Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement local

ISSUE DATE: April 08, 2021 **CASE NO(S).:** PL150119

The Ontario Municipal Board (the "OMB") is continued under the name Local Planning Appeal Tribunal (the "Tribunal"), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

PROCEEDING COMMENCED UNDER subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	Arbour Farms Limited
Subject:	Request to amend the Official Plan - Failure of the Township of Mulmur to adopt the requested amendment
Existing Designation:	Rural and Natural Area
Proposed Designated:	Extractive Industrial designation
Purpose:	To permit a sand and gravel pit
Property Address/Description:	Lot 23, Concession 7, East of Hurontario Street
Municipality:	Township of Mulmur
Approval Authority File No.:	OP01/2013
OMB Case No.:	PL150119
OMB File No.:	PL150119
OMB Case Name:	Arbour Farms Limited v. Mulmur (Township)

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

Applicant and Appellant:	Arbour Farms Limited
Subject:	Application to amend Zoning By-law No. 05-02 - Refusal or neglect of the Township of Mulmur to make a decision
Existing Zoning:	Rural and Environmental Protection
Proposed Zoning:	Extractive Industrial (MX)
Purpose:	To permit a sand and gravel pit
Property Address/Description:	Lot 23, Concession 7, East of Hurontario Street
Municipality:	Township of Mulmur

Municipality File No.:	ZB01/2013
OMB Case No.:	PL150119
OMB File No.:	PL150120

PROCEEDING COMMENCED UNDER subsection 11(5) of the *Aggregate Resources Act*, R.S.O. 1990, c. A.8, as amended

Referred by:	Ministry of Natural Resources
Objector:	John Bowles
Objector:	Conserve Our Rural Environment
Objector:	Gary Corlett
Objector:	Carl Cosack; and others
Applicant:	Arbour Farms Limited
Subject:	Application for a Class A licence for the removal of aggregate
Property Address/Description:	Part Lot 23, Concession 7
Municipality:	Township of Mulmur
OMB Case No.:	PL150119
OMB File No.:	MM150011

PROCEEDING COMMENCED UNDER subsection 31(2) of the *Local Planning Appeal Tribunal Act*, 2017, S.O. 2017, c. 23, Sched. 1

Motion By:	Arbour Farms Limited
Purpose of Motion:	Request for Determination
Appellant:	Arbour Farms Limited
Subject:	Directions
Municipality:	Township of Mulmur
OMB Case No.:	PL150119
OMB File No.:	PL150119
OMB Case Name:	Arbour Farms Limited v. Mulmur (Township)

Heard:	November 20, 2020 by telephone conference call

APPEARANCES:

Parties	**Counsel**
Arbour Farms Limited	Kim Mullin
County of Simcoe	Marshall Green

DECISION DELIVERED BY HELEN JACKSON AND ORDER OF THE TRIBUNAL

MOTION

[1] This is a motion by Arbour Farms Ltd. (the "Applicant" or "Arbour Farms") for an Order of the Tribunal determining that the effect of recent amendments made to s. 12 of the *Aggregate Resources Act* ("ARA") are that the Phase 2 hearing on this matter is no longer required, and that the Tribunal should direct the Minister of Natural Resources and Forestry (the "MNRF") to issue the Class A licence under the ARA applied for by the Applicant to permit a sand and gravel pit operation on their lands located at Lot 23, Concession 7 and known municipally as 938171 Airport Road (the "subject lands"), in the Township of Mulmur ("Mulmur") in the County of Dufferin ("Dufferin County").

[2] In support of Arbour Farms' position, was an affidavit of Brian Zeman, a land use planner retained by Arbour Farms. The County of Simcoe ("Simcoe County") filed affidavit material from Christian Miele, Director of Transportation for Simcoe County.

BACKGROUND

[3] By way of background, Arbour Farms applied for an official plan amendment ("OPA"), a zoning by-law amendment ("ZBA"), as well as a Class A licence to permit a sand and gravel pit operation on the subject lands. Pursuant to s. 22(7) and s. 34(11) of the *Planning Act*, the Applicant appealed Mulmur's failure to make a decision on the planning applications within the requisite time frame. Additionally, pursuant to s. 11(5) of the ARA, the MNRF referred this application to the Ontario Municipal Board (now the Local Planning Appeal Tribunal (the "Tribunal")) for a hearing to determine whether a licence should be issued for the subject lands.

[4] The parties entered into Board-assisted mediation. As a result, Minutes of Settlement were signed between the Applicant and Mulmur and between the Applicant

and the residents' groups Conserve Our Rural Environment ("CORE") and Airport Road Gravel Group ("ARGG").

