Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: April 15, 2024 **CASE NO(S).:** OLT-23-000741

PROCEEDING COMMENCED UNDER subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant/Appellant:	OBD Developments Inc.
Subject:	Application to amend the Zoning By-law – Refusal or neglect to make a decision
Description:	To permit temporary rock crushing on residential lands
Reference Number:	Z22-12
Property Address:	Part Lots 30 and 31, Concession 2, Baxter
Municipality/UT:	Georgian Bay/Muskoka
OLT Case No.:	OLT-23-000741
OLT Case Name:	OBD Developments Inc. v. Georgian Bay (Township)

Heard: February 5, 2024 by Video Hearing

APPEARANCES:

Parties	**Counsel/Representative**
OBD Developments Inc.	David White
Township of Georgian Bay	Rodney Northey Alex Ciccone

DECISION DELIVERED BY SHARYN VINCENT AND INTERIM ORDER OF THE TRIBUNAL

[1] OBD Developments Inc. ("OBD") have brought an appeal against the failure of the Township of Georgian Bay ("Township") to make a decision with respect to an

application for a Temporary Use Zoning By-law to permit the additional, conditional use of rock crushing for a period of up to not more than two years on land currently zoned RM4-34, the lands being the Summerside phase within a plan of subdivision originally registered in 2006. The site was dormant for a period until 2016 when the Court Appointed Receiver retained a planning and development consultant to bring the approvals to fruition. The zoning for the Summerside phase was approved in 2019 permitting 173 townhouses within a proposed common element condominium, and was preceded by the approvals and build out of the marina and golf course components of the approved subdivision by a corporate entity separate from OBD, and by the phase specific approvals and build out of the Links Trail, Woodland, Bayside, and Marina Towns residential phases by OBD.

[2] Over the course of the evidence, it was acknowledged by both Parties, given the geomorphology of the area, which is granite characteristic of the locale within the Canadian Shield, that any form of development, including servicing, required blasting resulting in shot rock debris which one way or another was a by-product of development.

[3] The Parties, however, disagreed as to how best to deal with the by-product: OBD advanced the case that on site crushing and redeployment of the stone in the construction of the necessary on site infrastructure, such as road beds and the back filling around servicing, is a normal part of subdivision construction on the Canadian Shield, and preferable to hauling the by-product to a quarry operation where the material could be crushed and then at some time, be trucked to the Site for redeployment in the construction of the on site infrastructure. The Township however is of the view that the crushing activity is only permitted, and should only be permitted to occur in the Township if undertaken in a quarry.

[4] OBD therefore seeks a temporary, site-specific zoning provision which would permit on site crushing, accessory to permitted construction for a period not exceeding two years, during which time the crushing activity would be limited to a maximum of 60

days as required, all subject to the terms and conditions set out in a Best Management Practices Plan ("BMPP"), dated July 19, 2023, as revised.

[5] The dispute is framed by the following uncontested facts brought into evidence:

a) There has been considerable change in Township personnel since 2016 when the build out of the Plan of Subdivision resumed;

b) On site crushing and redeployment had in fact occurred in the recent past,

c) The current, and arguably, new view of the Township arises in response to a complaint about the dust and noise attributed to on site crushing activity;

d) In lieu of on site crushing, the by-products of blasting for servicing and foundations, has been stored on the Summerside lands; and it is estimated by OBD that a total of 2883 truckloads of shot rock would have to be trucked from the Site, only to be trucked back to the Site as gravel at some point if not crushed and redeployed *in situ*, resulting in a total of approximately 5766 round trips and associated emissions;

e) Neither the Air Quality nor Acoustic Engineer appearing on behalf of the Township gave any evidence with respect to the potential impacts of trucking the stockpile and the additional shot rock which would be generated through the construction of the Summerside phase;

f) The Township had retained an acoustic engineer, an air quality engineer, and an ecologist to peer review the studies required of, and submitted by OBD. Despite the iterative review process having advanced between the like disciplines, as was evidenced in the correspondence brought to the attention of the Tribunal during the hearing, the Township retained a different slate of consultants to give evidence at the hearing who held and

advanced opinions which did not align with their predecessor professional colleagues.

g) Prior to the shift in strategy on the part of the Township, the correspondence between the OBD consulting team and their respective Peer Reviewer appeared close to resolution on the basis that the temporary crushing *in situ*, subject to as then yet unresolved mitigation measures, and redeployment of the resulting finer grade by-product on site, had been agreed was a reasonable course of action.

MAJOR FACILITY OR EMISSION SOURCE

[6] The underlying and conflicting opinions of the respective engineering witnesses, and the resulting dichotomy in the regulatory standards to be met, varied significantly, to the point of creating/representing a threshold issue for determination by the Tribunal.

