

Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement
local



ISSUE DATE: April 29, 2020

CASE NO(S): PL180754

The Ontario Municipal Board (the “OMB”) is continued under the name Local Planning Appeal Tribunal (the “Tribunal”), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Kevin Matthews and Robin Latimer
Appellant:	Trout Lake Camper's Association
Appellant:	Leslie Walker Larson
Subject:	By-law No. 004-2018
Municipality:	Township of Gorham
LPAT Case No.:	PL180754
LPAT File No.:	PL180754
LPAT Case Name:	Kevin Matthews/Robin Latimer v. Gorham (Township)

Heard: February 20, 2020 in Rosslyn, Ontario

APPEARANCES:

Parties

Counsel/Representative*

Leslie Walker Larson

Rene Larson

Kevin Matthews and Robin Latimer

Kevin Matthews

Trout Lake Camper's Association

Theresa McClenaghan
Kerrie Blaise

Lakehead Rural Planning Board

Leigh Whyte*

Lempiala Sand and Gravel Limited

Robert Botsford
Carly Deboni

DECISION DELIVERED BY HELEN JACKSON AND ORDER OF THE TRIBUNAL

BACKGROUND

[1] The Trout Lake Camper's Association ("TLCA"), Leslie Walker Larson ("Larson"), and Kevin Matthews and Robin Latimer ("Matthews/Latimer") appealed from the decision of the Lakehead Rural Planning Board ("LRPB") to pass Zoning By-law No. 004-2018 ("ZBL"), pursuant to s. 34(19) of the *Planning Act* ("Act"). The ZBL is to facilitate gravel extraction on lands described as Parcel 8755, Section TBF, Part Broken Lot 18, Concession 7, Township of Gorham ("subject lands/subject property"). Lempiala Sand & Gravel Limited ("Applicant/Lempiala") own the subject lands. The LRPB is designated as the approval authority pursuant to the Act for the unorganized Townships of Gorham, Ware, and a portion of the Dawson Road Lots.

[2] A Case Management Conference ("CMC") was conducted pursuant to s. 33(1) of the *Local Planning Appeal Tribunal Act, 2017* and Rules 26.17 to 26.26 of the Tribunal's *Rules of Practice and Procedure* on May 28, 2019, in person. At the CMC, the LRPB indicated that they did not intend to actively participate in the appeals, due to limited financial resources. The Applicant requested and was granted party status to the proceeding. As directed by the Tribunal, the Applicant filed with the Tribunal and served upon the parties a Responding Record and Case Synopsis on June 17, 2019.

[3] The CMC was continued to a telephone conference call ("TCC") held August 28, 2019, to permit the parties the opportunity to have settlement discussions. At the TCC, the Tribunal was advised that settlement discussions were not fruitful. The Tribunal directed that the appeal was to be heard by way of a two-day oral hearing. The parties requested that the Tribunal examine witnesses at the hearing and provided suggested questions for the witnesses. Prior to the hearing, the Tribunal reviewed the suggested questions and provided a selected list of questions for the witnesses and requested written responses be provided prior to the hearing.

[4] The Tribunal received submissions from the three Appellants, Kevin Matthews

and Robin Latimer, Trout Lake Camper's Association, Leslie Walker Larson and the Applicant. Affidavit evidence was provided by Leigh Whyte, a Registered Professional Planner with Quartek Group Inc. ("Quartek"), who was retained by the LRPB. Silvio Di Gregorio, Secretary and Treasurer of Lempiala, provided affidavit evidence regarding Lempiala's activities and the proposed operation at the subject property. Stefan Huzan, consulting planner with Northern Planning, was retained by Lempiala to provide land use planning opinion evidence. Anthony Usher was retained by TLCA to provide land use planning opinion evidence on behalf of TLCA. The Tribunal also reviewed extensive submissions, including numerous presentations provided by Dr. Karen Peterson, Vice-president of TLCA, and documentation provided by Dr. Robert Foster, retained by TLCA to conduct a peer review of Lempiala's Natural Environment Level 1 assessment report conducted by TBT Engineering Limited ("TBTE"). The Tribunal also reviewed lay evidence provided by Ms. Larson and Ms. Latimer, amongst other documents filed.

[5] The hearing in this matter was held on one long day, February 20, 2020. At the hearing, the Tribunal questioned the three planning witnesses who provided expert planning opinion evidence upon which the Tribunal relied; Mr. Usher, Mr. Whyte, and Mr. Huzan.

[6] In coming to this Decision on the merits of these appeals, the Tribunal has considered the municipal record and all materials filed, as well as the submissions of the parties and the oral evidence provided at the hearing. The Tribunal Orders the appeals are allowed for the reasons that follow.

SUBJECT PROPERTY

[7] The subject property consists of approximately 30 hectares of land located at the southeast corner of Highway 591 and Trout Lake Road. The site is irregularly shaped, and generally bounded by Highway 591 to the west, Trout Lake Road to the north, the McIntyre River and wetland complex to the east, and predominantly vacant land to the south. The wetland complex also extends to the south of the subject property.

[8] The lands are currently vacant and covered with natural vegetation. The surrounding land uses include permanent and seasonal residences along Trout Lake Road to the north of the subject property that front onto Trout Lake. The property to the south contains a single residence near Highway 591.

[9] Existing land use within the larger area includes agriculture, commercial industrial, institutional, residential (permanent and seasonal) and resource-based aggregate and forestry activities.

Official Plan and Comprehensive Zoning By-law

[10] The governing Official Plan is the Official Plan for the Townships of Gorham, Ware, and the Dawson Road Lots, Lots 1-20 Concession A and B, East of the Kaministiquia River ("Official Plan").