[5] The settlement with CORE and ARGG relocated the access to the pit from Airport Road to Dufferin County Road 21, located north of the subject lands. The settlement also required Arbour Farms to enter into a Haul Road Restriction Agreement ("HRRA"). The HRRA restricts trucks travelling to and from the pit from using the section of Airport Road between Highway 89 and the pit. Trucks delivering product to Mulmur and the Town of Shelburne are not restricted from using this section of Airport Road.

[6] Simcoe County and the Township of Adjala-Tosorontio ("Adjala-Tosorontio") objected to the HRRA, because they contend that it has the effect of directing haul route traffic from Dufferin County onto Simcoe County roads and through Adjala-Tosorontio that otherwise would not use Simcoe County roads or travel in such a direction.

[7] On November 24, 2016, Simcoe County brought a motion to the Board seeking party status in the proceeding in order to address these concerns. The Board granted party status at the motion hearing but limited the issues that could be raised. Simcoe County objected to the limitation and sought leave to appeal the Board's ruling at the Ontario Divisional Court.

[8] Adjala-Tosorontio also requested party status, which was granted by the Board in a decision dated April 6, 2017, with limitations similar to those placed on Simcoe County. Adjala-Tosorontio also sought leave to appeal the Board's ruling at the Ontario Divisional Court. The proceeding before the Board was adjourned on consent pending the resolution of these two motions at the Divisional Court.

[9] On November 16, 2017, the Divisional Court granted leave to Simcoe County and Adjala-Tosorontio (see: *Simcoe (County) v. Arbour Farms Ltd*., [2017] ONSC 6803

("Simcoe (County)")) to appeal the limitations imposed by the Board in its rulings. In its decision, the Divisional Court stated that denying Simcoe County and Adjala-Tosorontio a full hearing on all aspects of the Haul Route issue "constituted a denial of procedural fairness and natural justice."

January 2018 Minutes of Settlement ("January 2018 MOS")

[10] Following the decision by the Divisional Court; Simcoe County, Adjala-Tosorontio, the objectors, Mulmur, and Arbour Farms agreed on Minutes of Settlement with respect to a procedural order to allow increased status for Simcoe County and Adjala-Tosorontio.

[11] The procedural order was modified to amend the wording of the issue to be raised by Simcoe County and Adjala-Tosorontio to the following:

> County of Simcoe and Adjala-Tosorontio Issue
>
> 1. When one compares the haul route from the pit prior to the settlement with Conserve Our Rural Environment, Inc. and Airport Road Gravel Group (the "Settlement") to the haul route after the Settlement, which haul route is preferable in terms of operational aspects (amount of traffic, number of entrances, etc.) and any safety concerns related to truck traffic from the Arbour Farms pit?

[12] As a result of the January 2018 MOS, attendance on the main application at the Divisional Court was avoided. By Order of the Board issued on April 26, 2018, a five-day hearing was scheduled to commence January 21, 2019.

December 2018 Minutes of Settlement ("December 2018 MOS")

[13] Further discussions ensued. Simcoe County and Adjala-Tosorontio ultimately reached a settlement with Arbour Farms on restrictions on the use of Simcoe County roads by trucks from the Arbour Farms gravel pit. The parties to the settlement agreed

that, with the exception of local deliveries, trucks exiting the pit would travel west along Dufferin County Road 21 and then north on Dufferin County Road 18, which turns into Simcoe County Road 42. This settlement was executed December 2018.

[14] In this agreement, a phased hearing process for the consolidated appeals was set. Simcoe County sought payment of a haul route maintenance fee for the use of their roads to account for degradation caused by aggregate truck traffic. Preliminary discussions on a maintenance fee occurred but it was determined that the maintenance fee would be dealt with as Phase 2.

[15] The following extract is from para. 3 of the December 2018 MOS:

> The parties agree to a phased hearing process with respect to the Consolidated Appeals, as follows:
>
> (a) The hearing will be divided into two phases, Phase 1 and Phase 2;
>
> (b) The Phase 1 hearing will:
>
> i. Settle the issue raised by Simcoe and Adjala-Tosorontio in the April 2018 Procedural Order;
> ii. Settle the issues between Arbour Farms, Mulmur, CORE and ARGG regarding the Consolidated Appeals;
>
> (c) the Phase 2 hearing will consider the following issues:
>
> i. whether Arbour Farms should be required to make a payment to Simcoe relating to the maintenance of roads used as a haul route within Simcoe County; and
>
> ii. if the answer to (i) is yes, the appropriate amount of such payment.
>
> (d) The only parties to the Phase 2 hearing will be Simcoe and Arbour Farms.