[7] It is the shared view of the acoustic, air quality and land use planning witnesses called by the Township, that the mobile crusher is captured by the definition of a *major facility* by the Provincial Planning Policy ("PPS"), which is defined as the following:

> *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.

[8] The acoustic, air quality and land use planning evidence on behalf of OBD was based on a different assessment and characterization of the mobile crusher as a source of emissions akin to all construction equipment typically encountered on a large construction site, and not a facility, and therefore not a *major facility*, as contemplated by the PPS. [emphasis added]

[9] The Tribunal in making the determination as to whether the proposed crusher is a *major facility*, reads the illustrative definition which cites large scale critical and permanent infrastructure such as airports, sewage treatment facilities, energy generation facilities and transmission systems, and resource extraction activities (for the life of the resource), and the equally permanent networks such as transportation infrastructure and corridors, rail facilities, and waste management systems, in combination with policy 1.2.6.1 which strives to "ensure the long-term operational and economic viability of *major facilities* in accordance with provincial guidelines, standards and procedures." [emphasis added]

[10] The operation of the policy is clear: these dynamic but permanent operations are to be protected from the potentially threatening encroachment of sensitive lands uses which are known to be susceptible to [i.e. not compatible with] the predictable and unmitigated nuisance out puts of these *facilities.* [emphasis added]

[11] The Tribunal distinguishes the mobile crusher from the infrastructure and networks cited in the definition of *major facilities*, as it is neither a permanent component of the physical fabric or economy of the Province, nor worthy of protection.

[12] It is simply a piece of machinery, in this instance capable of recycling a by-product of construction at source for redeployment on site. While a crusher may be part of an aggregate extraction operation, it in and of itself, is not the operation, but rather a piece of machinery used to generate a product, the operation of which creates particulate and noise emissions.

[13] The Tribunal will therefore make its determinations with respect to weight and the regulatory framework on the basis that the proposed temporary crusher is a construction related emissions source, apropos to the geomorphology of the site, attracting the applicable regulation and mitigation.

ENDANGERED SPECIES

[14] Both Parties proffered ecology/natural heritage witnesses to advise the Tribunal with respect to the existing designation of the Summerside lands 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. While there was disagreement between the witnesses as to whether the rock stockpile on the subject lands had created potentially new habitat, it is uncontested that the entirety of the site is regulated under the *Endangered Species Act* ("ESA"), and that as such, section 2.1.7 of the PPS is invoked which requires that "no development or site alteration" is permitted "except in accordance with provincial and federal requirements". These protections, or predecessor versions thereof, have been in force and effect for the life of the overall master plan and therefore part of the approvals processes.

[16] The environmental sensitivities of this site were recognized at the time of the original approvals and are governed by the Master Subdivision Agreement dated April 12, 2012. This Agreement runs in tandem with the approved Plan of Subdivision revised and dated October 4, 2011, with the approval authority, the District Municipality of Muskoka.

[17] Paragraph 17 of the Master Subdivision Agreement sets out the non exhaustive list of requirements to implement the Environmental Impact Study prepared by Gartner Lee Limited in April 2006 and the peer review report prepared by Michalski Nielsen and Associated Limited in September 2006. The Agreement anticipates the implementation on a phase-by-phase basis, which as is set out in to the Agreement, requires that prior to the commencement of the development of a phase,

> "the owner shall obtain draft approval or site plan approval for the phase and a supplemental agreement shall be entered into with the Township in satisfaction of the conditions of draft plan approval or site plan approval for the phase. The phases and sequencing of phases may be adjusted and amended by the terms of a supplemental agreement and shall not require amendment to this agreement. […] In the event of conflict between this agreement at a supplemental agreement, the provisions of the supplemental agreement shall prevail."

[18] It was uncontested that this process has to date been followed as was confirmed by the planning witness for OBD, so while the ecology witness for the Township raised concern that the stockpiling present on the Site currently had not yet been placed there in 2006, it is clear to the Tribunal that the approval process captured in the original, and still in force Master Subdivision Agreement, contemplates that conditions of final approval will be specific to each phase, the supplemental agreement for which, shall prevail.

[19] Germane to this issue is the 2023 Annual Report for Oak Bay Development, pursuant to an Agreement entered into under s.23 of the ESA, which was included in the joint document book filed by the Parties and which OBD advances as meeting the following objective:

> "This report provides the information necessary to fulfill the annual reporting requirements under section 12 of Schedule B - Mitigation Plan of the [2010] Agreement. This report summarizes historic construction activities and describes the activities that occurred at the Oak Bay Development (the site) in 2023."

