

For Information

DATE: December 1, 2010

REPORT TITLE: **ROCKFORT QUARRY ONTARIO MUNICIPAL BOARD DECISION**

FROM: Norma Trim, Chief Financial Officer and Commissioner of Corporate Services

OBJECTIVE

The purpose of this report is to inform Regional Council of the Ontario Municipal Board decision with respect to the Rockfort Quarry Applications.

REPORT HIGHLIGHTS

- Ontario Municipal Board finds that the applications to establish the Rockfort Quarry do not represent good planning and that the requested licence should not be issued.
- The applicant, James Dick Construction Limited failed to demonstrate that the operation of a quarry would have no negative impact on the surrounding natural heritage features and functions.
- The OMB found that the establishment of a quarry would fundamentally change the rural character of the area.

DISCUSSION**1. Background**

On November 12, 2010, the Ontario Municipal Board ("the Board") issued its decision on the Rockfort Quarry applications in Caledon. The Board turned down the proposed quarry.

Vice Chair, Susan Campbell, presided over the proceedings which lasted 79 days, spanning nine months. Evidence and argument were presented by the applicant, James Dick Construction Limited (JDCL), the Ministry of Natural Resources (MNR), the Region of Peel (Peel), the Town of Caledon (Caledon), the Credit Valley Conservation Authority (CVC), the Coalition of Concerned Citizens (CCC) and numerous individual members of the public.

The Rockfort applications had been filed by JDCL in 1998 and had been updated and supplemented on several occasions, most recently in 2008-2009. Over the years, the Region of Peel and the Town of Caledon had cooperatively undertaken three major sets of comprehensive expert peer reviews of the Rockfort application materials and on each occasion, our peer review team found that there was inadequate information provided by JDCL to support approval of the proposed quarry. In the crucial area of hydrogeology, most of the detailed questions, comments and requests for further information that were made by the peer reviewer for the Region and Town were not answered by JDCL.

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Regional Council considered this application in September 2003 and again in March 2009. On both occasions, Regional Council directed Regional staff and legal counsel to oppose the approval of the proposed Rockfort Quarry due to the inadequacy of the information provided by JDCL in support of the applications. Regional Council further directed Regional staff and legal counsel to focus the Region's participation at the OMB hearing on the following five Regional Issues, consistent with Regional Roles and Responsibilities:

- Conformity with the Regional Official Plan (ROP) – to ensure that all relevant policies of the ROP are fully considered;
- Hydrogeology and related engineering design issues – to ensure the protection of groundwater and surface water, including natural features and functions and drinking water supplies;
- Natural Environment features and functions – to ensure the protection of wetlands, fisheries, coldwater streams and other components of the Regional Greenlands system;
- Transportation and Traffic issues – to ensure that impacts to the Regional road network are appropriately considered and, if the quarry is approved, that the applicant pay the full costs of any upgrades and/or increased costs that are required as a result of the quarry; and
- Enforcement, Financial Securities and Cost implications to the Region – to ensure that issues of enforcement are appropriately addressed and that the Peel Region taxpayers do not bear the burden of short term or long term costs or risks associated with any of the above issues relating to the proposed quarry.

In cooperation with the Town of Caledon, Regional staff presented extensive evidence and argument on all of these Regional Issues during the OMB hearing, consistent with Regional Council's direction.

2. Ontario Municipal Board Decision

Summarized below is an analysis of the Board's decision as it relates to the issues that the Region focused on at the Hearing. Excerpts from the Board's Decision can be found in Appendix I. The decision is available on the Region's web site at <http://www.peelregion.ca/planning/rockfort.htm>.

Conformity with the Regional Official Plan

The Board undertook the exercise of considering the policies and objectives of the ROP that acknowledge the importance of the aggregate industry to the economy of Peel and the importance of achieving a balance between these potential economic benefits and the protection of communities, the natural environment, and other resources. The Board agreed with the Region that the public interest lies in striking an appropriate balance. The Board concluded that "the interest in protecting the natural heritage and cultural heritage resources of the subject lands and those surrounding them outweighs the interest in making the aggregate resources ... available to supply mineral aggregate needs" (OMB Decision, Page 75).

Hydrogeology and Related Engineering Design Issues

The Board identified numerous concerns with JDCL's proposal as it relates to hydrogeology, modelling, water monitoring and potential impacts of reduced groundwater on natural heritage features. The Board was not convinced that it was in the public interest to postpone proof of concept of the mitigation measures until after the Board's decision on the application. The Board determined that the applicant had not

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demonstrated that there would be no negative impacts to the adjacent significant natural heritage features and as such the test in Section 2.3.2 of the PPS had not been met.

