 -204. Moreover even if individual point of impingement limits are met under Regulation 419/05 as argued by Capital such do not take into account background levels of contaminants and hence cumulative effect - *Dawber v. Ontario* (Director, Ministry of the Environment) (2007), 28C.E.L. (3d) 281 (OERT) at 297-298 affirmed in Divisional Court *Dawber v. Ontario* (Director, Ministry of

the Environment) (20080, 36 C.L.E.R. (3d) 191(Div.Ct.). Neither is the Board convinced that Capital modeling took into effect worst case positions and the best data. The evidence of the CARRA witness has been carefully considered for his qualifications and experience. Although the CARRA witness, Dr. DiGiovanni, was not as experienced in aggregates as the Capital witness, his experience, education and carriage in giving testimony was sufficient to give opinions in the specialized field.

The Board's finding is that social impacts are not minimized.

Notice

Helen Purdy questioned the Municipal notice re the *Planning Act* Amendments. Her concern was respecting notice signage on site and the failure to provide a planning report with the planning applications. The Board called for the Puslinch Clerk to testify. Based upon her testimony and *Planning Act* language, the Board finds the appropriate notice was provided through the newspaper. Signage on site and the planning report are optional. The absence of such a report is however, relevant. This process started with a License application even though the License could not be issued without rezoning. The Rezoning and Official Plan applications were filed 2 months after the License Application. That no planning impact assessment was filed with the application (may be required under section 4.6.2 of the County Official Plan), that Capital initially did not hire a planning consultant and that the planning witness for Capitol was not retained until, several years after the Planning Applications were filed, speaks to the significance that Capital placed on planning.

Compliance

The ARA requires in section 12 consideration of the Applicant's compliance record. Capital has an excellent record in rehabilitating sites after closure and has received awards. There have been however, instances in the record before the Board where Capital has not been as compliant. Capital failed to disclose its initial soil testing results so that others might appreciate the depth of the deposits when quantity and quality of the resource can be an issue. On another Capital site, unauthorized tree cutting by the owner who had leased to Capital, took place contrary to site plan conditions. On the proposed site Capital undertook preparatory work both with respect to a culvert and to constructing an access road without regard to approvals.

Section 2.1 of the *Planning Act*

Section 2.1 of the *Planning Act* requires the OMB to have regard for the Decision of the Municipal Council. In this case, due to the Transition provisions of Bill 51 this may not have application. However, because of the refilling and amending of applications it is out of caution reviewed in any event. In *City of Ottawa v. Minto Community Inc.* (Ont. Div. Ct. File DC-09-001527-000) the majority held that the Board has an obligation to at least scrutinize and carefully consider the Council decision as well as the information and material that was before the Council. The Board has done this with the planning reports made to the Councils, Exhibits 7a to 7d and press reports set out in the participant witness statement of Helen Purdy (Exhibit 212). In *Minto* the Ottawa Council provided reasons for its refusal. In the case now before the Board there are no such reasons. By its actions County Council voted to approve of an Official Plan amendment by resolution, then on third reading voted down the OP amendment. The County appeared at the Prehearing but then withdrew before the hearing commenced. The Township first passed a resolution to support the County OPA, then after the County OP amendment lost on third reading, the Township passed a resolution opposing. That position changed somewhat at the hearing based upon whether the Township could succeed on a higher established groundwater table and related Zoning. Press reports with no certification as to accuracy cannot be given determinative weight. The Council positions can be given very little weight in this case because they are so variable and without reasons.

Expert Witnesses

Expert witnesses are in a privileged position in giving their opinion evidence. Normal evidence is more direct. Experts are qualified and then are expected to conduct themselves in a manner that is independent. In this long hearing, questions arose as to that independence in respect of witnesses for each of the parties. Mr. Northey indicated a resident questioned the independence and impartiality of a Capital consultant in ecology. Mr. Northey then moved a Motion to deal with the allegation respecting the weight to be given to Capitol's ecological evidence. The Board set down that motion to be heard orally during the hearing. The resident and the ecologist testified re alleged directions from one Capital consultant in the hearing room to another who was testifying. Based on the denial and explanation concerning hand movements and the

line of vision, the complainant was satisfied with the explanation and thus Mr. Northey withdrew his Motion.

The Board having observed a Puslinch witness sitting in the front bench with counsel pose questions for counsel during his cross-examination of another witness by the counsel questioned whether this was bringing the assisting witness into the roll of an advocate. That conduct did not continue. Similarly the Board noted a witness for CARRA repeatedly approach his counsel during counsel representations. A response that the conduct was to assist the Board was accepted.

Mr. Pickfield, in able final argument, questioned whether the testimony of several CARRA witnesses had become so critical that it was more in the nature of advocacy and not independent expert testimony. The Board has carefully reviewed witness statements, exhibits and its notes and concludes that not to be the case. Several CARRA witnesses chose in a peer review capacity to comment on the evidence of their peers testifying for Capital. In so doing they may have been critical - but that is the nature of what has come to be common in peer review evidence. Pointing out the difference with one's evidence and that of another expert can be helpful to the Board as long as it is respectful and professional. That is the case. One CARRA expert witness chose to speak directly to the Board. He referred to the onus of proof based upon his review of witness statements and some of the *viva voce* testimony. That is normally the purview of counsel and the Board. However the Board acknowledges that such evidence was given in part respecting the PPS which does clearly indicate that in order to develop in lands adjacent provincially significant wetlands there is an initial onus on the proponent to show no adverse affects. Once that issue is joined the onus may shift during the hearing. The Board is satisfied that this and all other experts were appropriately qualified so as to enable them to give their opinions. The Board has carefully reviewed all the testimony in coming to its conclusions.

Board Conclusion

In coming to its Conclusion the Board is appreciative of the comprehensiveness of the final submissions and the professionalism of all counsel. The Board finds the *Planning Act* appeals are not consistent with the PPS and in particular policies 1.0, 1.1.1 c), 1.2 1.7.1(e), 2.1.1, 2.1.6, 2.2.1(c) and (e), 2.2.2, and 2.5.2.1 and 2.5.2.2. The

Planning Act Appeals for Official Plan Amendment and Zoning By-law Amendment do not represent good planning and are not in the public interest.

Disposition and Board Order

The Capital Appeals for Official Plan and Zoning Amendments under the *Planning Act* are dismissed. Without zoning required under the ARA, this Board respectfully directs the Honourable Minister of Natural Resources not to issue the Aggregate Licence referred to this Board.

So Orders the Board.

“N.C. Jackson”

N.C. JACKSON
MEMBER