[11] Schedule A-1 of the Official Plan designates the subject lands as 'Rural'. The homes along the shoreline of Trout Lake are in an area designated "Lakeshore Residential".

[12] Schedule B-1 of the Official Plan designates a portion of the subject property at its southern extent as Aggregate Resource Area. There is a strip of about 60 metres width along the west bank of the McIntyre River identified as Use Limitation.

[13] The comprehensive zoning by-law applies to these lands. The residential lands are zoned Lakeshore Residential, the lands along the McIntyre River are zoned Environmental Protection/Use Limitation, and the remainder of the subject lands are zoned Rural.

Proposed Zoning By-law No. 004-2018

[14] Lempiala applied to the LRPB for a zoning by-law amendment to rezone the subject lands from RU-Rural to M2-Extractive Industrial on December 5, 2016. The

rezoning is to facilitate the development of an aggregate extraction operation at the subject lands (the Trout Lake Pit ("Pit")).

[15] The proposal provides for a 60-meter buffer zoned RU-Rural between the proposed activities and the neighboring properties to the north and east. A 30-metre RU-Rural zone buffer is provided on the west and south sides. A berm of 3 meters high is proposed along the northern boundary of the subject property. Along the eastern boundary adjacent to McIntyre Creek, a 60-meter treed buffer is proposed.

[16] Lempiala has described their proposed operations in a broad fashion based on evidence provided by Mr. Di Gregorio. The Pit is to consist of above-water aggregate extraction, with a capacity of 1,200 tonnes per day and 90,000 tonnes per year. The proposed activities are limited to excavation only. There is to be no drilling, blasting, crushing, screening or stockpiling of aggregates. Ancillary processes may include fuel storage for on-site vehicles and maintenance welding. It is proposed to use a single loader and four trucks. Lempiala estimate that a single truck would leave the subject property every 10 to 12 minutes. Lempiala states there will be staged rehabilitation of the subject property as aggregates are depleted. The entrance to the subject property will be constructed from the existing Provincial Highway 591 at the current informal access point. The aggregate will be hauled to Lempiala's plant on Dog Lake Road.

[17] Lempiala state that they are the only approved active supplier of concrete aggregates for the Ministry of Transportation, the City of Thunder Bay and other municipalities between the Town of Marathon and the City of Kenora. The concrete aggregates are used in the construction of bridges, curbs, sidewalks, sewers, and buildings in northwestern Ontario.

[18] A number of studies were provided in support of the rezoning application as follows:

- Proposed Zoning By-law Amendment, Planning Report by Mr. Whyte, Quartek, dated March 29, 2018

- TBTE, Natural Environment Level 1 Assessment, dated February 1, 2018
- TBTE, Groundwater Summary Statement, dated December 20, 2017
- RWDI Consulting Engineers and Scientists (“RWDI”) Draft Report - Air Quality Assessment, dated October 10, 2017
- RWDI, Report - Noise Assessment, dated October 10, 2017

[19] Once zoning permission is obtained, the operation will require a licence under the *Aggregate Resources Act* (“ARA”) under a separate process administered by the Ministry of Natural Resources and Forestry (“MNR”).

Lakehead Rural Planning Board Approval Process

[20] The following outlines the process undertaken by LRPB for the application.

- a. March 30, 2017 – LRPB held a public meeting to consider the application.
- b. June 16, 2017 – Lempiala deferred its application in order to commission supporting studies as noted above.
- c. At numerous regular LRPB meetings, TLCA members and others raised concerns regarding the sufficiency of Lempiala’s reports; and whether the application was consistent with the applicable planning documents.
- d. June 7, 2018 – LRPB approved the rezoning in principle by resolution and directed staff to prepare a zoning by-law amendment.

[21] The approval is provided in Resolution No. 1025-2018, as amended (“Resolution”). An amendment to the Resolution made by LRPB is shown in underline. The following are relevant excerpts of the Resolution:

... The LRPB has carefully reviewed the application, the input from the public, including the input of professional planners and lawyers representing members of the public, and professional consulting firms representing the Applicant, as well as the advice of its own consultants;

... Be it resolved that the application is approved for all portions of the Subject Lands which are thirty (30) m or more from the west and south boundaries of the Subject Lands, and 120 m or more from the north and east boundaries of the Subject Lands, for the reasons set out in the following lettered paragraphs. [amendment underlined]

l) Subsection 3(5) of the *Planning Act*, as amended, provides that the LRPB must make decisions that are consistent with the PPS.

m) The PPS provides, in section 2.5.2.1, that “as much of the mineral aggregate resources as is realistically possible **shall** be made available as close to markets as possible” [emphasis added in Resolution].

n) the Subject Lands are close to markets for mineral aggregate resources.

...

q) The Provincial Policy Statement 2014 also provides, in Section 2.5.2.2, that “extraction shall be undertaken in a manner which minimizes social, economic and environmental impacts”. This direction relates to the operation of the extraction process; and not to the locations in which mineral aggregates exist. The regulation of the operation of mineral aggregate facilities is the purview of the MNRF under the *Aggregate Resources Act*, R.S.O. 1990, c. A.8, as amended, and not the purview of the LRPB.

...

u) The regulatory framework for mineral aggregate operations outside of the *Planning Act* is the more appropriate venue to consider the “minimization of social, economic and environmental impacts” of mineral aggregate operations under Section 2.5.2.2 of the Provincial Policy Statement.

...

[22] On July 5, 2018, the LRPB passed the ZBL which amends the zoning schedule for the Township of Gorham for the subject lands from Rural to Extractive Industrial. Notably, the setbacks of 120 metres that were stated in the Resolution were decreased to 30 metres from the north boundary, and 60 metres from the northeast and east

boundary. No justification was provided for the change in setbacks. The Notice of Decision is dated August 9, 2018.

