

WILMOT

Proposed Middle Street Pit

Interim Control By-laws

S.38 of the *Planning Act*, R.S.O. 1990, c. P.13

May 23, 2023



Who is Donnelly Law?

David Donnelly has represented environmentalists, citizens' groups and First Nations at the Ontario Municipal Board, Local Planning Appeal Tribunal, Ontario Land Tribunal and Ontario Courts since 2000.

- David Donnelly has been an environmental advocate for 35 years, first as Executive Director of Environmental Defence, and then as their legal counsel.
- Donnelly Law was founded in 2008 to service provincially significant and precedent-setting environmental law cases.
- Donnelly Law has fought and won some of the biggest land-use battles in Ontario history, including stopping a very large quarry on the Niagara Escarpment.



Background

The proposed Middle Street Pit, a sand extraction operation, if approved, would become the seventh pit on Snyder's Road East in the Community of Petersburg.

Petersburg Sand Company is requesting a change in zoning for approximately 27.5 hectares of land at 1856 Snyder's Rd. E., currently designated agricultural.

The area of extraction would be 22.5 hectares, and produce 450,000 tonnes per year.

Council Sleepwalking to an Approval?

- 1) Does Wilmot Township know where it ranks amongst Ontario Municipalities vis-à-vis protective aggregate policies?
- 2) Have Planning Staff and legal counsel considered an Interim Control By-law (“ICBL”), like Caledon?
- 3) Does your Township Council, planning staff, and Township legal counsel have the experience to defeat this pit application? If not, Council needs experienced advice.

How they did it in Caledon



OFFICIAL PLAN AGGREGATE POLICY ASSESSMENT FOR THE TOP TEN AGGREGATE PRODUCING MUNICIPALITIES IN ONTARIO IN RELATION TO THE TOWN OF CALEDON

DATE: SEPTEMBER 12TH, 2022
PREPARED BY: SUSAN ROBERTSON AND ALLAN RAMSAY
FOR: FORKS OF THE CREDIT PRESERVATION GROUP

Where Does Wilmot Rank?

“The results of this planning assessment are clear. While no municipality performed exceptionally well for overall aggregate policy strength, the Town of Caledon ranks the lowest out of all top aggregate producing municipalities in Ontario. Overall, concerning aggregate extraction, Caledon has a general lack of policy content and a highly permissive policy context, with minimal description, tests, and terminology.”

- Susan Robertson, p.3

Table 3: Top Ten Aggregate Producing Municipalities in Ontario: Official Plan Policy Analysis and Scoring

Rank	Municipality	Air quality	Blasting	Cumulative Effects	First Nations consultation	Haul Routes	Hydrogeological	Natural Heritage	Noise	Surface Water
#1	Ottawa	□	□	□	□	□	□	□	□	□
#2	Hamilton	□	□	□	□	□	□	□	□	□
#3	Kawartha Lakes	□	□	□	□	□	□	□	□	□
#4	North Dumfries	□	□	□	□	□	□	□	□	□
#5a	Burlington	□	□	□	□	□	□	□	□	□
#5b	Halton Hills	□	□	□	□	□	□	□	□	□
#6	Zorra	□	□	□	□	□	□	□	□	□
#7	Puslinch	□	□	□	□	□	□	□	□	□
#8	Severn	□	□	□	□	□	□	□	□	□
#9	Clarington	□	□	□	□	□	□	□	□	□
#10	Caledon	□	□	□	□	□	□	□	□	□

Legend

Strong	□	<i>Detailed and prescriptive, with several tests for approval, multiple policy references and clearly defined study requirements</i>
Average	□	<i>Reference to provincial requirements, more than one policy reference, a study required</i>
Weak	□	<i>Minimal reference, deferring to Provincial Acts</i>
Not Present	□	<i>No mention</i>



Describe the ICBL Strategy

- An Interim Control By-law (“ICBL”) is a legal planning mechanism under the *Planning Act*, R.S.O. 1990, c. P.13.
- Frequently used by municipalities to grant themselves the time (“breathing room”) to study an issue affecting some portion of their community, e.g. too many pits.
- Permits adoption of an updated zoning by-law that protects residents from dust, noise, truck traffic, and preserves the safety of drinking water, etc.

Section 38 of the *Planning Act*, R.S.O. 1990, c. P.13

- **38 (1)** Where the council of a local municipality has, by by-law or resolution, directed that a review or study be undertaken in respect of land use planning policies in the municipality or in any defined area or areas thereof, the council of the municipality may pass a by-law (hereinafter referred to as an interim control by-law) to be in effect for a period of time specified in the by-law, which period shall not exceed one year from the date of the passing thereof, prohibiting the use of land, building or structures within the municipality or within the defined area or areas thereof for, or except for, such purposes as are set out in the by-law.

Why does Wilmot need an ICBL?