[16] The preceding introduction to the 2023 Annual Report sets out a reporting chronology for the subject agreement follows:

> "Oak Bay Developments Inc. (now OBD Developments Inc.) entered into an agreement under Section 23 of Ontario Regulation 242/08 made under the Endangered Species Act (ESA. 2007) (File number PS23DV-001-10). The effective date of the agreement was June 29th, 2010, and the agreement is:
>
> Between Her Majesty the Queen in right of Ontario, as represented by the Minister of Natural Resource is the Minister. And Oak Bay Developments Inc (now, OBD Developments Inc) the developer.
>
> The designated representative for the minister was Mr. Andy Heerchop, and for the developer was Mr. Brian Coleman.
>
> Note the property was sold to new owners (OBD Development Inc) in September 2016. The new owners continue to follow the requirements of the agreement.
>
> The Ministry of Natural Resources and Forestry (MNRF) Species at Risk (SARC) contact was Jeremy Rouse[…].

> On April 1st, the responsibilities of the ESA were transferred from the MNRF to the Ministry of Environment Conservation and Parks (MECP). The 2022 monitoring report was submitted to the MECP, and received by Jake Shaw, Senior Environmental Officer."

[17] The Township takes the position that the Agreement, by operation of Article 5.6, is not in effect "without a Mitigation Plan that is in effect", and by operation of Article 5.2, no mitigation Plan could be in effect after June 29, 2020, given the 10-year sunset provision of Article 5.2.

[18] Article 5.2 does however contemplate that the Mitigation Plan could be "amended and replaced in accordance with this Article." There is no record of any revised agreement or Mitigation Plan.

[19] It was the evidence of OBD that prior to the oversight and approvals responsibilities being transferred from MNRF to MECP, it was the position of MNRF that the commitment by OBD to honour the Agreement and Mitigation Plan was satisfactory. It was further the testimony of the ecology witness that such verbal arrangements were not uncommon. The 2023 Annual Report was submitted on the basis of this understanding, and concludes that the "measures in the Mitigation Plan were adequate to prevent adverse effects on the species." The Township takes exception to this conclusion.

[20] The Tribunal sees no impediments to or reason why the reporting practice outlined above could not be formalized to address the concerns of the Township, and the Mitigation Plan revised to reflect the current circumstances and timelines. Again the Tribunal reiterates, the zoning for the subject phase is in place, and the evidence before the Tribunal is that a number of tools pursuant to *Planning Act* powers, including the lifting of a Hold provision and the execution of phase specific agreements, are available to address this concern, which is clear to the Tribunal, could and should advisably be addressed, whether the temporary crushing is permitted or not. It is noted that the Ecologist for the Township, when asked to state an opinion of trucking or crushing, stated a preference for the crushing option.

[21] It is clear to the Tribunal that through the approval process, the Township can require OBD to satisfy the Township that all appropriate approvals with respect to endangered or species at risk are secured, which incidentally would be required whether the stockpile is removed from site, or crushed *in situ,* [emphasis added], The Township could not seem to reason beyond a sunset provision in an agreement dating from 2010, or come to grips with the practical reality, that removing the stockpile from the Site, would likely manifest in similar nuisance impacts, such as the previously referenced noise, dust and emissions associated with the truck trips necessary to remove the stockpile, estimated to be over 5,600 trips.

[21] The Tribunal therefore finds that the evidence with respect to endangered species or species at risk is in no way determinative to the dispute before the Tribunal due to the facts that the issue must be addressed, whether or not the Appeal is allowed, and that the vehicles through which to address the issue are contemplated as the part of the normal process which would follow this Decision.

NOISE

[22] The Tribunal is persuaded by the evidence that the proposed rock crushing is, in this instance, part of the construction naturally expected in the buildout of a multi phase residential development built on the Canadian Shield.

[23] The Tribunal finds that the relatively conservative approach adopted by the OBD noise witness to be reasonable given the anticipated noise emissions are measured to be comparable to the other pieces of heavy machinery typically associated with subdivision construction, as is anecdotally evidenced in the Township's Noise By-law 2018-18 which, again not surprisingly given the Canadian Shield setting of the Township, captures rock crushing in the definition of construction, which is subject to time restrictions in that By-law.