NATURE OF APPEAL, ISSUES AND TEST

The Basis for Appeal

[23] These Appeals are brought pursuant to s. 34(19) of the Act as it has been amended under Bill 139. The basis for an appeal is provided for in s. 34(19.0.1) of the Act:

Basis for appeal

(19.0.1) An appeal under subsection (19) may only be made on the basis that the by-law is inconsistent with a policy statement issued under subsection 3 (1), fails to conform with or conflicts with a provincial plan or fails to conform with an applicable official plan.

[24] In making a decision under the Act with respect to these appeals, the Tribunal must have regard to the matters of provincial interest set out in s. 2 of the Act and must have regard to the decision of the approval authority and the information considered by the approval authority under s. 2.1(1). The Decision on the ZBL must be consistent with the Provincial Policy Statement, 2014 (“PPS”) under s. 3(5) of the Act; conform with any relevant policies of the Growth Plan for Northern Ontario, 2011 (“GPNO”) under s. 3(6) of the Act; and the ZBL must conform with the Official Plan under s. 24(1) of the Act.

[25] Under s. 34(26.2) of the Act, if the Tribunal determines that a part of the By-law that is the subject of the appeal is inconsistent with a policy statement issued under s. 3(1), fails to conform with or conflicts with a provincial plan or fails to conform with an applicable Official Plan, the Tribunal shall repeal that part of the By-law and provide the municipality the opportunity to make a new decision in respect of the matter. The Tribunal does not have the authority to otherwise amend the instrument.

Issues in the Appeal

[26] There were three Appellants to this matter. The TLCA is an incorporated non-profit group whose members have lived and camped on properties at Trout Lake since 1929. In their Notice of Appeal, TLCA note that the LRPB's decision unduly narrows the scope of a planning decision by focusing solely on the provisions in the planning framework which promote aggregate development, and improperly delegate consideration of planning considerations, including serious environmental concerns, to the MNRF as part of a future ARA licensing decision.

[27] The TLCA allege that the ZBL fails to consider the details of this particular proposed aggregate development, the adequacy of the studies submitted in support of the application, and the local planning context.

[28] The TLCA also submit that the LRPB failed to consider the provisions of the planning framework which promote environmental protection and consider the social impacts of competing land uses, alongside aggregate development, and the evidence relating to those planning considerations.

[29] The TLCA allege the ZBL is inconsistent with the PPS which requires consideration of the environmental, social and economic impacts of competing land uses.

[30] Further, they allege the ZBL fails to conform with or conflicts with the GPNO which stresses balance between competing land uses, as the ZBL was passed without consideration given to provisions which support land uses other than aggregate development.

[31] The TLCA allege that the ZBL does not conform with the Official Plan, which requires the details of the proposed aggregate development, its impact on other competing land uses, and environmental protection be considered before a zoning by-law amendment be approved.

[32] The Matthews/Latimer appellants live year-round at Trout Lake with their young family. They allege that the decision of the LRPB to rezone a portion of the subject property is inconsistent with the PPS, specifically s. 1.2.6.1, as the decision fails to appropriately separate a major facility (pit) from sensitive land uses (homes) and declines to properly mitigate impacts. As well, the Decision is inconsistent with PPS s. 2.1.5; 2.1.6; and 2.1.8 as the Applicant has not demonstrated “no negative” impacts on natural features or environmental functions.

[33] Matthews/Latimer also allege that the Decision fails to conform with the Official Plan s. 2.7.1 as it fails to avoid land use conflict due to the excessive importance the LRPB places on aggregate extraction, and it fails to conform with s. 2.17 as it permits development that will result in the degradation of the ecosystem. Matthews/Latimer also express concern regarding silica dust.

[34] Leslie Walker Larson owns four properties at Trout Lake. The family home is off Trout Lake Road about 320 metres north of the subject lands. Ms. Larson also owns three properties on the east side of the McIntyre River, adjacent to the subject property. These lands are used for camp / recreational purposes.

[35] Ms. Larson is concerned about impacts to the use of her properties, and also alleges inconsistency with the PPS and the lack of conformity with the Official Plan. Ms. Larson raised a concern that the Notice of Passing of the By-law was made beyond the required 15 days.

[36] Both Matthews/Latimer and Ms. Larson adopt the evidence and submissions made by TLCA. In this Decision, the Tribunal has focussed on the expert evidence brought forward by TLCA in the determination of the planning merits of this matter, specifically the tests of consistency with the PPS and conformity with the Official Plan. The GPNO is an aspirational document and the policies are general in nature, and therefore the Tribunal finds the GNPO to be less informative to this matter than the application of policies of the PPS and Official Plan.

PLANNING EVIDENCE

[37] Mr. Whyte provided a Planning Report wherein he reviewed the planning context for this proposal. With respect to the PPS, he reviewed the following policies:

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 (including second units, affordable housing and housing for older persons), employment (including industrial and commercial), institutional (including places of worship, cemeteries and long-term care homes), recreation, park and open space, and other uses 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 patterns and standards to minimize land consumption and servicing costs;
- f. improving accessibility for persons with disabilities and older persons by identifying, preventing and removing land use barriers which restrict their full participation in society;
- g. ensuring that necessary *infrastructure*, electricity generation facilities and transmission and distribution systems, and *public service facilities* are or will be available to meet current and projected needs; and
- h. promoting development and land use patterns that conserve biodiversity and consider the impacts of a changing climate.

[38] He stated that many of the policies in s.1.1.1 a) to h) are met by the ZBL.

[39] Mr. Whyte also looked to s. 1.1.4 Rural Areas in Municipalities; and s. 1.1.5 Rural Lands in Municipalities; and determined the ZBL met these policies.