Furthermore, the Board determined that it would be abdicating its responsibility to accept the JDCL argument that proof of the effectiveness of the mitigation measures could be left to post-approval. "As the AMP [Adaptive Management Plan] leaves so much demonstration work to be completed in a post-approval process, the Board cannot find that the operation of the quarry would have an acceptable effect on the environment. Until the work set out in the AMP is completed, the Board finds that the requisite degree of certainty about the efficacy of mitigation has not been demonstrated. The Board finds that an unmitigated or an inadequately mitigated quarry could have a disastrous effect on the natural features and functions on the lands surrounding the subject property. Therefore, a high degree of certainty, which would be attendant upon demonstration by JDCL, is required before the Board approves the applications. Such demonstration has not taken place." (OMB Decision, page 69).

The Board also found JDCL's reliance on the MNR to implement the Milestones and Approval of the AMP was not in the public interest.

Natural Environment Features and Functions

The uncertainty and concerns outlined above with respect to the effectiveness of JDCL's proposed mitigation measures led the Board to conclude that "A failure in the mitigation measures proposed for the quarry, as set out in the AMP, would have a catastrophic impact on the natural environment or the natural features and functions of the area." (OMB Decision, pages 75-76).

The Board determined that the applicant had not demonstrated that there would be no negative impacts to the adjacent significant natural heritage features and functions. As such, the test in Section 2.3.2 of the PPS had not been met. The onus to demonstrate no negative impact was on JDCL and the Board was not satisfied that JDCL had met that requirement.

Transportation and Traffic Issues

The Board determined that JDCL did not adequately address the economic, social and physical impacts of the proposed haul route on the local rural character and therefore the test in the Caledon Official Plan had not been met.

The Board noted that "There is no question that roads could be improved to the standards required for an aggregate haul route. However, the more fundamental question is whether the work should be done. ... The area is rural and JDCL has not demonstrated that a "fundamental change" to the traffic pattern in this rural area is either acceptable or able to be adequately mitigated." (OMB Decision, pages 22-23).

Enforcement, Financial Securities and Cost implications to the Region

Not only was the Board concerned with the uncertainties of the AMP but also the cost of implementing the AMP factored into the Board's decision. "... the only thing standing between the proposed quarry and a catastrophic impact on the environment is the AMP. Therefore the Board must be convinced that the applicant would have the financial resources to complete all that is required by the AMP." (OMB Decision, page 72-73).

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The Board member noted that no public authority (MNR, Peel or Caledon) should be burdened with the costs of mitigating and rehabilitating the proposed quarry. The Board found that financial assurances would be necessary for a quarry dependent upon a complex, highly engineered AMP.

3. Next Steps

There are two possible legal options available should JDCL seek to challenge the Board's decision: The first is to file an application to the Divisional Court for Leave to Appeal on a question of law, under section 96 of the Ontario Municipal Board Act. The second option is to request the Board review and reconsideration of its decision, under section 43 of the OMB Act.

An application for Leave to Appeal to the Divisional Court ("the Court") must normally be served on all parties within 15 days of the date of the decision and filed with the Court within five days of service. An application for Leave to Appeal will normally be heard by the Court within a few months of filing. If Leave is granted, the appeal would normally be heard by the Divisional Court within another six months to a year. To succeed on an application for Leave to Appeal, an applicant must satisfy the Court that:

- the proposed appeal relates to a question of law;
- the question of law is of sufficient importance to merit the attention of the Court; and
- there is reason to doubt the correctness of the Board's decision.

An application to the Board under section 43 must normally be submitted to the Board within 30 days of the Board's decision. It can take anywhere from a few weeks to a year or more to be determined, although most applications of this sort would be determined in a matter of months. To succeed on an application to the Board for review under section 43 of the OMB Act, an applicant must satisfy the Board that the request for review raises a "convincing and compelling case" that the Board:

- acted outside its jurisdiction;
- violated the rules of natural justice or procedural fairness, including those against bias;
- made an error of law or fact such that the Board would likely have reached a different decision;
- heard false or misleading evidence from a party or witness, which was discovered only after the hearing and would have affected the result; or
- should consider evidence which was not available at the time of the hearing, but that is credible and could have affected the result.

As of the date of writing this report, JDCL had not requested leave to appeal the decision. JDCL's intentions with respect to a review under Section 43, of the OMB's decision are unknown. The deadline for proceeding with this option is on December 13, 2010 and as such JDCL's intentions will be known by the time that Council considers this report. Staff and legal counsel will be prepared to update Council at that time.