[16] The parties settled the issues with respect to Phase 1 and the settlement hearing was held January 21, 2019. Vice-Chair Chris Conti issued the decision in Phase 1 on August 30, 2019. Of note in Vice-Chair Conti's decision is the following:

> [34] As requested by the Appellant through this decision the Tribunal will approve the OPA and ZBA. As set out in s. 11(8) of the ARA the Tribunal does not approve the license, but directs the Minister to issue the license. At this time the Tribunal will recognize that the application is acceptable, but will withhold its final order on the license directing that it be issued by the Minister until the issue of the payment to be made by the Appellant to the County has been resolved. The parties should contact the Case Coordinator for this file to schedule a PHC if it is still required.
>
> [36] The Tribunal orders that the appeal is allowed in part and the Official Plan of the Township of Mulmur is amended as set out in Exhibit 7, Tab S included with this Decision as Attachment 1.
>
> [37] And the Tribunal orders that Zoning By-law No. 05-02 of the Township of Mulmur is amended as set out in Exhibit 7, Tab T included with this Decision as Attachment 2.
>
> [38] Furthermore, the Tribunal finds that the proposed license application is acceptable and the license should be issued subject to the provisions and conditions contained in the Site Plan. The Tribunal will withhold its final order directing the Minister to issue the license until it is informed by the parties that the outstanding matter regarding the payment to be made to the County of Simcoe has been resolved.

[17] Section 12 of the ARA sets out the matters that must be considered when the Minister or the Tribunal is considering an application for a licence. On September 20, 2019, less than one month following the issuance of the Phase 1 decision, the Minister (MNRF) posted proposed amendments to the ARA to the Environmental Registry of Ontario, which included a proposed amendment to prevent the Tribunal and the Minister from imposing conditions requiring agreements between municipalities and aggregate producers for the payment of haul route maintenance fees.

[18] On December 10, 2019, the amendments to s. 12 of the ARA came into force. Section 12 of the ARA now reads, in part:

> **Matters to be considered**
>
> 12(1) In considering whether a licence should be issued or refused, the Minister or the Local Planning Appeal Tribunal, as the case may be, shall have regard to,
>
> […]

> (h) the main haulage routes and proposed truck traffic to and from the site
>
> **Exception**
>
> (1.1) Despite clause (1)(h), the Minister or the Local Planning Appeal Tribunal shall not have regard to ongoing maintenance and repairs to address road degradation that may result from proposed truck traffic to and from the site.

[19] The amendment to s. 12 is subject to a transition provision, which reads as follows:

> (1.2) Subsection (1.1) applies to an application in respect of which no decision has been made by the Minister or the Local Planning Appeal Tribunal, as the case may be, on or before the day section 2 of the Schedule 5 to the *Better for People, Smarter for Business Act, 2019*, comes into force.

[20] Arbour Farms contends that the amendments to s. 12 of the ARA deprive the Tribunal of the jurisdiction to require Arbour Farms to pay the maintenance fee to Simcoe County as of December 10, 2019. Accordingly, by this motion, Arbour Farms submits there is no point to Phase 2 of this hearing and the Tribunal ought to direct the Minister to issue the licence.

EVIDENCE, ANALYSIS AND FINDINGS

Simcoe County's Position

[21] Marshall Green, counsel for Simcoe County, contends that there should be another interpretation of the ARA amendments as they apply in this case, because the interpretation proposed by Kim Mullin, counsel for Arbour Farms, being that Simcoe County has no right to a hearing in Phase 2, is unreasonable and unjust. Mr. Green states that the principles of statutory interpretation hold that if the result of an interpretation produces an unreasonable or unjust result, then there must be some other reasonable interpretation of the statute. He took the Tribunal to *Canadian Imperial*

Bank of Commerce v. Deloitte & Touche, 2013 ONSC 2166, ("*CIBC*") at paras. 82 and 83 to support this position:

> If the natural or ordinary meaning of the words of a statute leads to an unreasonable or unjust result, it is proper to look for some other possible meaning that will avoid that unreasonable or unjust result …
>
> It is a presumption of statutory interpretation that the legislature does not intend to produce absurd consequences; an interpretation can be considered to be absurd if: … (c) the interpretation is extremely unreasonable or inequitable; …

[22] Mr. Green referenced the decision by Vice-Chair Conti issued in August of 2019; in which in his view, Vice-Chair Conti clearly indicated that the hearing of the licence application was underway, but not completed. Mr. Green asserts that it is clear that the decision to grant a payment for a maintenance fee, if Simcoe could substantiate a claim, had been made. He referenced the following from para. 38 of the decision:

> … The Tribunal will withhold its final order directing the Minister to issue the license until it is informed by the parties that the outstanding matter regarding the payment to be made to the County of Simcoe has been resolved.

[23] Mr. Green asserts that it has been established that Simcoe County is entitled to a maintenance fee for the use of its roads, and that the Tribunal had also already decided that Simcoe County was entitled to a maintenance fee in this case. Mr. Green asserts that a decision has been made on all aspects of the licence except for the amount of payment to Simcoe County, which was to be determined by the Tribunal in Phase 2.

