

Court File No.
OLT File No.: OLT-23-000741

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

TOWNSHIP OF GEORGIAN BAY

Moving Party
(Party in the OLT Proceeding)

and

OBD DEVELOPMENTS INC.

Responding Party
(Appellant & Party in the OLT Proceeding)

MOTION UNDER s. 24(1) of the *Ontario Land Tribunal Act* and Rule 61.03(1) of the *Rule of Civil Procedure*.

NOTICE OF MOTION FOR LEAVE TO APPEAL

TAKE NOTICE that the Moving Party, Township of Georgian Bay will make a motion for leave to appeal to the Divisional Court under section 24(1) of the Ontario Land Tribunal Act and Rule 61.03 of the Rules of Civil Procedure from the April 15, 2024 decision of Ontario Land Tribunal Vice-Chair Sharyn Vincent, file number OLT-23-000741, on a date to be fixed by the Registrar at the Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

PROPOSED METHOD OF HEARING: The motion is to be heard in person or by video conference.

THE MOTION IS FOR:

1. An Order granting the Township of Georgian Bay (the “**Township**”) leave to appeal

to the Divisional Court from the decision of Tribunal Vice-Chair Sharyn Vincent dated April 15, 2024 on the following questions of law:

- (a) Did the Ontario Land Tribunal ("Tribunal") err by failing to adhere to section 3(5) of the *Planning Act*, which requires that Tribunal decisions be consistent with the Provincial Policy Statement, in wrongly concluding that
- i. policies 1.1.1c) and 1.2.6.1 did not apply to a proposed temporary rezoning to permit the crushing of aggregate beside or near dozens of residents where these policies require the avoidance of land uses that raise public health concerns or are likely to cause adverse effects;
 - ii. policies 2.1.7 and 2.18 were addressed in accordance with provincial requirements under the *Endangered Species Act, 2007* ("*Endangered Species Act*" or "ESA") for a proposed temporary rezoning to permit site alterations located entirely within the habitat of endangered and threatened species after all applicable ESA approval requirements had lapsed;
- (b) Did the OLT err in law by approving a temporary zoning under section 39 of the *Planning Act* by failing to address the minimum requirements and permitted scope of conditions authorized under section 39;
- (c) Did the OLT err in law under section 24(1) of the *Planning Act* by failing to ensure that a proposed temporary zoning conformed with the applicable official plans,

including the Township Official Plan prohibition of aggregate processing anywhere within a defined urban area or otherwise within 1,000 metres of a residence;

(d) Did the OLT err in law in addressing a dispute over a zoning by-law authorized under the *Planning Act* by ignoring the specific terms of this by-law in favour of conflicting terms from a different by-law authorized under the *Municipal Act, 2001*;

(e) Did the OLT err in law in relying on *Environmental Protection Act* (EPA) policies and regulations to address the application of the *Planning Act* to a proposed temporary rezoning for aggregate crushing that is likely to emit several contaminants at levels causing adverse effects on dozens of nearby residents, including emissions of toxic particulate matter that has no threshold for adverse effects on human health;

2. An Order granting the Township their costs of this motion for leave to appeal;
3. Such further and other relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE:

A. Parties

4. The Township is a lower-tier municipality under the *Municipal Act, 2001* ("Municipal Act") with exclusive authority to pass zoning by-laws under the *Planning Act*, including zoning for temporary uses under section 39 of the *Planning Act*.

5. Oak Bay Developments Inc. (“Oak Bay”) is an Ontario corporation that owns lands in the Township of Georgian Bay. OBD is a private landowner of Part Lots 30 and 31, Concession 2, Former Baxter Township, now Georgian Bay. The Oak Bay lands are entirely within the Port Severn designated urban centre.