1.1.4.1 Healthy, integrated and viable rural areas should be supported by:

- f. promoting diversification of the economic base and employment opportunities through goods and services, including value-added products and the sustainable management of resources;

1.1.5 Rural Lands in Municipalities

1.1.5.2 On rural lands located in municipalities, permitted uses are:

- a. the management or use of resources;

[40] He stated that s. 1.1.4.1 (f) and s. 1.1.5.2 (a) are met by the ZBL.

[41] Section 2.5 of the PPS relates to Mineral Aggregate Resources, as follows:

2.5.1 Mineral aggregate resources shall be protected for long-term use and, where provincial information is available, deposits of mineral aggregate resources shall be identified.

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 markets 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 which minimizes social, economic and environmental impacts.

[42] Mr. Whyte states that s. 2.5.1—protect for long term use—is met by the ZBL; as is s. 2.5.2—protection of long-term supply; and s. 2.5.2.1—close to source. With respect to s. 2.5.2.2—“extraction shall be undertaken in a manner which minimizes social, economic and environmental impacts”; Mr. Whyte stated:

Review of draft environmental reports indicates that mineral aggregate extraction at the subject site would be viable and capable of being accomplished in a manner which minimizes social, economic and environmental impacts. Further, the proposed facility will be subject to a thorough licensing process administered by the MNRF, with input from the LRPB. The end result will be the establishment of appropriate and

reasonable controls for the operational details of the proposed facility to protect the interests of surrounding land uses.

Note the mandatory language “shall” in this policy. The MNRF’s consideration of appropriate restrictions on operations must take into consideration the minimization of social, economic and environmental impacts, on balance with all of the other policies.

[43] Mr. Whyte’s position is that “most of the public comments refer to operational aspects” of the proposed Pit and should be examined by MNRF alone.

[44] Policy 2.5.3 relates to the rehabilitation of mineral aggregate extraction sites and Policy 2.5.3.1 specifically indicates that “progressive and final rehabilitation shall be required to accommodate subsequent land uses, to promote land use compatibility, to recognize the interim nature of extraction, and to mitigate negative impacts to the extent possible. Final rehabilitation shall take surrounding land use and approved land use designations into consideration.”

[45] Mr. Whyte states that a rehabilitation plan will be required for the proposed mineral aggregate extraction site. He states:

As resources, by their nature, are limited, the operation of the Trout Lake Pit will not be perpetual. It will have an ultimate end date, at which time, rehabilitation will occur.

[46] Mr. Whyte pointed to the Official Plan policies he reviewed as applicable to the proposal. As set out in the Purpose and Goals; s. 1.2.3 (m) “promote resource based economic development within the planning area as a means of supporting the local population and contributing to the larger surrounding local area and economy”; Mr. Whyte provided his opinion that the proposal supports the local population and contributes to the larger surrounding local area and economy.

[47] Mr. Whyte also referenced:

Section 1.3.1 – The Planning Board is committed to encouraging, throughout the planning area, development which maintains the rural quality of life and sustains the local economy through a focus on the resource and recreational potential of the area.

Section 1.3.5 – The Planning Board shall have regard for the importance of natural resources within the planning area with respect to their contribution to the economic and social well-being of the planning area and its residents, as well as the larger surrounding region.

Section 1.3.6 – The Planning Board shall have regard for the importance of the aggregate industry in Gorham and Ware Townships. The planning area represents an important source of aggregate, being the prime source of construction aggregate for the City of Thunder Bay, and for public road work throughout the area.

[48] Mr. Whyte states that aggregates are an important natural resource which contributes to the economic and social well-being of the whole planning area and its residents as well as the larger surrounding region. While the immediate neighbors may be opposed, the larger surrounding region must be considered in terms of the importance of natural resources. Mr. Whyte notes that the mandatory term “shall”, requires the Planning Board have regard for the importance of the aggregate industry in the Township of Gorham. In his view, the Official Plan policies recognize that aggregate considerations are significant.

[49] Mr. Whyte referenced s. 2.7 which deals with and use compatibility.

2.7.1 – As much as possible land use conflicts should be avoided. The encroachment of sensitive land uses and industrial uses on one another is discouraged. Buffering and separation distances in accordance with the Ministry of Environment and Energy’s guidelines shall be incorporated between sensitive and industrial uses to minimize potential adverse effects, such as noise, odour, vibration, particulate, and other contaminants. The implementing zoning by-law may include a special buffer zone between sensitive and industrial uses.

[50] Mr. Whyte states that:

Controls on operations, as stipulated through the licensing process in accordance with the *Aggregate Resources Act*, will mitigate any potential land use conflicts. Recognition that aggregate resource operations are limited by the extent of the resource available is a balancing factor against any land use conflicts that may arise.

[51] Mr. Whyte also referenced s. 2.18 - Mineral and Aggregate Resource Areas. He refers to s. 2.18.1; 2.18.3; 2.18.4; and 2.18.5.

2.18.1 As much as possible of the mineral and aggregate resource will be protected for the long run. Mineral and/or aggregate resource operations, deposits, and areas of potential mineral resources will be protected from incompatible land uses 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.

2.18.3 Land uses that preclude or hinder future access to, and use, of mineral or aggregate resources shall not be permitted unless it can be demonstrated that the use of the resource is not feasible and the proposed use serves a greater long term public interest than does the resource.

2.18.4 Lands with active mineral or aggregate resource operations shall be zoned accordingly and non-resource operations should be restricted. Development on lands adjacent to mineral resource operations or adjacent to areas of deposits will be permitted if:

(a) the development would not preclude or hinder the continuation of existing operations;

(b) the development would not preclude the development of the resource; and

(c) issues of public health, public safety and environmental impact are addressed.