[24] Mr. Green notes that the new legislation applies to a case where "no decision" has been made; however, he submits that it is not clear whether it is to be applied to cases in which "part" of the decision remains to be made. He states that a "part" decision is not accounted for in the amendment or in the transition provision. He is of the view that the amendments to the ARA and the transition provision are unclear and ambiguous with respect to whether they apply in this situation where the hearing was adjourned after Phase 1. He questions whether "the adjournment of the matter by the

Tribunal in January [2019], was merely “procedural”, or did it impact “substantive rights” of Simcoe, …”

[25] Mr. Green submits that the “no decision” provision in the ARA amendment is ambiguous; and that the adjournment of the matter by the Tribunal in January 2019 impacted Simcoe County’s “substantive rights”.

[26] Mr. Green notes that when transitioning from old to new or from existing to amended legislation, issues of fairness with those who have matters that are underway at the time the new or amended legislation comes into force are often raised. In unclear situations, such as in this case, one looks to the *Legislation Act*, S.O. 2006, c. 21, Sched. F, as follows:

> 52 (1) This section applies,
> (a) if an Act is repealed and replaced;
> (b) if a regulation is revoked and replaced;
> (c) if an Act or regulation is amended
> …
>
> (3) Proceedings commenced under the former Act or regulation shall be continued under the new or amended one, in conformity with the new or amended on as much as possible.
>
> (4) The Procedure established by the new or amended Act or regulation shall be followed, with necessary modifications, in proceedings in relation to matters that happened before the replacement or amendment.

[27] As provided by the above and reiterated by Justice Conway of the Superior Court of Justice, in *Alymer Packers Inc. v. Ontario*, 101 O.R. (3d) 277 (“*Alymer*”), procedural matters “are presumed to have immediate effect at common law and by s. 52(4) of the *Legislation Act*, 2006”. Justice Conway states in para. 14 of *Alymer*:

> For the rule of immediate application to apply, a provision must be purely procedural – it must not interfere with a substantive right or liability of the parties or produce other unjust results.

[28] Mr. Green submits that the question to be addressed in this particular circumstance is whether the amendment to the ARA should be applied immediately or retrospectively. He submits the general test is whether the new legislation affects procedural matters or substantive rights. In his view, the amendment to the ARA affects Simcoe County's substantive rights and should not be applied retrospectively.

[29] Mr. Green cited *CIBC, supra*, where Justice Perell dealt with the question of the proper interpretation of amendments to legislation and their impact on ongoing matters, as follows:

> [84] Where a statute affects substantive rights, it shall not apply retrospectively unless the statute expressly or by clear implication provides that it shall apply retrospectively…
>
> […]
>
> [86] Under the rule about substantive rights, a statute taking away a right of action shall not be presumed to have a retrospective affect…
>
> [87] In contrast to the rule about substantive rights, where a statute is purely procedural; i.e., it affects only the procedure and practice of the courts and does not affect substantial rights, there is a presumption that the statute shall apply retrospectively…

Mr. Green submits that the right of a municipality to charge a quarry operator a fee for delivering its product to market is a substantive right, not a procedural one, and one that should not be applied retrospectively to a hearing that is already underway. Mr. Green bolsters this contention with the support of three rulings.

[30] The first is from the Divisional Court's decision in the leave application in relation to the limitations put on Simcoe County's status in the current matter *(Simcoe (County), supra)*, where Justice Spies stated that denying Simcoe County and Adjala-Tosorontio a full hearing on all aspects of the Haul Route issue "constituted a denial of procedural fairness and natural justice."

[31] The second is *Giofam Investments Inc. v. Kawartha Lakes (City)*, [2017] O.M.B.D. No. 745 (File No. PL140201), ("*Giofam*"). In its decision, the Board ordered the operator of a quarry (Giofam) in the City of Kawartha Lakes to negotiate a maintenance fee to be paid by Giofam to Simcoe County for the use of its roads. In that case, the Board determined that Simcoe County had a right to ask for such a payment and stated:

> [37] The question here is whether it is also necessary and incidental to the Board's powers to ensure that an adequate haul route exists for the lifetime of the proposed project by way of a condition requiring a contribution to the maintenance and repair necessitated as a result of the use of the haul route by Giofam. The Board finds that the answer to this question must be in the affirmative. A project with a lifetime of approximately 94 years, using some of the heaviest vehicles on the road, will result in the need for increased maintenance and repair. It is reasonable and in the public interest to ensure that Giofam contributes toward the maintenance and repair of these roads.