B. Chronology of Events

6. The Oak Bay lands proposed for temporary zoning, known as the Summerside lands, were part of a draft approved, initially approved on May 4, 2011. In 2010, Oak Bay obtained a time-limited exemption from the Ontario *Endangered Species Act* to permit construction activities.
7. Since 2008, Oak Bay accumulated waste rock on the existing rock barrens at the Summerside site instead of trucking it off-site for disposal and/or crushing.
8. In 2016, Oak Bay commenced a residential zoning application for the Summerside lands. In 2019, the Township zoned the Summerside lands for 173 townhouses within zone, RM4-34.
9. Since 2014, the Township Zoning By-law has prohibited rock crushing except on lands zoned Extractive Industrial (MX). Similarly, since 2014, the Township Official Plan has sought to separate “mineral aggregate operations” from residential dwelling units by prohibiting such uses within the Port Severn Urban Centre and, elsewhere, by imposing a 1,000-metre buffer absent demonstrated compatibility for less.
10. In early 2020, Oak Bay carried out rock crushing on lands nearby the Summerside

site without zoning approval. This activity triggered immediate residential complaints to Oak Bay and the Township and resulted in the Township advising Oak Bay in early 2021 that rock crushing on this site was contrary to the Township's zoning by-law.

11. In 2022, Oak Bay applied for temporary zoning to permit rock crushing on the Summerside site. The Township deemed the application complete for the purposes of technical review in late 2022.
12. In February 2023, the Township scheduled the required public meeting on the By-law, which identified numerous concerns, including noise, air quality, and health concerns from the hundreds of residents that reside in three directions around the proposed site for crushing. During this time, various technical discussions on aggregate crushing focused on the applicability of provincial noise and air approvals under the *Environmental Protection Act*.
13. In July 2023, Oak Bay pre-empted further Township review and decision-making under the *Planning Act* by appealing to the Tribunal.
14. In October 2023, the Township Council determined that it was opposed to the rezoning and retained new legal counsel to deal with the January 2024 appeal hearing under the *Planning Act*. Township legal counsel retained the existing noise expert and three new experts to focus on *Planning Act* issues.
15. The hearing commenced in early February 2024 and involved seven hearing days. The Tribunal heard evidence from OBD and Township experts on issues of air

quality, human health, noise, endangered species, and land use planning. Each party served and filed written submissions on February 23, 2024.

16. On April 16, 2024, the Tribunal issued its Decision in Case No. OLT-23-000741, dated April 15, 2024.

Leave to Appeal

17. Under section 24 (1) of the Ontario Land Tribunal Act, 2021, S.O. 2021, c. 4, Sched. 6, a decision of the Tribunal may be appealed to the Divisional Court on a question of law, with leave.
18. The Township seeks leave to appeal on five questions of law that arise from the Tribunal's April 15th Decision. Three questions of law arise in relation to the Planning Act, namely sections 3(5), 24(1), and 39(2).
19. Section 3(5) of the Planning Act requires that the Tribunal's decisions must be consistent with the Provincial Policy Statement ("**PPS**"). The applicable PPS was approved by cabinet Order in Council in 2020.
20. Section 24(1) of the *Planning Act* requires that rezoning decisions by a municipality must conform to the applicable official plans. There are two applicable official plans: the Official Plan for the District Municipality of Muskoka – an upper-tier municipality – and the Official Plan for the Township – a lower-tier municipality.
21. The interpretation of a planning instrument – including provincial policy statements and official plans – is a question of law.

22. Section 39 governs temporary zoning. Generally, zoning is permanent and absolute, not temporary or conditional. Zoning by-laws set out yes/no requirements. However, consistent with the special nature of temporary zoning, section 39(2) authorizes some limited conditions that may attach to a temporary zoning by-law. In particular, the by-law must set out the geographic area to which it applies and the applicable time limit for the by-law to apply.
23. Further issues of law arise from the Tribunal's interpretation of regulations issued under the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended, and the *Endangered Species Act, 2007*, S.O. 2007, c. 6, as amended, and are addressed below.

Issue 1: The Tribunal's failure to adhere to the s.3(5) Planning Act requirement to make its decision consistent with the 2020 Provincial Policy Statement

24. The Township provided expert evidence relevant to several policies in the PPS.

i) PPS Avoidance Policies: policies 1.1.1c) and 1.2.6.1:

25. PPS Policy 1.1.1 c) states that “healthy, liveable and safe communities are sustained by [...] avoiding development and land use patterns which may cause environmental or public health and safety concerns.”
26. The Township's land use planning evidence and Closing Submissions expressly addressed this policy and referenced an earlier Ontario Municipal Board decision that applied this policy to a proposed aggregate facility. The Tribunal decision erred in law in failing to consider or apply this policy and the earlier Board decision.