2.18.5 Rehabilitation of mineral resource lands will be required after extraction and other related activities have ceased. Lands may be re-zoned from mineral resource uses following rehabilitation.

[52] Mr. Whyte notes that these policies very clearly favour aggregate extraction over other land uses and the use of “shall” in s. 2.18.4 is of great relevance.

[53] He states:

the restrictions on operations of the proposed Trout Lake Pit through the licensing of the operation under the ARA, with input from the LRPB will mitigate potential land use conflicts. Rehabilitation of the lands once the resource has been extracted, is mandatory under Official Plan s. 2.18.5.

[54] Section 3.2 provides relevant land use policies in the Rural area.

3.2.1 ... it is the intent ... to protect the rural character and environment ...

3.2.3 ... It is also the intent of the Rural designation to permit and **encourage** such rural uses as ..., aggregate resource extraction, pits and quarries, ...

3.2.4 (d) allow development of natural resources and economic activities in a manner compatible with the rural character;

3.2.4 (e) protect existing and future aggregate operations from incompatible land uses and ensure their viability; ...

[55] Mr. Whyte states it is recognized and acknowledged that this development needs to be undertaken “in a manner compatible with” the existing development. He states that the licensing process will provide the controls necessary to maintain an appropriate balance between the shorter term need to develop local resources for infrastructure improvement, and the longer-term compatibility with existing and future lakefront residential development.

[56] Mr. Whyte also references Policies: 3.2.6 (c); 3.2.8 (h); 3.2.9 (a) to (e) to support his opinion that “On balance, the policies of the Official Plan are very supportive of the development and protection of mineral aggregate resources.”

[57] Mr. Whyte found that the relevant planning documents “not only favour, but mandate” the development of local natural resources and that the proposal was consistent with the planning documents.

[58] Mr. Huzan agrees with Mr. Whyte and also provided his opinion that contrary to the submission that LRPB failed to consider environmental and social impacts, as required by the PPS and the Official Plan; he states that the LRPB received and considered oral and written submissions regarding the social and environmental impacts of the proposed aggregate extraction operations at several of their regular meetings throughout the process. Lempiala submit that the concerns raised were considered by the LRPB, as is required.

[59] Mr. Usher disagrees with the view put forward by Mr. Whyte and the LRPB that PPS Policy 2.5.2.2 is not to be considered as part of this application for a zoning by-law

amendment, and instead is the responsibility of the MNRF. He states there is nothing in the Official Plan to suggest that an application to rezone to Extractive Industrial should receive any less scrutiny by the LRPB than any other rezoning application.

[60] Section 2.5 of the PPS addresses mineral aggregate resources. Policy 2.5.2.2 of this section of the PPS states: “Extraction shall be undertaken in a manner which minimizes social, economic and environmental impacts.” Mr. Usher’s opinion is that s. 2.5.2.2 of the PPS requires the planning authority, not the MNRF, to consider whether the proposed Pit can be undertaken in a manner that would minimize social, economic and environmental impacts.

[61] Mr. Usher points to the LRPB Resolution, which approved in principle the ZBL to permit this Pit. In the Resolution, the LRPB state that most of the public comments refer to operational aspects of the proposed Pit and should be examined by MNRF alone.

[62] Mr. Usher and the TLCA, assert that this is an incorrect interpretation of the role of the planning authority in relation to the PPS. Mr. Usher states that Policy 4.4 of the PPS requires that “this Provincial Policy Statement shall be read in its entirety and all relevant policies are to be applied in each situation”; and Part III of the PPS requires that “when more than one policy is relevant, a decision-maker should consider all of the relevant policies to understand how they work together.”

[63] Mr. Usher raised this issue as a key concern during the approval process. In his letter of April 4, 2018, and his planning report, he advised that s. 2.5.2.2 of the PPS had to be applied by the LRPB, as follows:

Mr. Whyte’s report says that ‘the MNRF will evaluate the operational details of the proposed facility to ensure that operations of the facility will not result in significant adverse impacts to the environment or adjacent land uses’ (p. 1) and that ‘[the] MNRF’s consideration of appropriate restrictions on operations must take into consideration the minimization of social, economic and environmental impacts, on balance with all of the other policies’ (p. 7). These are issues that the planning authority and its advisors, not to mention the public, should be addressing when considering the principle of the land use, before MNRF does its licensing job. The second quote specifically refers to Provincial Policy Statement

Policy 2.5.2.2, '[extraction] shall be undertaken in a manner which minimizes social, economic and environmental impacts'. It is the responsibility of the planning authority, not MNRF, to determine whether that is the case.

[64] In addition to Mr. Usher's concern that the planning authority neglected to consider PPS s. 2.5.2.2, Mr. Usher is of the view that the reports submitted in support of the application were inadequate, and therefore, there was insufficient information for the LRPB to address this key test in any event.

[65] He states that the Applicant must further demonstrate the acceptability of the operational impacts to justify the proposed land use. He noted that no Cultural Heritage Resource Stage 1 report was done. He also recommended that peer reviews of the submitted reports as described above in paragraph [18] be done. He noted that Dr. Foster's peer review of Lempiala's Natural Environment Level 1 Assessment Report found serious weaknesses which limited its usefulness for identifying natural environment features.

[66] With respect to land use compatibility, Mr. Usher highlighted several provisions of the PPS and Official Plan which deal with environmental protection and land use compatibility with respect to aggregate extraction. The LRPB was required to consider those provisions, and the evidence relevant to those provisions, in making its decision, to be consistent with the totality of the PPS and Official Plan land use planning scheme. Issues such as maintaining the rural quality of life, environmental protection, provincially significant wetlands, and fish habitat, among other issues, were not properly considered in Mr. Usher's opinion.