In the event that JDCL determines to initiate legal proceedings to challenge the Board's decision, staff and legal counsel will respond as required, consistent with Council's direction regarding this matter. In the event of further proceedings, staff will provide Council with regular updates as events unfold.

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FINANCIAL IMPLICATIONS

Should the applicant pursue a Section 43 review of the decision, there will be cost implications for responding to the materials to be filed by JDCL. If necessary, these costs will be assessed and brought before Regional Council at a future date.

CONCLUSION

In summary, the Board made findings in relation to all of the Regional Issues identified by Regional Council, which are consistent with the positions taken by Regional Council in 2003 and 2009. Fundamentally, the Board concluded that the applicant had not provided sufficient information to demonstrate that its proposed quarry would not result in unacceptable impacts on the surrounding natural environment. The Board was not satisfied with the applicant's proposal to defer such demonstration work to be reviewed and approved by MNR, after the Board's approval. Neither was the Board satisfied that the mitigation measures outlined in the Adaptive Management Plan could be relied upon for long term care in the absence of any financial assurances.

In addition to the above findings in relation to Regional Issues, the Board also made findings that the proposed quarry would result in unacceptable negative impacts in relation to local issues, including cultural heritage impacts, visual impacts, noise impacts and social impacts. These issues were addressed at the hearing primarily by Caledon and the CCC.



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Approved for Submission:



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Excerpts from Ontario Municipal Board Decision issued Nov 12, 2010 for files PL000643 and PL060448

Regarding Conformity with the Regional Official Plan:

"The ROP, like the PPS, must be read in its entirety and a balancing exercise must be undertaken by the Board. As Simone Banz, qualified by the Board to provide expert land use planning on behalf of the Region so eloquently put it: 'the ROP contains objectives and policies that recognize the importance of the aggregate industry to the economy of Peel Region and the importance of achieving a balance between these potential economic benefits and the protection of communities, the natural environment, and cultural and other resources that may be adversely affected by the extraction operations. The public interest lies in striking this balance appropriately in this case.'" (OMB Decision, page 12).

Regarding Hydrogeology and Related Engineering Design Issues:

"After reviewing hundreds of pages of evidence on hydrogeology, modelling, water monitoring and potential impacts of reduced groundwater on natural heritage features; the evidence of expert witnesses for all parties; and the submissions of Counsel, the Board finds that the most significant piece of evidence on this issue is Exhibit # 34, The May 2009 Updated Adaptive Management Plan (AMP), Water Resources Protection. It is in the context of this document that the Board will determine whether JDCL has, for the purposes of the PPS, Policy 2.3.2, demonstrated that there will be no negative impacts on natural heritage features and functions and for the purposes of Policy 5.11.2.4(d) of the OP demonstrated that the proposal will not have any unacceptable impacts. Further, for the purposes of the ARA, section 2(d) and section 12(1)(a) and (e), the Board finds that the AMP is critical to the determination it must make." (OMB Decision, page 65).

"When the Board examines the details of the Implementation Milestones and Approvals, all to be completed post-Board approval, the Board finds that matters vital to the operation of the AMP, and therefore vital to the protection of natural heritage features and functions are left solely to the determination of MNR." (OMB Decision, page 66).

"Having considered the provisions of the AMP, in particular the Milestones and Appendix I, the Board finds that JDCL has not met the requirements of the PPS. Policy 2.3.2 provides that development may be permitted on lands adjacent to certain significant natural heritage features if it has been demonstrated that there would be no negative impacts on those features. The subject property is 'adjacent lands' for the purposes of the PPS." (OMB Decision, page 68).

"The Board would be abdicating the responsibility assigned to it by the Planning Act, the ARA, the PPS and the OP if it determined that proof that the mitigating measures will work as planned could be left to post-approval. ... As the AMP leaves so much demonstration work to be completed in a post-approval process, the Board cannot find that the operation of the quarry would have an acceptable effect on the environment. Until the work set out in the AMP is completed, the Board finds that the requisite degree of certainty about the efficacy of mitigation has not been demonstrated. The Board finds that an unmitigated or an inadequately mitigated quarry could have a disastrous effect on the natural features

and functions on the lands surrounding the subject property. Therefore, a high degree of certainty, which would be attendant upon demonstration by JDCL, is required before the Board approves the applications. Such demonstration has not taken place." (OMB Decision, page 69).