[32] Giofam sought leave to appeal the Board's decision at the Divisional Court (*Giofam Investments Inc. v. Simcoe (County)* 2018 ONSC 3923 ("Giofam Div. Court Decision")). In denying leave, Justice Sosna stated:

> [88] There was specific and uncontradicted evidence before the OMB that heavy trucks – like those serving Giofam's facility – cause disproportionate wear and tear on Simcoe's roads. …
>
> […]
>
> [105] The OMB carefully reviewed and considered its jurisdiction to withhold its final order on Giofam's licence, to allow the parties to determine the equitable share that each should bear for the Haul Route's direct repair and future maintenance.

[33] In para. 107 of the decision, Justice Sosna noted that the OMB reviewed policy to "provide insight into the legislative objective of getting private operator's product to market over infrastructure that [the municipality's] taxpayers are required to maintain".

[34] Mr. Green contends that in this current case, minutes of settlement (December 2018 MOS) were entered into permitting Simcoe County roads to be used. He submits

that Simcoe County entered into the December 2018 MOS on the basis of, and in reliance upon, the law as it then stood. Mr. Green submits that the removal of the right to claim a maintenance fee in the amended ARA should not affect Simcoe County's substantive right to make its case for a maintenance fee on behalf of its taxpayers in this Phase 2 hearing.

[35] The fact that the Province has chosen to, in the future, remove this right from a municipality should not affect Simcoe County's application to the Phase 2 hearing in this case.

[36] Mr. Green notes that if the Tribunal had delivered its decision on Phase 1 earlier than seven months after the hearing, or if the Applicant's counsel had replied promptly to Simcoe County's request to set a date for the Phase 2 hearing, the matter would have been dealt with before the amendments to the ARA became law.

[37] Mr. Green asserts that Simcoe County's substantive right to continue the hearing to determine the maintenance fee cannot be taken away by the amendments to the ARA based on the case law noted above and the principles of fairness.

Arbour Farms' Position

[38] Ms. Mullin submits that, as noted by the Supreme Court in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, ("*Rizzo & Rizzo*"), the modern rule of statutory interpretation requires that the words of a statute be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament."

[39] She submits that if one applies the modern principles of statutory interpretation it is clear that the intention of the Legislature in amending s. 12 of the ARA is to prevent

the Tribunal from requiring applicants for licences to contribute to the cost of ongoing maintenance and repairs of haul routes.

[40] Ms. Mullin submits that the Tribunal no longer has jurisdiction to require aggregate operators to pay fees for the maintenance of haul routes. Subsection 12(1.1) applies in this matter, since there has been no decision by the Tribunal on the issue of payment of the maintenance fee, which is the test established by s. 12(1.2), to determine whether s. 12 (1.1) applies. She submits that as a matter of law and fairness, the Tribunal should not hold the Phase 2 hearing and should instead direct the Minister to issue the licence.

[41] Ms. Mullin disagrees with Mr. Green's position that the amendments to the ARA should not be applied in this circumstance because it affects a substantive right of Simcoe County to argue for a maintenance fee. She does agree that there is a presumption against applying legislative amendments retroactively or retrospectively; however, it is her view that the presumption can be rebutted on the basis of the language of the amendments to the ARA.

[42] Ms. Mullin cited *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [1975] S.C.J. No. 116 ("*Gustavson*") in para. 11, which states that an amendment to legislation "may provide that it is to be operative with respect to transactions occurring prior to its enactment." In those instances, the legislation operates retrospectively.

[43] Ms. Mullin notes that s. 12 (1.2) of the ARA clearly says that s. 12 (1.1) of the ARA "applies to an application in respect of which no decision has been made by the Minister or the Local Planning Appeal Tribunal…" The language of the amendment indicates that even if a hearing on the merits has already been held, the amendment applies and no maintenance fee can be ordered if there has been no decision by the Tribunal. Retrospective application of the amendments is clearly contemplated by the

amendment to the ARA, therefore, the presumption against the retrospective application of the amendments is rebutted.

[44] Ms. Mullin notes that it is clear by the language of the amendments that if a hearing on the merits with regard to the maintenance fee had taken place and the Tribunal had not yet issued a decision, Arbour Farms could have claimed the benefit of this amendment. No hearing on the maintenance fee has occurred, nor has there been a decision by the Tribunal.

[45] Ms. Mullin submits that even if the presumption against retrospective application were to apply, she contends that Simcoe County has no vested right to a maintenance fee. She notes that the principle against retrospective or retroactive application of legislation is closely associated with the principle or presumption against interference with vested rights, which has long been accepted in Canadian law as noted in *Dikranian v. Québec (Attorney General)*, [2005] 3 S.C.R 530 ("*Dikranian")* at para. 32.