27. PPS Policy 1.2.6.1 states that:

Major facilities and sensitive land uses shall be planned and developed to avoid, or if avoidance is not possible, minimize and mitigate any potential adverse effects from odour, noise and other contaminants, minimize risk to public health and safety, and to ensure the long-term operational and economic viability of major facilities in accordance with provincial guidelines, standards and procedures.

28. The PPS defines "major facilities" very broadly as follows:

Major facilities: means facilities which may require separation from sensitive land uses, including but not limited to airports, manufacturing uses, transportation infrastructure and corridors, rail facilities, marine facilities, sewage treatment facilities, waste management systems, oil and gas pipelines, industries, energy generations facilities and transmission systems, and resource extraction activities.

29. Nearby residences west, north and south of the proposed crushing operations were "sensitive land uses."

30. The Tribunal decision erred in law by incorrectly ignoring the two-part test for major facilities set in the definition of "major facilities" and instead (i) reading into the definition the requirement that a major facility be "permanent" and (ii) exempting aggregate crushing from the definition of "facilities" on the basis that the crusher is "simply a piece of machinery," but not "the operation" covered by the definition. As such, the mobile crusher was exempt from compliance with Policy 1.2.6.1.

31. As a result of these omissions and errors, the Tribunal's decision fails to avoid or even assess the adverse effects on nearby residents from the proposed aggregate crushing emitting noise and toxic particulate matter less than 10 microns in size

(PM10) or 2.5 microns in size (PM2.5).

32. The Tribunal decision is therefore not consistent with Policies 1.2.6.1 and 1.1.1c) of the PPS, in contravention of section 3(5) of the *Planning Act*.

ii) PPS Endangered and Threatened Species Policies:

Policies 2.1.7 and 2.1.8:

33. It was uncontested, and the Tribunal confirmed in its decision, that the entirety of the site is regulated under the *Endangered Species Act, 2007* (“ESA”) as part of the provincially regulated habitat for the Eastern Foxsnake, Eastern Hognosed Snake, and the Blanding’s Turtle, provincially and federally recognized threatened species.
34. Policy 2.1.7 of the PPS states that “Development and site alteration shall not be permitted in habitat of endangered species and threatened species, except in accordance with provincial and federal requirements.”
35. Provincial and federal requirements are defined by the PPS in regard to policy 2.1.7 as “legislation and policies administered by the provincial government or federal government, where applicable, for the purpose of protecting species at risk and their habitat” and include the ESA.
36. Section 10 of the ESA prohibits the damage or destruction of the habitat of any species listed on the Species at Risk in Ontario List as an endangered or threatened species.

37. Under the ESA, section 23 of O.Reg.242/08 authorized transitional agreements to mitigate harm to endangered species so long as they were signed before June 30, 2010. Effective June 29, 2010, the developer signed an agreement with the Province to mitigate development effects on the Eastern Foxsnake and two other endangered species (the "2010 Agreement").
38. Article 5 of the Agreement, Mitigation Plan, advised in Art.5.2 on the term of the mitigation plan as follows: "The Mitigation Plan is in effect for the term set out in Schedule B, but no Mitigation Plan may be in effect for a term longer than 10 years." This made clear that no Mitigation Plan could be in effect after June 29, 2020.
39. Article 5.6 advised: "Agreement Not in Force: The Agreement is not in force without a Mitigation Plan that is in effect." Because the Mitigation Plan under the 2010 Agreement had expired, the 2010 Agreement was no longer in force after July 2020.
40. The 2010 Agreement does not address the activities of depositing or crushing waste rock anywhere on the Oak Bay lands.
41. The Tribunal's decision acknowledges that there is no record of any revised agreement or Mitigation Plan.
42. However, erroneously, the Tribunal ignored the legal limits on the 2010 Agreement to find that there are "no impediments or reason" why the 2023 Annual Report and Mitigation Plan could not be "formalized" and/or "revised" to "reflect the current

circumstances and timelines." It thus failed to address the "provincial requirements" mandated to comply with policy 2.1.7.

