

An Analysis of the Ontario Municipal Board's Order on the Aikensville Pit, Township of Puslinch, Ontario

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January 2010

Executive Summary

In July 2008, Capital Paving Inc. submitted an application to the Ministry of Natural Resources (MNR) for a license to operate an aggregate extraction operation in the Township of Puslinch (Aikensville) County of Wellington. The proposed site for extraction is within 1 kilometre of a rural residential community and in close proximity to Provincially Significant Wetlands, Woodlands, Wildlife Habitat, and other environmentally sensitive lands. Residents of the area, notably members of the Cranberry Area Residents and Ratepayers Association (CARRA), and other citizens are opposed to the proposed Aikensville pit.

In November 2008, Capital Paving appealed to the Ontario Municipal Board (OMB) under the *Planning Act* Wellington Council's refusal to amend Puslinch Township's Official Plan to provide for the establishment of the extraction operation. Capital Paving also appealed the Township of Puslinch Council's refusal to rezone lands from Agricultural Zone and Natural Environment Zone to permit aggregate extraction. Later, the MNR referred to the OMB under the *Aggregate Resources Act* Capital Paving's application for a Category 1 Class A License for aggregate extraction. These appeals were consolidated and a hearing date was originally set for May 2009.

In January 2010, the OMB decided to dismiss Capital Paving's appeals. Additionally, Board Member N.C. Jackson ordered the Minister of Natural Resources not to issue the company the Aggregate Licence. Based on an analysis of the Board's decision, this report summarizes the key reasons for the ruling. It also highlights some lessons that parties to pit and quarry hearings can derive from the hearing.

The Board's interpretation and application of the Provincial Policy Statement (PPS) were among the most significant determining factors in this case. Jackson applied the PPS in its entirety, noting especially the sections specific to the case covered by Township planners. The PPS's Aggregate Policies, therefore, were not applied as an override of the other sections of the PPS relevant to aggregate extraction operations. Rather, Jackson took a holistic approach in applying the range of policies within the PPS.

More research is required to determine the degree to which Jackson's application of the PPS is precedent setting. Specifically, research that focuses on pit and quarry hearing outcomes based on the Board's application and interpretation of the PPS would increase our understanding of the significance of the Aikensville pit decision.

1.0 Summary of Key reasons for Jackson’s Order

Based on an analysis of the Board’s January 19, 2010 decision statement (OMB File No. PL080489), this section describes the key reasons for the Board’s ruling in the Aikensville pit case: Capital Paving Inc.’s *Planning Act* appeals are not consistent with certain PPS policies, do not reflect good planning, and are not in the public interest. Consequent upon this decision, the Board directed the Minister of Natural Resources not to issue to Capital Paving a Category 1 Class A License for aggregate extraction.

1.1 Surface and groundwater study methodology

Jackson found that the methodology used by Capital Paving to assess the potential impacts of the extraction operation on surface and groundwater was flawed (see p. 15 of the OMB file). First, the surface and groundwater inputs and outputs assessment methods did not take an ecosystems approach and, notably, did not consider how the inputs and outputs change (e.g., with the land gradient and over the estimated 5 to 7 year period of the proposed extraction operation). The report is unclear about the precise input and output changes that were ignored.

Second, the methods were found to be inferior to the extensive water balance methods set out in the Oak Ridges Moraine Conservation Plan Technical Paper Series. Jackson asserted that the ORMCP methodology is more reflective of an ecosystems approach and more appropriate for use upon another Moraine, i.e., the subject Paris Moraine.

Finally, Jackson found that Capital Paving failed to establish a water table reflective of the most recent water levels. This failure was determined to be not good planning, especially in light of Capital Paving’s intent to stay above the established water table for most of the site (p. 16).

1.2 Ecological studies

Because the Board found that Capital failed to satisfactorily analyze ground and surface water on the site, and because of the close relationship between water and ecology, the associated ecological studies were also ruled to be unacceptable (p. 17).