[24] The Tribunal finds that the temporary deployment of a mobile crusher in these circumstances is not a Stationary Source as contemplated by MECP Publication NPC-

300, and similarly is not subject to the Environmental Compliance Approvals process by operation of the exemptions provision in paragraph 1.2 of O.Reg 524/98 which references, therein exempting “any equipment, apparatus, mechanism, or thing that is used at the site of a building or structure for the construction, alteration, demolition, drilling, or blasting of the building structure.” While crushing is not explicitly cited, the shot rock would not exist but for the permitted construction, drilling or blasting, and the Tribunal therefore finds that the crusher should therefore be subject to MECP Publication NPC-115. (“NPC-115”)

[25] Quoting directly from the Valcoustics Noise impact Statement:

> “NPC-115 does not specifically provide an emission limit for a crushing plant, but does provide limits for other equipment. The sound emission limits in NPC-115 for excavation equipment /tracked drills is 85/100 dBA at a 15 meter reference distance. The crushing plant has an emission limit of 85.6 dBA at 15 meter according to the manufacturer specification. This is at the lower end of the range considered acceptable for this type of equipment. […]”
>
> With respect to the specifics in this circumstance:
>
> The unmitigated sound levels at the closest noise sensitive receptor locations are [estimated to be] between 55 and 60 dBA. As shown in table one above daytime sound levels of 55 dBA. (NPC-300 guideline objective) to 60 dBA (excess up to five dBA permitted by NPC 300) are acceptable for road and rail traffic noise in an outdoor amenity area in a new residential development.”

[26] The Tribunal finds that this analysis, which, in the absence of a specific guideline, relies upon emission levels associated with comparable heavy machinery, and acceptable tolerances for stationary sources, is a well reasoned, two prong approach. From a practical perspective, the operation of the crusher as required for a period not exceeding 60 cumulative days over the course of a two-year period, will be subsumed in the overall noise of a range of heavy machinery characteristic of a large construction site, which will be ongoing for considerably longer. The Tribunal therefore finds that the estimated noise impacts of the crusher meet acceptable levels at the sensitive receptors, recognizing that the permitted, and expected construction of the Summerside

phase of 175 units will create the ‘background’ to the operation of the crusher, which will be situated approximately 200-225 metres from the closest receptor.

DUST AND PARTICULATE AND AIR QUALITY

[27] There was no light between the Parties that the Site, and in fact the whole of the Subdivision, and much of the Township is located within the Canadian Shield, where it is typically required, expected, and unrefuted that blasting in order to service a site is part of normal construction. It is undisputed that the stockpile is a by-product of the blasting to service and build previous phases, and the Township in particular, raised no issue with air borne emissions resulting from the routine blasting or other construction activity. OBD did submit a draft BMPP which had evolved through the iterative peer review process before it was truncated, and which addresses drilling, blasting, and crushing operations.

[28] The only evidence with respect to the position advanced by the Township to require the stockpile to be loaded and trucked off site came in the form of the estimates provided by the OBD witness, citing air quality, noise and traffic impacts attributable to the estimated 5,766 truck trips made necessary by requiring this outcome.

[29] The green house emissions were calculated as follows:

> “with an estimated round trip of 25 KM to the nearest quarry located south of Port Severin, for each truck, approximately 11.25 L of diesel fuel would be burned per trip. 2,883 truck round trips would generate approximately 88,075 KM. CO2-e of greenhouse emissions.”

[30] These estimates and associated impacts and trip volumes were not challenged, and were not directly compared to the modelled impacts, and proposed mitigation measures of the operation of a crusher.

[31] A BMPP was submitted to the Township during the iterative peer review process. The draft BMPP was introduced into evidence as part of the air quality evidence before the Tribunal and Article 1.2 of the draft document sets out an overview of the plan:

> "A BMPP is a detailed document that outlines the fugitive dust sources at a given site and describes the measures that shall be used to control the emission from these sources. The BMPP is used to manage fugitive dust emissions from sources such as vehicle movement along paved or unpaved on-site haul routes and wind erosion. The MECP recommends that the BMPP be based on a process of "Plan, Do, Check, Act" as described in the Technical Bulletin: Management Approaches for Industrial Fugitive Dust Sources. This BMPP is designed to meet the recommendations of the MECP in a form that provides clear and concise procedures for site personnel."

[32] Following the recommended "Plan, Do, Check, Act" criteria, the Draft Plan, complete with definitions, sets the range of activities included, the controls and mitigation proposed, the implementation schedule, the implementation plan, inspection, and maintenance requirements, monitoring requirements, record keeping and reporting requirements, and finally, complaint tracking and resolution.

[33] It is clear given the existence of the Technical Bulletin that MECP uses BMPPs, as a routine tool to address the mitigation of "fugitive dust sources", which makes abundant sense given the exemption of construction activities pursuant to s.1. (1)2. of O Reg 524/98, which as set out above, states that s. 9 of the EPA does not apply to "any equipment, apparatus, mechanism, or thing that is used, at the site of a building or structure for the construction, alteration, demolition, drilling or blasting of the building or structure."