43. As a result, the Tribunal's decision fails to conform with the requirement of Policy 2.1.7 that no development or site alteration shall be permitted except "in accordance with" the ESA, in contravention of section 3(5) of the *Planning Act*.

44. Additionally, as set out in Township evidence and submissions, PPS policy 2.1.8 applies to the proposed rezoning. Policy 2.1.8 provides that lands adjacent to the habitat of endangered or threatened species must also be protected from development or site alteration that will have negative impacts on these species. The entirety of the Summerside site is adjacent to provincially significant coastal wetlands and includes significant wildlife habitat for the purposes of policy 2.1.8. The Tribunal decision does not ever consider policy 2.1.8 and thus fails to consider the species protected by its provisions which differ from the species protected by the 2010 Agreement. This failure also contravenes section 3(5) of the *Planning Act*.

Issue 2: Did the Tribunal err in law by approving a temporary zoning under section 39 of the *Planning Act* on the basis of conditions that are beyond the scope of conditions authorized under section 39?

45. Section 39 of the *Planning Act* sets out the statutory requirements that govern temporary zoning. In particular, the required by-law must set out the area subject to the temporary zoning. The By-law proposed by Oak Bay and submitted to the Tribunal failed to address this requirement as it drew a circle of undefined scale and location within the Summerside site.

46. The second problem with the Tribunal decision to approve this temporary rezoning is that it purports to rely on various mitigation measures proposed by Oak Bay, but fails in its approval decision to ever address the Township concern that the *Planning Act* makes no provision for a temporary zoning by-law to contain any of Oak Bay's proposed mitigation measures. Section 39 of the *Planning Act* contains authority for conditions on the location and duration of the temporary land use, but provides no authority to attach additional conditions to provide mitigation.
47. The failure of the Tribunal to respect its limited jurisdiction to approve a temporary rezoning subject to conditions is an error of law.

Issue 3: Did the Tribunal err in law under section 24(1) of the Planning Act by failing to ensure that a proposed temporary zoning conformed with the applicable official plans?

48. Section 24(1) of the *Planning Act* addresses the legal requirement that every zoning by-law must conform with the applicable official plans. The District Municipality of Muskoka ("Muskoka") – an upper-tier municipality according to the *Municipal Act* – has an official plan. Equally, the Township of Georgian Bay – a lower-tier municipality according to the *Municipal Act* – also has an official plan.
49. The Township Official Plan has two policies relevant to any zoning by-law dealing with aggregate crushing. Policy D.5.2.3 prohibits aggregate processing anywhere within a defined urban area. The Muskoka Official Plan advises that Port Severn is an urban area. The Oak Bay lands are entirely within the Severn Urban Area. As such, the Tribunal decision to approve temporary zoning for aggregate crushing on the Summerside lands does not conform to the Township Official Plan. This

decision is therefore also contrary to section 24(1) of the *Planning Act*. Policy D.5.3.9 of the Township Official Plan also prohibits aggregate operations – including crushing – within 1,000 metres of a residence. The uncontradicted evidence before the Tribunal is that the proposed crushing is less than 250 metres from the nearest residence in three directions – west, north, and east. Therefore, the temporary zoning does not conform to this policy of the Township Official Plan and is therefore contrary to section 24(1) of the *Planning Act*.

Issue 4: Did the Tribunal err in law by ignoring the specific terms of a zoning by-law authorized under the *Planning Act* in favour of conflicting terms from a by-law authorized under the *Municipal Act*?

50. The Tribunal determined that aggregate crushing was "construction" under the Township's Noise By-law and was therefore exempt from various legal requirements. The Tribunal reached this conclusion despite being informed by the Township that the *Municipal Act* rendered this definition legally "inoperative" for a zoning by-law under the *Planning Act*. Section 14 of the *Municipal Act* declares inoperative any by-law passed under its authority that conflicts with any legislative instrument passed under the authority of another provincial law. In this case, the Municipal Act by-law conflicts with the terms of the Township's Zoning By-law. There is conflict as the Municipal Act by-law permits what the Zoning By-law prohibits.
51. In particular, the Tribunal ignored the definition of "construct" under the Zoning By-law, which did not include aggregate crushing as part of what may be constructed on a site having zoning approval. The Tribunal also ignored the Zoning By-law definition of "portable processing plant." This definition expressly included crushing

within aggregate processing. The terms of the Zoning By-law prohibited use of a portable processing plant – and thus aggregate processing and crushing – anywhere in the Township except in the zone designated for aggregate extraction – the MX Zone. No part of the Oak Bay lands are zoned MX.

