

ENVIRONMENTAL REVIEW TRIBUNAL

IN THE MATTER OF an appeal by St Marys Cement Inc. filed June 11, 2010 for a Hearing before the Environmental Review Tribunal pursuant to section 100 of the *Ontario Water Resources Act*, R.S.O. 1990, c. O. 40, as amended with respect to a Notice of Refusal Permit to Take Water No. 3708-862GHB issued by the Director, Ministry of the Environment, on June 3, 2010, under section 34 of the *Ontario Water Resources Act*, regarding an application for the taking of water from a site located at Lot 3, Concession 11, E. Flamborough, in the City of Hamilton, ON.

NOTICE OF MOTION

Friends of Rural Communities and the Environment (“**FORCE**”) will make a motion before the Environmental Review Tribunal at the Council Chambers, Flamborough Town Hall, 163 Dundas Street East, Waterdown, Ontario on Wednesday, October 20th, 2010 at 10:00 a.m., or as soon thereafter as the motion may be heard. The estimated time for the hearing of this motion is one (1) day.

THE MOTION IS FOR:

1. An adjournment *sine die* of the within appeal;
2. FORCE’s costs of the within motion; and
3. Such further and other relief as Counsel for FORCE may advise and the Tribunal may permit.

THE GROUNDS OF THE MOTION ARE:

4. St Marys Cement (“**SMC**”) has an interest in 154 hectares comprising Lots 2, 3 and Part of Lot 1, Concession 11 East, bounded to the south by the 11th Concession Road East, to the east by Milborough Line/Town of Milton, to the north by the unopened 12th Concession Road Allowance and the Timberrun Court subdivision and to the west by

Bronte Creek Condominium Estates residential development and other lands owned by SMC (the “**Subject Property**”);

5. SMC intends to develop an open-pit stone quarry (the “**Proposed Quarry**”) on the Subject Property;
6. The Subject Property is currently zoned “Agricultural” and “Conservation Management”;
7. To facilitate the development of the Quarry, SMC has applied to:
 - (a) the City of Hamilton (the “**City**”) for Official Plan and Zoning By-law Amendments (the “**Planning Act Applications**”) to permit extractive industrial activities on the Subject Property;
 - (b) the Ministry of Natural Resources (the “**MNR**”) for a Category 2 (Quarry Below Water), Class “A” Quarry License (the “**ARA Application**”); and
 - (c) the Ministry of the Environment (the “**MOE**”) for permits to take water to allow it to investigate the use of a groundwater recirculation system as a means of mitigating the adverse effects of quarry dewatering;
8. Following SMC’s Planning Act Applications and ARA Application, the Minister of Municipal Affairs and Housing issued a Minister’s Zoning Order (the “**MZO**”) pursuant to section 47 of the *Planning Act*, thereby freezing the zoning of the Subject Property as “Agricultural” and “Conservation Management.” Neither of these zones permit the construction of the Proposed Quarry;

9. SMC has requested the revocation of the MZO by asking the Minister of Municipal Affairs and Housing (the “**Minister**”) to refer the MZO to the Ontario Municipal Board (the “**OMB**”) for a hearing. To date, however, the Minister has not done so;
10. Where an MZO is in place, the issuance or grant of any license, permit, approval or permission, which includes the requested Permit to Take Water (the “**PTTW**”), in contravention of an MZO is prohibited by Section 48 of the *Planning Act*;
11. SMC is not entitled to construct the Proposed Quarry unless and until the MZO is revoked, and the Planning Act Applications are approved because section 12.1 of the *Aggregate Resources Act* provides that no ARA Licence shall be issued for a pit or quarry if a zoning by-law prohibits the site from being used for the making, establishment or operation of pits and quarries;
12. SMC therefore has no legitimate basis to request the issuance of a PTTW because the stated purpose of the PTTW is to conduct hydrogeological testing in support of a use of the Subject Property that is not permitted;
13. SMC’s position in correspondence with the MOE has been that:
 - (a) no further data will be gained by conducting further pumping tests,
 - (b) that doing another pumping test will not garner any further useful information, and
 - (c) further data on the hydrogeology of the site is not required for the ARA Application;
14. In any event, the results of the testing are not necessary for a hearing related to the revocation of the MZO, as SMC has stated that the testing is intended to prove the

concept of proposed quarry dewatering mitigation measures. A hearing as to whether the MZO should be revoked will focus on the conformity of the MZO with Provincial Policy, and whether the MZO represents good planning and is in the public interest. The hearing will not focus on the details of SMC's specific quarry proposal or mitigation measures;