[46] *Dikranian, supra*, at para. 37, provides criteria for recognizing vested rights and states that vested rights arise when (1) the legal situation is tangible and concrete rather than general and abstract, and (2) the legal situation is sufficiently constituted at the time of the new statute's commencement. Further, vested rights must have inevitability and certainty, must have crystallized and cannot be conditional on certain events (para. 30).

[47] Ms. Mullin went on to clarify that vested rights are also distinguishable from "mere hopes or expectations" that something might occur, as is articulated in *Niagara Escarpment Commission v. Paletta International Corp*, [2007] O.J. No. 3308 CarswellOnt 5521 ("*Paletta*") at paras. 47-48;

> At most, Paletta had a hope or expectation that its application might be approved by the Board, ... This would invariably be conditional on the payment of compensation to tenants. The Privy Council held that the applicant had no accrued right to a rebuilding certificate nor a right to

> vacant possession of the premises under the repealed legislation. At most, he had a hope of a favourable decision at the time of the legislative change. Moreover, he had no right to have the application procedure continue. The Privy Council adopted the following statement from the Appellate Division:
>
> > It is one thing to invoke a law for the adjudication of rights which have already accrued prior to the repeal of that law; it is quite another matter to say that, irrespective of whether any rights exist at the date of the repeal, if any procedural step is taken prior to the repeal, then, even after the repeal the applicant is entitled to have that procedure continued in order to determine whether he shall be given a right which he did not have when the procedure was set in motion.
>
> As Robertson J.A. observed in *Apotex Inc. v. Canada (Attorney General)* (1993), [1994] 1 F.C. 742 (Fed. C.A.), at 772, aff'd [1994] 3 S.C.R. 1100(S.C.C.) at para. 56:
>
> > If a decision-maker has an unfettered discretion which he or she has not exercised as of the date a new law takes effect, then the applicant cannot successfully assert either a vested right or even the right to have the decision-maker render a decision. This is the ratio of the Judicial Committee of the Privy Council in *Director of Public Works v. Ho Po Sang* …. [i]n that case, the court distinguished a "vested right" from a "mere hope or expectation" and determined that an applicant for a re-building permit had only a mere hope or expectation that the permit would be granted at the time that repealing legislation came into force.

[48] Ms. Mullin notes that Simcoe County's assertion that the amendment does not apply in this case because it had a vested right to a maintenance fee is premised on two factors:

1) that Simcoe County was entitled to a maintenance fee, based on the *Giofam* decision; and

2) that the Tribunal had already made a decision that Simcoe County was entitled to a maintenance fee in this current case.

[49] With respect to the first factor, Ms. Mullin asserts that the *Giofam* decision determined that a municipality could request and the Tribunal could require that a party

pay a maintenance fee. In her view, the *Giofam* decision simply determined the legality of maintenance fees, it did not establish that Simcoe County should receive a maintenance fee in the current case. That determination was to be made in the Phase 2 hearing.

[50] With respect to the second factor, it is Arbour Farms' position that the Tribunal did not decide that Simcoe County was entitled to a maintenance fee. She notes that Vice-Chair Conti could not have made a determination about entitlement to a maintenance fee because no evidence was presented on that issue at the January 2019 hearing. Evidence about entitlement to a maintenance fee was to be heard at the separate Phase 2 hearing, and there is no inevitability or certainty that, at the Phase 2 hearing, the Tribunal would decide Simcoe County was entitled to a maintenance fee. In her view, Simcoe County's position that a decision to grant a payment had been made is grounded in nothing more than some imprecise language in the August 30, 2019 Tribunal decision for Phase 1.

[51] Accordingly, it is Arbour Farms' view that Simcoe County does not have a vested right to a maintenance fee. As the Supreme Court of Canada noted in *Gustavson, supra*, at para. 15, "[n]o one has a vested right to continuance of the law as it stood in the past" as follows:

> Second, interference with vested rights. The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction: *Spooner Oils Ltd v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629, 638. The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective or prospective in operation. A prospective enactment may be bad if it affects vested rights and does not do so in unambiguous terms. This presumption, however, only applies where the legislation is in some way ambiguous and reasonably susceptible of two constructions. It is perfectly obvious that most statutes in some way or other interfere with or encroach upon antecedent rights, …. No one has a vested right to continuance of the law as it stood in the past; …

[52] Arbour Farms contends that, at most, Simcoe County had a “mere hope or expectation” that the Tribunal would agree that it was entitled to a maintenance fee as a result of the Phase 2 hearing.

Findings

[53] Simcoe County’s position rests on two main points – firstly that the amendments to s. 12 of the ARA are ambiguous in relation to a case such as this where “part” of a decision has been made; and when one considers the *Legislation Act* and *Alymer, supra*, the amendment should not be applied because it results in an unfair or absurd result. Secondly, the amendment should not be applied retrospectively because it impacts the substantive right of Simcoe County to continue to Phase 2 of the hearing and to collect a maintenance for the use of its roads.