- Wilmot's zoning by-law governing pits and quarries was most recently revised in 2022, but is very similar to the by-law first enacted in 1983. The by-law contains only barebones regulations concerning the operation and location of pits and quarries.
- An ICBL allows Wilmot to study a number of important areas of concern, including air quality, traffic, road safety, noise, water, etc., and pass by-laws to protect the community in accordance with the results of these studies. Failing this, an OLT hearing would use the 2022/1983 by-law to evaluate the application.
- According to the most recent TOARC statistics, Wilmot produces 1,043,000 tonnes of aggregate per year, or approximately 52 tonnes per person. The average Ontarian consumes 11 tonnes per person. Is that fair? What is the safe limit of extraction in Wilmot?

Legal Benefit at OLT

An ICBL can defeat the Clergy Principle – an application is assessed by OLT against the Official Plan and by-laws in place at the time of the application unless an ICBL is adopted, and new policies/by-laws approved:

“The nature of the breathing space is set out in section 38(6) of the *Planning Act* which provides that the zoning in effect prior to the passing of the Interim Control By-law will come into effect again after the expiry of the interim control period (breathing room) if Council has not passed a new zoning by-law consequent on the review or study within the breathing room space. The *Planning Act* accordingly preserves the priority of Zoning passed in the period of the breathing period and if passed in that period the prior zoning does not come back into effect unless the new zoning which has its own notice requirements is appealed and is defeated on the appeal.”

- *Petro-Canada Asset Management v. Ajax (Town)*, 2008 CarswellOnt 318, 58 O.M.B.R. 495, at paras 10-11.

Recent Examples of ICBL

- Milton (CN Inter-modal)
- Burlington (Downtown condos)
- Welland (Medical marijuana)
- Ramara (Short-term rentals)
- Oakville (Air quality control)
- Halton Hills (By-law 2016-0009, Mature Neighbourhoods Character Study)
- Caledon (By-law 2022-075, Freezing development of new quarries and pits)

Bad Faith vs ICBL

- Planning staff and legal counsel often say ICBL's are risky re: vulnerable to bad faith lawsuits.
- Bad faith against municipalities is rarely proven, as it requires proof of illegal, unreasonable or arbitrary action on the part of Council or municipal employees. It is not credible to claim the Township is at risk of being sued for bad faith, simply by adopting a legitimate ICBL.
- ICBLs are adopted all the time; bad faith lawsuits are exceedingly rare, only a few egregious cases have been successful.

Townships are needlessly afraid of Bad Faith

The Ontario Court of Appeal has been clear:

“Bad faith by a municipality connotes a lack of candour, frankness and impartiality. It includes arbitrary or unfair conduct and the exercise of power to serve private purposes at the expense of the public interest.”

- *Equity Waste Management of Canada Corp v. Halton Hills (Town)*, 1997 CarswellOnt 3270, [1997] O.J. No. 3921 at para 61.

Myth of OLT Costs

- Townships often claim that OLT hearings cost between \$400K and \$800K to fight an appeal.
- An OLT appeal can be approached in a much more cost-effective manner.

Legal Fees

- Cost breakdown of one lawyer for a two week hearing:
 - \$500 per hour x 10 hours per day = \$5,000 per day.
 - \$5,000 per day x 10 days = \$50K.
 - The general rule is that for each day of a hearing, the lawyer must devote two days to preparation.
 - Total preparation cost = \$100K.
 - Total legal fees \$150K.

Expert Fees

- General rule is that expert fees may be equivalent to legal fees.
- Five experts each costing \$20K-\$30K:
 - Planning.
 - Noise.
 - Hydrogeology.
 - Traffic.
 - Air quality.
- Total expert fees = \$100K-\$150K.

Case Management and Cost Sharing

- Legal fees can be shared between citizens' groups and Township.
 - Preparation cost reduced by half = \$50K prep.
 - Total legal cost reduced to \$100K.
 - Cost of experts split = \$50K-\$75K.
-
- Total overall cost to Township \$150K-\$175K.

Amount of aggregate taken each year

- According to the Reform Gravel Mining Coalition, The government of Ontario has already authorized the gravel mining industry to extract thirteen times more gravel each year than is required to meet long term average annual consumption.

<https://www.reformgravelmining.ca/faqs>

Trucks Hauling Aggregate

- The Ontario Stone, Sand, and Gravel Association states that on average, 164 million tonnes of aggregate are used each year in Ontario.
- A single truck can move 20 tonnes of material.
- 8,200,000 trucks are required each year to move this amount of aggregate.



- Each truck is approximately 10 meters long = 80,200,000 meters of truck end-to-end, or 80,200 km of trucks to move aggregate each year in Ontario.



The earth's circumference is 40,075.017 km.

Put end-to-end, the trucks required to move aggregate in Ontario each year would circle the earth more than twice!

Next Steps

1. Concerned citizens of Wilmot must keep the pressure on!
2. Wilmot Council must pass an ICLB now, it's free!
3. Council must devise a strategy for OLT appeal that includes Wilmot's citizens and is proactive (strictly reacting/sleepwalking at this point).
4. Wilmot Township needs to review its out-of-date aggregate policies. When is enough aggregate enough?

THANK YOU!