[67] Mr. Usher notes that PPS s. 1.1.6 is specific to unorganized areas and was not considered by Mr. Whyte in his planning report. Policy 1.1.6.1 states "On rural lands located in territory without municipal organization, the focus of development activity shall be related to the sustainable management or use of resources and resource-based recreational uses (including recreational dwellings)." Mr. Usher notes this policy gives equal recognition to sustainable management or use of resources and to

recreational dwellings.

[68] Mr. Usher also notes that the LRPB and Quartek do not address PPS sections 2.1 or 2.2. Section 2.1 establishes Natural Heritage Policies, which would apply to the extent that there are any PPS—recognized natural features on or near the subject lands. Section 2.2 requires that a proposed development not impair water features or their hydrologic functions.

[69] The LRPB and Quartek also do not examine the goals in the Official Plan in s. 1.2.3 (b) “to protect and maintain the rural quality of life”; and s. 1.2.3 (d) “to secure the health, safety, convenience and welfare of the residents”. He states the preamble of the Official Plan includes provisions to support the economic potential of resources and recreation, and to ensure that development will maintain “the rural quality of life”, which were also not considered.

[70] Mr. Usher notes that the LRPB and Quartek do not cite s. 1.3.3, a mandatory environmental protection policy, or s. 1.3.4, which recognizes the importance of recreation.

[71] Additionally, Mr. Usher notes that LRPB and Quartek omit the following relevant Official Plan sections:

Section 2.17.1 – development shall not degrade ecosystem quality and integrity.

Section 2.17.3 – development shall demonstrate no negative impact on provincially significant wetlands or adjacent lands.

Section 2.17.8 – development is discouraged in or near significant wildlife habitat unless no negative impact is demonstrated

Section 2.17.12 and 2.17.14 – Trout Lake and McIntyre River are fish habitat areas, and development shall demonstrate no negative impact on adjacent lands.

Section 2.17.18 – development is not permitted in endangered or threatened species habitat and shall demonstrate no negative impact on

adjacent lands.

[72] Mr. Usher notes that the LRPB has not considered any of these Official Plan provisions or assessed whether Lempiala has demonstrated “no negative impact” as stipulated in the Official Plan. Further, he states that Quartek did not cite s. 3.1.2 and s. 3.2.5 of the Official Plan, which support land use compatibility and minimizing land use conflicts.

[73] Mr. Usher is of the view that the ZBL, the LRPB Resolution, and the Quartek report do not reflect considerations of balance and compatibility in the Official Plan between the proposed Pit, the recreational and residential uses of neighbours living at Trout Lake, and the surrounding environment because the provisions which support residential and recreational land use and environmental protection were not applied appropriately, and these provisions are mandatory and foundational to the Township of Gorham’s land use planning regime.

[74] Mr. Usher states it was an error of interpretation when Quartek found that in the event of a conflict between lake residential land use and aggregate extraction, “the predominant language in all of the governing planning documents favours extraction.” Contrary to Quartek’s assertion, his opinion is that the PPS and Official Plan favour a balanced approach. The details of the specific proposal need to be analyzed. In his view, it is not good planning, and it is not consistent with s. 2.7.1 of the Official Plan, to permit a new aggregate pit in an existing recreational and residential community without first determining whether it is a compatible land use.

[75] Mr. Usher is of the opinion that the ZBL fails to conform with the Official Plan because it failed to consider whether a pit at this location was compatible with existing land uses.

[76] Mr. Usher states that in establishing the appropriate setbacks, the LRPB should have considered the default setback in the comprehensive zoning by-law of 120 metres for the north and east boundaries and should have further evaluated the appropriate

proximity to the natural and hydrologic features. This would have required further investigation to confirm conditions.

[77] In Mr. Usher's opinion, the LRPB required more information to assess whether aggregate extraction could be conducted at this location in a manner compatible with existing land uses.

SUBMISSIONS AND FINDINGS

[78] The parties referenced a previous application to permit an aggregate operation on the subject property. The matter was heard by the OMB in 1982 and denied at the time (*Minister of Housing, Re (Trout Lake Campers' Association)*, [1982] OMBD [*Minister of Housing (TLCA)*]). The Tribunal heard that that application included other more intrusive processes, such as crushing, and that a key issue in the denial was the lack of enforceability.

[79] Mr. Huzan states that control over aggregate extraction under the ARA has been in place in the Township of Gorham since January 1, 2016. He expressed the view that the aggregate extraction licensing process under the ARA provides the most efficient and effective environmental controls over operations, especially in areas without the benefit of municipal organization, such as the Township of Gorham. Mr. Huzan states that there are few services in areas without municipal organization and therefore relying on the ARA for enforcement is consistent with the PPS, which calls for coordination and efficiency of services. It is Mr. Huzan's opinion that it is most appropriate for the aggregate extractive operations to be regulated by licence through the ARA.

[80] In Lempiala's submissions they note that the ARA includes the following provision:

The Local Planning Appeal Tribunal may consider an application and objections referred to the Local Planning Appeal Tribunal under subsection (5) and a related appeal to the Local Planning Appeal Tribunal under the *Planning Act* at the same hearing.

[81] Further, s. 11(5) of the ARA states that:

The Minister may refer the application and any objections arising out of the notification and consultation procedures that are prescribed or set out in a custom plan to the Local Planning Appeal Tribunal for a hearing and may direct that the Local Planning Appeal Tribunal shall determine only the issues specified in the referral.

[82] Lempiala submit that it is clear from the language of the ARA that joint hearings are permissible but are not mandatory. They stated there is no obligation to apply for a licence under the ARA at the time the zoning application is made.