[54] Ms. Mullin contends that the words of the transition provision s.12 (1.2) of the amendment are clear – if a decision has not been made by either the Tribunal or the Minister, the amendment to s. 12 (1.1) applies, which deprives the Tribunal from having regard to ongoing maintenance and repairs to address road degradation that may result from proposed truck traffic to and from the site. She also disputes Simcoe County’s contention that it has a vested right (or a substantive right) to a maintenance fee.

[55] The parties both agree that the “decision” referenced in the transition provision, provided below, is the decision regarding the maintenance fee.

> (1.2) Subsection (1.1) applies to an application in respect of which no decision has been made by the Minister or the Local Planning Appeal Tribunal, as the case may be, ... [emphasis added]

[56] Mr. Green is of the view that there was at least a part decision given by the Tribunal by December 10, 2019, which is that a maintenance fee is to be set; therefore, the Tribunal can continue the hearing and decide the maintenance fee issue.

[57] By contrast, Ms. Mullin asserts that the Tribunal never made such a decision. The decision from the Phase 1 hearing did not address the question of whether the fee was required, or what the amount should be. The Tribunal specifically noted that it would withhold its final order on the ARA licence until the "issue of payment to be made by the Appellant to the County has been resolved." She notes that the issue was to be resolved through the Phase 2 hearing.

[58] In order to determine whether a "decision" has been made, the Tribunal looks to para. 38 of Vice-Chair Conti's decision:

> [38] Furthermore, the Tribunal finds that the proposed license application is acceptable and the license should be issued subject to the provisions and conditions contained in the Site Plan. The Tribunal will withhold its final order directing the Minister to issue the license until it is informed by the parties that the outstanding matter regarding the payment to be made to the County of Simcoe has been resolved. [emphasis added]

[59] The "outstanding matter regarding the payment to be made to the County of Simcoe has been resolved" is the Phase 2 of the hearing. As was agreed in the December 2018 MOS,

> (c) the Phase 2 hearing will consider the following issues:
> i. whether Arbour Farms should be required to make a payment to Simcoe relating to the maintenance of roads used as a haul route within Simcoe County; and
> ii. If the answer to (i) is yes, the appropriate amount of such payment.

[60] There is no dispute that the hearing that was held on January 21, 2019 was the Phase 1 hearing that settled the issues amongst all the parties; with the exception of the maintenance fee which was to be dealt with in Phase 2. Mr. Green asserts that the Tribunal had already made a determination that Simcoe County was entitled to a maintenance fee. However, the Tribunal cannot accept this assertion, as the language from the decision of Vice Chair Conti in para. 38 above does not indicate that such a determination has been made. As noted by Ms. Mullin, such a determination could not

have been made, as there was no evidence provided during the Phase 1 hearing in relation to the maintenance fee issue upon which such a determination could be made.

[61] The jurisprudence (including *Rizzo & Rizzo, supra*) directs the Tribunal to apply the ordinary meaning of the words of the legislation. In this situation, the transition provision states that if no decision has been made, then the amendment to s. 12 applies. The amendment is as follows:

> (1.1) Despite clause (1)(h), the Minister or the Local Planning Appeal Tribunal shall not have regard to ongoing maintenance and repairs to address road degradation that may result from proposed truck traffic to and from the site.

[62] It is clear to the Tribunal that no decision has been made as of yet with respect to the requirement for a maintenance fee or the amount of such a fee. Therefore, the plain reading of the legislation that states that "if no decision has been made" then the transition clause applies. The transition clause directs the Tribunal to the amendment, which prohibits the Tribunal from considering a maintenance fee when considering whether or not to direct the Minister to issue a licence.

[63] Phasing, indeed, can complete some portions of a proceeding, and provide decisions on some instruments. Clearly, in this case, the OPA and the ZBLA were approved in the Phase 1 settlement hearing under the *Planning Act*. The decision has been made on those instruments. However, the decision for the Tribunal to direct the Minister to issue the aggregate licence, as requested in the Application, has not been made. It was phased to await the outcome of Phase 2.

[64] The Tribunal agrees with Ms. Mullin's submission that the settlement reflected in the December 2018 MOS negotiated and signed between Arbour Farms and Simcoe County was clear. The purpose of the Phase 2 hearing was to determine the narrow issue of whether Arbour Farms should be required to pay the maintenance fee, and if so, how much. The Tribunal agrees with Arbour Farm's conclusion that there was never

any agreement that Arbour Farms would pay the fee, and the wording of the settlement contemplated that the result of the Phase 2 hearing could have been that the maintenance fee was not required.