[34] Despite the exception, the Tribunal was advised that O Reg 419/05 under the EPA governing local air quality, nonetheless prevailed, and modelling of the estimated emissions was conducted accordingly to ensure, notwithstanding the inevitable nuisance to be realized through the permitted construction, that the additional, temporary permission for accessory on site rock crushing was undertaken in keeping with the requirement that the Tribunal must make determinations that align with the overarching policies of the PPS to achieve and maintain healthy and livable communities. The analysis concluded that "the predicted air quality impacts are within

the relevant benchmarks at all locations off-site", and recommended a number of mitigation measures be employed, and secured.

[34] The air quality and planning witnesses for OBD therefore recommended that the BMPP, requiring amongst other measures, the continuous use of watering, whenever the crusher is active, form part of the temporary Zoning By-law and cited other examples in s. 17.6 of the existing Township By-law 2014-75, which incorporated performance standards for other site-specific circumstances.

[35] This remedy to securing compliance with the recommended mitigation measures was challenged by the planning witness proffered by the Township on the basis that the inclusion of performance standards, despite the cited precedents, was tantamount to conditional zoning. The witness, in giving this opinion, did not distinguish a temporary zoning permission pursuant to s.39 of the *Planning Act* from the land use permissions granted under s.34, nor did the witness address the existing Holding provisions applicable to the Site, both of which are known to the Tribunal to be tested tools entrenched in the *Planning Act* for approval authorities to engage in the appropriate circumstances.

[36] As was discussed in paragraph 17 of this Decision, the build out of the approved zoning permissions for 139 townhouse units will be subject of what the Master Subdivision Agreement refers to as the Site Plan Agreement, the execution of which is a condition precedent of the lifting of a Holding restriction on the Site. It appears to the Tribunal that appending the BMPP to the phase specific agreement, and securing therein, would eliminate the challenge of conditional zoning raised by the Township planning witness, which incidentally, the Tribunal does not share given the very premise of s.39 of the *Planning Act*, which clearly authorizes conditional zoning permissions. The Tribunal notes that the draft BMPP extends to controls over activities beyond the operation of a crusher such as drilling and blasting, using haul trucks, loaders and excavators and placement of material using the same range of heavy equipment.

[37] The Tribunal is therefore persuaded that the dust emissions can be adequately mitigated to levels prescribed by the applicable regulation, subject to the following terms and conditions:

- The crusher shall be equipped with a water spray system;
- Crushing shall not exceed 1000 tonnes/day;
- Crushing shall not occur outside of the hours of Monday to Friday 7 a.m. to 5 p.m. and shall be limited to a maximum number of 60 days over a course of a two-year period commencing when the temporary By-law comes into full force and effect;
- Watering shall be applied at all times when the crusher is in operation and will not be operated when water is not available;
- The crusher shall not be operated when temperatures are below 4 degrees Celsius to ensure water flows;
- The water application rate shall ensure that no visible dust is generated by the crusher;
- Crushing activities shall be avoided when winds are blowing towards homes;
- Administration, inspection and monitoring, including record keeping and reporting shall be undertaken in accordance with the terms set out in the BMPP.

[38] To summarize the findings that have been made throughout this decision, it is the conclusions of the Tribunal as follows:

1. The temporary use of a mobile crusher accessory to permitted construction does not constitute a *major facility* as defined by the PPS

2. The protection of Endangered Species must be addressed to the satisfaction of MECP whether the temporary crushing is permitted or whether OBD is required to truck the stockpile from the Summerside Lands;

3. The Tribunal is persuaded by the noise modelling and evidence on behalf of OBD that the crusher can operate, muffled as recommended, and achieve noise levels considered acceptable under Ministry guidelines at the nearest sensitive receptors;

4. The Tribunal is persuaded that through adherence to the terms and conditions of the BMPP, that the crusher can operate for a maximum of 60 days on a construction site to create materials to be redeployed on site;

5. There are options available to the Parties to secure the collateral approvals necessary as conditions precedent to permit the construction to proceed, in the form of either a temporary use by-law in final form, the use of the Hold provisions, or a Site Plan Agreement

ORDER

[39] **THE TRIBUNAL THEREFORE** will allow the Appeal in part and withhold its Final Order until in receipt of confirmation from the Township that the By-law is in final form.

[40] The Tribunal may be spoken to should issues arise in bringing this Interim Order to fruition in a timely fashion.

"Sharyn Vincent"

SHARYN VINCENT
VICE-CHAIR