52. There is also conflict because the Municipal Act by-law definition of "construction" frustrates the purpose of the Zoning By-law.
53. Therefore, the Tribunal erred in law by relying on a defined term under a different by-law and different statutory regime to overrule conflicting terms in the Zoning By-law that applied to the decision that was before the Tribunal.

Issue 5: Did the Tribunal err in law in relying on *Environmental Protection Act* (EPA) policies and regulations to exempt proposed aggregate crushing from requirements of the *Planning Act*?

54. It was undisputed by the two air quality experts before the Tribunal that PM10 and PM2.5 are known to cause adverse health effects and that both are recognized by Health Canada as "non-threshold pollutants" because they are unsafe at any level of exposure.
55. The matter before the Tribunal was under the *Planning Act*, the Tribunal erred in law in relying on regulations and policies specific to requirements under a different statutory regime - the EPA - to conclude that aggregate crushing was exempt from the requirements of the *Planning Act* and the Township's Zoning By-law approved under the *Planning Act*.
56. In particular, the Tribunal wrongly concluded that the appropriate way to interpret

the term, "adverse effects," within the PPS under the *Planning Act* was to rely on the requirements of Regulation 419/05 under the EPA. This Regulation applies to applicants seeking an Environmental Compliance Approval under the EPA. O.Reg.419/05 sets out standards that provide maximum air concentrations for specific pollutants. As noted above, Oak Bay had concluded it was exempt from this approval, so no such approval was before the Tribunal.

57. Notably, O.Reg.419/05 contains no standards for PM10 or PM2.5.
58. The Tribunal wrongly relied on the terms of EPA Regulation 419/05 to decide that in considering "adverse effects," it could exclude consideration of background levels of contaminants. In sum, the Tribunal decided that it must assess adverse effects on the air that residents would breathe without regard to the existing air quality. The Tribunal reached this conclusion even though the definition of "adverse effects" in the PPS contains no exclusion of background levels. The Tribunal also reached this conclusion by ignoring the evidence before it of a recent air quality assessment that had included background levels for PM10 in support of a proposed rezoning.
59. The *Planning Act* provides no general basis for the Tribunal to ignore its requirements in deference to the terms of regulations passed under the *Environmental Protection Act* – a different regulatory regime. The terms of the EPA expressly advise that despite any regulation – such as O.Reg.419/05 – no person is permitted to discharge a contaminant likely to cause an adverse effect. There was thus no basis for the Tribunal to apply O.Reg.419/05 to overrule the PPS

requirement to avoid adverse effects.

Questions Have General and Public Importance

60. Each of these questions of law is important to the public, the development of the law, and the administration of justice.

61. As such, each of these issues have sufficient importance to warrant the attention of the Divisional Court.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The Order of Tribunal Vice-Chair Sharyn Vincent dated April 15, 2024;
2. All exhibits to the Tribunal hearing, including:
 - (i) the Township Witness Statements and Attachments, Volumes 1 to 8, dated December 15, 2023; the Visual Evidence Brief of the Township, dated January 12, 2024; the Additional Exhibits of the Township served and filed on January 30, 2024; the Legislation, Policy Documents and Caselaw of the Township submitted on January 29, 2024; and the Additional Authorities provided to the Tribunal on February 8, 2024;
 - (ii) the Oak Bay Witness Statements and Reply Witness Statements and to the Tribunal;
 - (iii) the Closings Submissions of the Township, dated February 23,

2024; and

(iv) the Final Argument of Oak Bay, dated February 23, 2024.

3. Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

May 1, 2024

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Moving Party (Party in the OLT Proceeding)

-and- OBD DEVELOPMENTS INC.
Responding Parties (Appellant & Party in the OLT Proceeding)
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**ONTARIO
SUPERIOR COURT OF JUSTICE
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PROCEEDING COMMENCED AT TORONTO

NOTICE OF MOTION FOR LEAVE TO APPEAL

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