15. Although previous PTTWs have been issued to conduct testing in support of an ARA License and quarry planning approvals, they pre-dated the MZO. The *Planning Act* does not contain the same prohibition on the issuance or grant of any license, permit, approval or permission where there is no MZO in place, even if the license, permit, approval or permission relates to a use of land that is not permitted by the applicable Zoning By-law;
16. SMC will continue to be entitled to a full and fair hearing of its appeal even if an adjournment *sine die* is granted. The appeal will simply be heard later, after and if the OMB determines that the MZO should be revoked;
17. FORCE has made its request for adjournment in a timely way;
18. The granting of an adjournment will not cause or contribute to any existing or potential risk of environmental harm;
19. This motion is taking place before the parties have incurred the expenses associated with exchanging documents and preparing witness statements;
20. There is no inconvenience to the other parties, participants and presenters associated with the grant of an adjournment. This motion is being heard far enough in advance of the

commencement of the hearing that the parties, participants and presenters can arrange their affairs accordingly;

21. It is not in the public interest to hear SMC's appeal at this time. Unless and until the MZO is revoked, it is a waste of the Tribunal's and parties' time and resources to respectively conduct and participate in a hearing of SMC's appeal;
22. *Aggregate Resources Act*, R.S.O. 1990 c. A.8, Part II "Licences";
23. *Ontario Water Resources Act*; R.S.O. 1990 c. O. 40, as amended, ss. 34, 34.1 and 100;
24. O. Reg. 387/04 "Water Taking," made pursuant to the *Ontario Water Resources Act*, R.S.O. 1990 c. O. 40, as amended;
25. *Planning Act*; R.S.O. 1990 c. P. 13, as amended, Part V "Land Use Controls and Related Administration";
26. Town of Flamborough (now City of Hamilton) Zoning By-law No. 90-145-Z, Section 28 "Conservation Management Zone," Section 33 "Agricultural Zone," and zoning maps;
27. Rules 4, and 104-107 of the *Rules of Practice and Practice Directions of the Environmental Review Tribunal*;
28. Such further and other grounds as Counsel for FORCE may advise and the Tribunal may permit.

THE FOLLOWING DOCUMENTS will be used at the hearing of the motion:

29. Affidavit of Graham Flint sworn on September 28, 2010 and the Exhibits attached thereto;
30. Tribunal's record in Case No. 10-031;
31. Such further and other materials as counsel for FORCE may advise and this Tribunal may permit.

Dated this 29th day of September, 2010

DAVIS LLP
Barristers & Solicitors
1 First Canadian Place, Suite 5600
P.O. Box 367
100 King Street West
Toronto, ON M5X 1E2

David Crocker (LSUC #14162U)
Tel: 416.941.5415
Fax: 416.365.7886

Laura K. Bisset (LSUC #509710)
Tel: 416.941.5400
Fax: 416.777.7432

Lawyers for the Moving Party,
Friends of Rural Communities and the Environment

TO: The Secretary
Environmental Review Tribunal
655 Bay Street
Toronto, ON M5G 1E5

AND TO: WeirFoulds LLP
The Exchange Tower, Suite 1600
P.O. Box 480, 130 King Street West
Toronto, Ontario, M5X 1J5

John Buhlman
Tel: 416-365-1110
Fax: 416-365-1876
Lawyers for St Marys Cement

**AND TO: Legal Services Branch
Ministry of Environment
135 St. Clair Avenue West, 10 Floor
Toronto, ON M4V 1P5**

Frederika Rotter
Tel: 416.314.0219
Fax: 416.314.6579

Neil Gobardhan
Tel: 416.212.0850
Fax: 416.314.6579

AND TO: Turkstra Mazza
701-375 University Ave.
Toronto, ON, M5G 2J5

Nancy Smith
Tel: 416.368.4554 Ext:264
Fax: 416.368.4741

Lawyers for the City of Hamilton

AND TO: Danny Duhan
Stonebrook Estates
2 Woodspring Court
RR2
Hamilton, ON L8N 2Z7

Participant on behalf of Wentworth Standard Condominium Corporation #363