

Special Edition Stepping Stones



THE DUNTROON QUARRY EXPANSION NEWSLETTER

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Highlights of the Judicial Review

As planned, the Judicial Review of the Consolidated Hearings Board decision to approve Walker Aggregates' Duntroon Quarry expansion occurred yesterday. The review took place before three judges at the Ontario Superior Court of Justice at Osgoode Hall in Toronto.

In addition to numerous lawyers, employees from Walker and the Niagara Escarpment Commission (NEC), members of the Clearview Community Coalition (CCC) and other spectators packed the courtroom.

First up were the lawyers for the NEC. Lise Favreau argued that the majority decision of the Consolidated Hearings Board did not apply the tests set out in the Niagara Escarpment Plan (NEP) in deciding to approve the quarry expansion application.

She said instead, that they took the approach, "Let's find a way to approve this project." In referring to the opinion presented by the dissenting board member Robert Wright, she said, "You have to consider the plan and whether you have met the criteria of the plan."

Favreau spoke to the balance that needs to be considered when deciding whether to allow development in the Niagara Escarpment Plan Area. "Development can proceed but must be compatible to this special area," she said. "The focus is protection."

She went on to say that the board majority "does a fairly superficial review of the amendment requirements" of the NEC, and argued that the NEP does not support a "net gain" approach. This is in reference to Walker's proposal to remove part of a woodland for the quarry expansion, and mitigate the impacts through reforestation of adjacent areas.

"At the end of the day, the majority did not do what they were supposed to do," Favreau said when it came to considering the tests and analysis of the NEP and the Provincial Policy Statement (PPS). She said that the board took the approach, "Gravel is a good thing; let's make this work."

A Judicial Review is not an appeal of the board's decision. It is a challenge of the decision on the basis of a legal error.

Another lawyer for the NEC, Judie Im, argued the board inappropriately allowed for the finalization of the quarry's Adaptive Management Plan (AMP) to be delegated to the Minister of Natural Resources. She said the Aggregate Resources Act does not provide authority for this, and said such an arrangement is "in violation of procedural fairness."

CCC lawyer John Laskin was next on the agenda and presented the arguments of the CCC. "The Joint Board decision must be set aside," he said, because the majority failed to carry out its responsibility of assessing noise impacts of the quarry expansion.

Laskin maintained that the board majority compared noise impacts to those of the existing Duntroon Quarry. He said that it should have made a comparison to the background noise of no existing quarry – since the existing quarry is scheduled to close. This was the case made at the board hearing in 2010-2011 by the CCC's noise consultant.

Laskin said the board erred in its analysis of noise impacts along the haul route of the quarry expansion.

During the afternoon, Walker's lawyer Tom Curry urged the court to respect the majority board decision, and refuse to grant the Judicial Review. "The majority of the joint board made no error in law," he said, noting that the board heard 139 days of testimony from 36 expert witnesses, which came after a decade of work on the quarry expansion approval process.

He said the board works daily with legislation and policies, and is well qualified to make an appropriate decision on the application.

"It is not enough," he said, "...to point to one or two words in the act or plan and say 'ah'...the majority didn't consider this or that."

"The majority made a careful review of the interplay between the policies...It required a contextual analysis."

Curry pointed out that the dissenting board member was able to criticize the majority decision because he

had its draft report in front of him. He also noted that, "The dissent is a dissent of almost every single finding; of almost every conclusion."

Curry also pointed out that the Duntroon Quarry expansion is "heavily conditionally approved," and demonstrated the changes made to the quarry expansion plan by Walker and the board since the start of the board hearing to better protect the environment.

As for the determination on the noise impacts of the haul route, Curry said it is squarely within the board's jurisdiction to decide the methodology for assessing the noise the quarry expansion would create.

Clearview Township lawyer Ian Rowe was last on the agenda. He said the majority board approval of the Duntroon Quarry expansion "represents a greater public interest."

Rowe said the township values the economic benefits of a quarry expansion, including jobs, spinoff economic activity and the ability to source aggregates for its own use at a good price. He also spoke to what he called the "collateral" benefits of the expansion – including Walker's contribution of millions of dollars towards road improvements, funding for the township's acquisition of environmental lands, and funding to allow for tree planting throughout the township.

He also disputed the NEC's position that there is a conflict between the policies of the NEP and the PPS. "It is a dual compliance test. There is no primacy; they stand together."

Rowe objected to the NEC assertion that the board had a predisposition to approve the quarry, and said if that had been the case, "I don't think it would have taken 139 days to get there. The board was considering every aspect of this proposal." He added that, "In every case, the natural heritage was the highest goal."

The township lawyer dismissed the NEC's position that it is inappropriate to replace a section of woodlands for the quarry with a larger section in the surrounding area. He said when a scarlet tanager is looking for a nesting site, it doesn't check to make sure it is in the Niagara Escarpment Plan Area – or even within the boundaries

of Clearview Township. "It doesn't need to be in licensed lands," he said.

Rowe completed his testimony by stating that the proposed quarry expansion would be going into an area designated in the NEP as "Escarpment Rural," an area where aggregate extraction is permitted. He told the court that the NEC has never made an effort to re-designate this area to one with greater protection.

At the end of the day's proceedings, the panel of judges asked Walker's lawyers if the company would be seeking legal costs should it be successful in the Judicial Review outcome. The lawyers said they would not be seeking costs against the CCC but would consider costs against the NEC. They indicated they would speak to the NEC's lawyers about this, and inform the court of their decision in writing within the week.

The Duntroon Quarry is operated by Walker Aggregates Inc., a division of Walker Industries.

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