[83] Mr. Usher was of the view that it is the best practice to submit an ARA licence application at the same time as the rezoning application, though he acknowledges that there is no legislative requirement that this be done. He states that had the ARA licence application been addressed at the same time as the rezoning application, then the required site drawings and operational plan would inform the studies submitted as part of the rezoning application.

[84] Subsection 12(1) of the ARA, which requires that a licence application provide information on “any planning and land use considerations”, does not displace a municipality’s role or jurisdiction in determining zoning issues, but instead actually highlights the municipality’s role. This principle is laid out in *Carlyle Development Corp. v. Baldwin (Township)*, 2017 CarswellOnt 7658 (“*Carlyle*”) at paragraph 35:

Section 12(1) of the ARA sets out matters to be considered by the Minister in deciding whether to issue an aggregates licence, including the effect of the operation of a proposed quarry on nearby communities and planning and land-use considerations. Also, the Provincial Standards require that a licence application provide information on “any planning and land use considerations”. The Board finds that these provisions do not displace a municipality’s role or jurisdiction in determining zoning issues. They reinforce the point that MNR considers a municipality’s land-use planning decisions associated with proposed quarry sites when deciding whether or not to issue a licence, thus highlighting a municipality’s role in this regard.

[85] *Carlyle* clearly outlines the concept that the municipality’s role is to determine the zoning issue and the MNRF subsequently will decide whether or not to issue a licence.

In the current case, an application for a ZBL was approved by the LRPB. There was no application for a licence under the ARA; it is intended to proceed following the determination of the principle of the land use.

[86] The Tribunal agrees with Lempiala that it is clearly not required that an application to the LRPB for rezoning under the Act be coincident with a licence application to MNRF under the ARA. The Tribunal notes that the legislation provides MNRF with a distinct role in licensing under the ARA; however, the Tribunal notes that this does not displace the LRPB's role in zoning under the Act.

[87] In *Ottawa (City) v. Sample*, 2001 CarswellOnt 4408 (SCJ), ("*Sample*"), the OMB considered the evidence that supported an environmental assessment, because it was presented in support of an Official Plan amendment. In paragraph 15 of *Sample*, the court stated: "It would be unprecedented to require the OMB to decline its independent jurisdiction to decide whether an undertaking is good land use planning or not, simply because an undertaking has received an approval from the Ministry of the Environment."

[88] *Sample* underscores the principle that the same evidence may be, and often is, considered by several authorities as they make related decisions on an application. This is exactly the situation in this matter—LRPB was required to make a decision on the planning merits of the ZBL application. A future ARA licence application is a separate and distinct process with its own approval that is undertaken under a separate regime and jurisdiction, notwithstanding that some of the same information may inform both decisions.

[89] The Tribunal agrees that there is no legislative requirement for Lempiala to apply for an ARA licence at the same time as the rezoning application; however, when this choice was made by Lempiala, it led to an erroneous assumption that issues characterized as 'operational' need not be considered as part of the rezoning assessment. The Quartek Report, which the LRPB relied upon, erred by characterizing some of the issues related to the ZBL application as being 'operational' and therefore

within the purview of the MNRF to undertake the required evaluation rather than the LRPB.

[90] This error ultimately led to the failure of the LRPB to appropriately address all the relevant policies of the PPS. The error was perpetuated throughout the hearing by the Applicant's maintaining the position that 'operational' matters are within the purview of the MNRF and need not be assessed by the LRPB.

[91] There is no hard and fast dividing line between the planning and operational aspects of a proposed development; however, the approach taken by the LRPB is not what the legislation intends. It is incumbent upon the planning authority to assess the planning merits of the application, which requires testing the proposal against consistency with the appropriate planning policy and conformity with the appropriate plans. This responsibility cannot be pushed forward to another agency.

[92] The planning authority is tasked with the determination of the principle of the land use at a specific location. The Tribunal finds that when evaluating the ZBL application, the LRPB erred when it expressly declined in the Resolution to consider the key requirement that extraction be undertaken in a manner "which minimizes social, economic and environmental impacts" as required by s. 2.5.2.2 of the PPS.

[93] The Tribunal finds that the LRPB improperly found that s. 2.5.2.2 relates only to the operation of the extraction process, not to the principle of establishing aggregate extraction at that specific location. The interpretation by Quartek and the LRPB of PPS s. 2.5.2.2 is inconsistent with the case law.

[94] In *Ontario (Ministry of Natural Resources), Re*, 2012 CarswellOnt 10693, at paragraph 25, the OMB found that the PPS makes it "abundantly clear" that a planning authority must consider all relevant interests, and that all policies must be considered and weighed when land use decisions are to be made.

[95] The Tribunal finds LRPB's Decision to approve the ZBL was inconsistent with the

PPS because it declined to consider all relevant policies of the PPS. As required by Policy 4.4 and Part III of the PPS, the approval authority, which was the LRPB, and is now the Tribunal, must consider all relevant sections of the PPS, and must consider the PPS in its entirety.

[96] In support of the ZBL, based on evidence of Mr. Whyte and Mr. Huzan, the Applicant submits that even if the LRPB expressly did not consider s. 2.5.2.2 of the PPS, the impacts are minimized because the ZBL establishes a Rural zone that is a buffer to the Extractive Zone. The contention is that the Rural zone buffer appropriately mitigates any impacts to sensitive receptors and the environment, and therefore the presence of the buffer in effect meets the intent of PPS Policy 2.5.2.2 “to minimize social, economic and environmental impacts”.

[97] The Applicant contends that with the buffer established in the ZBL, the proposed new land use is compatible with the existing residential use, and limitations use along the McIntyre River. Furthermore, Mr. Whyte and Mr. Huzan are both of the opinion that overall, policies of the PPS and the Official Plan favour extraction, in particular, at this location in the Township of Gorham.