1.3 Interpretation and application of the PPS

Jackson’s interpretation of an appropriate application of the PPS was that it should be applied in its entirety even though the policies may “differ” when applied to the same project. Jackson is presumably referring to the conflicting policies within the PPS with respect to, for example,

protecting aggregate resources and water quality and quantity, etc. Jackson applied the PPS Mineral Aggregate Resources policies in such a way as not to override other relevant PPS policies: "...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" (p. 17-18).

1.4 Insufficient noise screening and unacceptable noise level

Jackson found that the minimum separation distance and zone of influence proposed by Capital Paving was insufficient in that they did not comply with the MOE's Noise Screening Process for Section 9 Applications. The minimum separation distance to achieve compliance with Ministry noise guidelines is 1000 metres from Aggregate crushing operations (p. 18).

Jackson found that the proposed noise level would exceed MOE guidelines for the maximum level at the closest residential property to the excavation site. Moreover, the Board preferred the use of rural guidelines as opposed to urban guidelines for this case (p. 20).

1.5 Unacceptable discharge of particulate matter

Jackson found that the potential discharges of fine particulate matter and crystalline silica would be in excess of MOE guidance documents (Ambient Air Quality Criteria). Jackson found that Capital Paving's Best Management Practices Plan failed to mitigate potential impacts: "The Board's finding is that public health concerns may result inconsistent with policy 1.1.1(c) of the PPS" (p. 20). Jackson also asserted that the Board was not convinced that Capital Paving's modeling considered worst-case scenarios and best data. The above points (4, 5 and 6) led Jackson to find that Capital Paving failed to demonstrate the social impacts would be minimized.

2.0 Lessons for Parties to OMB Hearings for Pits and Quarries

2.1 Application and interpretation of the PPS

Jackson's application and interpretation of the PPS, described above (s. 1.3) were of paramount importance in this case. The Board may have set an excellent precedent with respect to what parties to pit and quarry hearings should expect in future. More research is required to determine the range of pit and quarry hearing outcomes based on the Board's application and interpretation of the PPS.

2.2 Natural heritage

The designated environmentally sensitive lands (wetlands, woodlands, wildlife habitat, etc.) in and surrounding the proposed site played an integral role in this case. The Provincially Significant designation, for example, is a leverage tool for parties to OMB hearings who wish to protect valued natural and cultural resources from potentially harmful developments.

2.3 Use of experts and local knowledge

Jackson speaks to the sufficiency of the experience, education and carriage of experts. In particular, Jackson carefully considered the evidence forwarded by one CARRA witness with respect to social impacts, Dr. DiGiovanni. Jackson found that DiGiovanni was not as experienced in aggregates as Capital Paving's witness; however, DiGiovanni's experience, education and carriage was found to be sufficient to give opinions in his area of specialization.

With regards to traffic impacts, one CARRA member provided local knowledge as evidence. This evidence, however, was not regarded as highly as Capital Paving's expert evidence on traffic.

Finally, Jackson speaks to Capital Paving's concern that CARRA witnesses were advocates as opposed to independent experts. Based on this concern, the Board carefully reviewed CARRA witness statements, notes and exhibits before determining that the expert testimonies were sufficiently independent and professional.

2.4 Use of supporting scientific reports

Jackson highlighted a preference for the methodology used in the Oak Ridges Moraine Conservation Plan Technical Reports for surface and groundwater studies. These reports stood in stark contrast with Capital Paving's studies and provided an excellent example of environmental study standards. Notably, the ORMCP reports take an ecosystem approach to analysis.

3.0 Conclusion

This report summarized the key reasons for the OMB's ruling in the Aikessville pit hearing, and highlighted some lessons that parties to pits and quarries might derive from this hearing. The Board's interpretation and application of the PPS were perhaps the most significant determining

factors in this case. Jackson applied the PPS in its entirety as a “good planning test” as opposed to allowing the aggregate policies to override other PPS policies relevant to aggregate extraction operations (e.g., protection of natural features, protection of water quality and quantity, etc.).

More research is required to determine the degree to which Jackson’s application of the PPS is precedent setting. Specifically, research that focuses on pit and quarry hearing outcomes based on the Board’s application and interpretation of the PPS would increase our understanding of the significance of the Aikensville pit decision.