"The Board will not approve an aggregate proposal which leaves an issue like the protection of the natural environment to be dealt with by a third party with demonstrably inadequate resources, like MNR. The AMP Milestone approval process leaves no room for the participation of bodies like the Region, the Town and CVC, which have the mandate of protecting the public interest." (OMB Decision, page 71).

Regarding Natural Environment Features and Functions:

"The Board finds that the 'bottom line' ... may be simplistically, but accurately summarized as follows: if the AMP (*Adaptive Management Plan*) works properly, the impact of the quarry on the natural heritage features and functions around the site will be acceptable." (OMB Decision, page 62).

"A failure in the mitigation measures proposed for the quarry, as set out in the AMP, would have a catastrophic impact on the natural environment or the natural features and functions of the area." (OMB Decision, pages 75-76).

"Policy 2.3 (*of the PPS*) provides 'development and site alteration may be permitted on adjacent land to (natural heritage features and areas) if it has been demonstrated that there will be no negative impacts on the natural features or on the ecological functions for which the area is identified'. The Board finds that this means that a proponent of development has the onus of demonstrating no negative impact. Objectors to a development need not demonstrate that there will be negative impact." (OMB Decision, page 4).

Regarding Transportation and Traffic issues:

"It is fair to say that any outstanding technical transportation and traffic issues could be resolved at a later date through the normal Regional assessment process for the upgrading of Roads." (OMB Decision, page 19).

"The Board finds that if it accepted that Alternative 'B' (*i.e. the proposed haul route*) should be the haul route for an approved quarry, appropriate study and work could be completed by the Region and JDCL to bring the roads up to an appropriate standard. However, the Board finds that while all technical design issues could be satisfactorily addressed if the Region agreed to the necessity of road upgrades, the (*Caledon*) OP requires more to be determined by the Board." (OMB Decision, page 20).

"For the Board to accept the haul route as proposed, the Board must be able to find, based on the evidence, that the impacts are acceptable". (OMB Decision, page 20).

The Board finds that JDCL has not met the requirements of these policies. Through the work of Messrs. Pritchard and Parkin, JDCL inadequately addressed the economic, social and physical impacts of the proposed haul route. There is no question that roads could be improved to the standards required for an aggregate haul route. However, the more

fundamental question is whether the work should be done. The Board finds that the work of Mr. Pritchard, while thorough, does not help the Board determine that it should be done, given the economic, social and physical context of the subject property and the proposed haul route. The area is rural and JDCL has not demonstrated that a "fundamental change" to the traffic pattern in this rural area is either acceptable or able to be adequately mitigated." (OMB Decision, pages 22-23).

"For the reasons set out above, the Board finds that local impact was not assessed in accordance with the requirements of the OP (*i.e. the Caledon OP*)." (OMB Decision, page 23).

Regarding Enforcement, Financial Securities and Cost implications to the Region:

"The Board finds that as section 12(1)(k) of the ARA requires the Board to have regard to 'such other matters as are considered appropriate', it must have regard to the cost of the mitigation measures and who will bear the costs of them. The Board is cognizant of the fact that all parties have agreed that an unmitigated quarry is inappropriate for the site. The Board would go further to find that such an unmitigated quarry would, without a doubt, result in a catastrophe for water dependent natural heritage features and functions around the site. It appears to the Board from all the evidence adduced by all the parties, that the only thing standing between the proposed quarry and a catastrophic impact on the environment is the AMP. Therefore the Board must be convinced that the applicant would have the financial resources to complete all that is required by the AMP." (OMB Decision, page 72-73).

"The Board finds that no public authority, not the Province, the Region, the Town, nor the CVC should ever find itself responsible for the costs of mitigation measures for the proposed quarry." (OMB Decision, page 73).

"As noted above, the only thing that stands between the proposed quarry and a negative impact on the natural environment is a complex, highly engineered and closely monitored mitigation system which would have to operate effectively for approximately 80 years. On the limited evidence before it, the Board finds that such a mitigation system could cost well in excess of \$90 million. The Province, the Region and the Town and their residents must have clear assurances embodied in executed legal agreements that JDCL will always be responsible for the costs of mitigation." (OMB Decision, pages 73-74).

"The Board finds that the template established in the Milton Quarry Extension is a good one when it is considering a proposed quarry which would be reliant on a costly, long-term adaptive management plan. It would not be in the public interest to approve such a quarry in the absence of agreements similar to those executed in the Milton Quarry Extension matter. No statute or policy affords the Board the authority to require any person to enter into such agreements. However the Board cannot envision the approval of a quarry dependant upon a complex, highly engineered adaptive management plan, without such agreements being in place or without making the execution of such agreements a condition of approval." (OMB Decision, page 74).