[98] To assess the merit of this submission, the Tribunal looks to s. 2.5 of the PPS which relates to Mineral Aggregate Resources. The OMB highlighted how s. 2.5.2 should be interpreted in *Capital Paving Inc. v. Wellington (County)*, 2010 CarswellOnt 697 (“*Capital Paving*”). Paragraph 16 provides useful commentary:

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 ... 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. ... 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. ... 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.

[99] As laid out by the OMB above, *Capital Paving* holds that although aggregate extraction is given a privileged position in the planning documents, it is “fair to say that 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”.

[100] As *Capital Paving* sets out, it is clear that the proposed new use must be assessed with respect to compatibility with existing use. The Tribunal finds that appropriate assessment by the LRPB and Quartek has not been undertaken in the current case.

[101] Lempiala submit that the Tribunal should accept that the proposed land use is compatible with the existing use on the basis of the presence of a buffer. The Tribunal cannot accept this approach. The Applicant has not provided sufficient rationale, including technical evidence, to support that finding. Additional reliable evidence regarding an appropriate buffer to both the McIntyre River and wetland complex and to the lakefront residential lands is necessary.

[102] The Tribunal heard that the wetland complex is being evaluated by MNRF with respect to whether it should be classified as a Provincially Significant Wetland (“PSW”); however, Lempiala does not intend to evaluate potential impact to this feature unless and until it is so designated. That approach falls short of the requirements for establishing the principle of the land use, as is laid out by the PPS and the Official Plan. Indeed, both Mr. Whyte and Mr. Huzan only provide a cursory assessment of the policies that require an assessment of the environmental and social impacts.

[103] The Tribunal finds that the provisions which support recreational and residential uses and environmental protection were not addressed sufficiently in order to determine whether the proposed aggregate Pit meets the requirements of the planning regime in

the Township of Gorham.

SUMMARY OF LEGISLATIVE TEST

[104] The question that the Tribunal must answer is “does Zoning By-law No. 004-2018 meet the test of consistency with the PPS and conformity with the Official Plan?”

[105] The Applicant states that the application and supporting studies provide sufficient information to answer in the affirmative. The Applicant submits that any shortcomings are to be addressed at the licensing stage, under the MNRF process. Mr. Huzan is of the view that this is an appropriate approach in a situation such as this, where the LRPB, in an unorganized municipality, is without resources for either overseeing the studies or enforcement. The Applicant states that if further studies identify any features (natural heritage, PSW, etc.), these will be assessed as necessary, and appropriate mitigation measures will be provided, as required by MNRF.

[106] The Appellants, in particular TLCA, submit that the above question must be answered in the negative, as the Applicant has failed to properly consider the PPS and Official Plan in their entirety.

[107] It is well established by previous OMB and LPAT Decisions that the principle of the land use must be established prior to the issuance of an ARA licence. The LRPB incorrectly assumed that they need not consider aspects of the proposed activity deemed to be ‘operational’; and that these aspects fall exclusively under the purview of the MNRF. Indeed, the MNRF will address operational aspects; however, the Tribunal finds that that does not relieve the LRPB from determining the principle of the proposed land use for the purposes of determining whether the proposed ZBL is consistent with the PPS and conforms with the Official Plan.

[108] The Tribunal accepts that aggregate resources are given a privileged position in the PPS. Indeed, the Tribunal notes that both the PPS and the Official Plan anticipate that aggregate use will result in impact; the test is whether the impact can “be

minimized”.

[109] In this circumstance, the Tribunal is only offered the ‘hope’ that the impacts will be appropriately mitigated by requirements that the MNRF may impose. The Tribunal cannot abrogate its responsibility to another jurisdiction to evaluate what rightly falls in what is now the ambit of the Tribunal’s jurisdiction, and that is the determination of the principle of the land use.

[110] The Tribunal finds there is insufficient evidence to determine that the buffer proposed by the ZBL to the lakefront residential lands and the McIntyre River is sufficient to allow for compatible land uses. This application falls short of the standard required for the Tribunal to make that determination.

[111] The Act, the PPS and the Official Plan applicable to the unorganized Township of Gorham, stress balance and compatibility between land uses. Contrary to that mandatory direction, the LRPB focused solely on the provisions of the planning documents which support aggregate extraction and did not consider the provisions which support recreational and residential land use, and environmental protection. The Tribunal finds that the LRPB has failed to appropriately consider the PPS and Official Plan policies that relate to land use compatibility in relation to this application.

[112] The LRPB has failed to ensure that the proposal is consistent with the PPS and conforms to the Official Plan. The Tribunal finds that the ZBL is inconsistent with the PPS, and fails to conform with the Official Plan, for the reasons outlined in this Decision.

[113] The Tribunal is required by legislation to either approve the Decision of the LRPB or send the matter back to the LRPB to make a new Decision. The Tribunal cannot alter or amend the Decision of the Approval Authority.

[114] In this matter, the Tribunal finds that the matter must be sent back to the LRPB to make a new Decision.

ORDER

[115] The Tribunal orders that the Appeals against Zoning By-law No. 004-2018 are allowed. The Tribunal orders that Zoning By-law No. 004-2018 is repealed.

[116] The Tribunal orders the Lakehead Rural Planning Board to make a New Decision in the application for an extractive industrial operation on the subject property located at Parcel 8755, Section TBF, Part Broken Lot 18, Concession 7, Township of Gorham.

"Helen Jackson"

HELEN JACKSON
MEMBER

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Local Planning Appeal Tribunal

A constituent tribunal of Tribunals Ontario - Environment and Land Division
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