[65] In Simcoe County's view, it is entitled to a maintenance fee; however, it is clear by the facts of the case that evidence and findings on that issue was not presented to the Tribunal and was not adjudicated upon. Contrary to Mr. Green's assertions, the Tribunal has no evidence that the Tribunal had made a determination that the County was entitled to a maintenance fee. As noted by Ms. Mullin, the Tribunal could not have made a decision in this regard, as there was no evidence proffered in relation to this issue.

[66] Mr. Green contends that because the transition provision does not address a "part" decision, it is ambiguous. The Tribunal does not agree with this proposition. The words in the transition provision are not ambiguous and can be applied to this matter. It is clear to the Tribunal that no decision has been made in relation to any part of Phase 2; as Phase 2 has yet to be addressed by the Tribunal, as is described above.

[67] Additionally, the Tribunal looks to the intent of the amendments to the ARA. It is clear that the intent of the amendments is to remove the Tribunal's authority to require a maintenance fee when considering whether a licence should be issued. That is not to suggest that a proponent may not offer to provide a maintenance fee in certain cases, such as this one, where roads of an adjacent county are part of the haul route. As was explained to the Tribunal, in this case, no revenue from fees collected by The Ontario Aggregate Resources Corporation ("TOARC") will accrue to Simcoe County; which is the concern raised all along by Simcoe County in this matter. However, by the clear words of the amendments to s. 12 of the ARA, the Tribunal no longer has the authority to require an operator to pay a maintenance fee for the degradation of roads related to the use of the haul route.

[68] Next, the Tribunal looks to the arguments put forward by Simcoe County that the amendment cannot be applied retrospectively because it will affect Simcoe County's substantive right to charge an operator located in an adjacent municipality a fee to account for the wear and tear of its roads, given that Simcoe County would not receive any TOARC fees from that operator.

[69] Mr. Green complains that the delay in getting the decision in Phase 1, combined with the delay in getting a response from Arbour Farms to set the Phase 2 hearing, impact the substantive right of Simcoe County to have Phase 2 – the maintenance fee portion of the hearing – continue.

[70] Without ruling on whether Simcoe County's right to continue to the Phase 2 hearing to determine the maintenance fee is a substantive right, the Tribunal looks to the case law to assess the reasonableness of Simcoe County's position.

[71] The question the Tribunal must consider is whether the right to a maintenance fee had crystallized by the time the amendments were in force. As stated by the court in *Dikranian*, *supra*, at para. 37 – "the situation must be tangible and concrete rather than general and abstract; and this legal situation must have been sufficiently constituted at the time of the new statute's commencement."

[72] The Tribunal concludes that no – the entitlement to a maintenance fee had not crystallized by the time of the amendments – it was merely a prospect that was to be determined in Phase 2. The Tribunal's determination that Arbour Farms should pay a maintenance fee to Simcoe County remained a mere "hope or expectation". The decision that a maintenance fee should be ordered by the Tribunal has not been made yet. Vice-Chair Conti did not decide that a maintenance fee must be ordered – he only provided in his Phase 1 decision that it remained to be adjudicated in Phase 2.

[73] The Tribunal looks to the following extract provided from *Paletta, supra*, “If a decision-maker has an unfettered discretion which he or she has not exercised as of the date a new law takes effect, then the applicant cannot successfully assert either a vested right or even the right to have the decision-maker render a decision.” The Tribunal finds the current situation to fall exactly within those parameters. The Phase 2 portion of the hearing has not commenced, and as such, Simcoe County has no vested right to the determination of a maintenance fee nor the right to the continuation of the hearing.

[74] The Tribunal is a creature of statute. The interpretation of legislation leads to the finding that this is exactly what the legislation intends – to remove the jurisdiction of the Tribunal to require a maintenance fee for the use of a haul road. Simcoe County may view the outcome as unfair; however, the statute is clear in restricting the Tribunal’s jurisdiction in this regard.

January 2018 MOS and HRRA

Simcoe County’s Position

[75] Mr. Green asserts that if the Tribunal should decide that Simcoe County has lost the right to apply for a maintenance fee, the consequence of that determination should be that the Tribunal should allow Simcoe County the opportunity to re-open the agreement that was reached in the January 2018 MOS. Mr. Green explained that during negotiation for that settlement agreement, Arbour Farms insisted that neither Simcoe County nor Adjala-Tosorontio would argue the validity of the HRRA. Simcoe County asserts that it gave up the opportunity to argue the validity of the HRRA and to have a hearing on whether the potential Dufferin haul route is the preferable route in all of the circumstances, with the understanding that it would have the ability to argue for a maintenance fee. Mr. Green submits it is unfair for Arbour Farms to now take

advantage of its benefit under that agreement and deny Simcoe County what it bargained for.

[76] Mr. Green states that “it was never considered that the proposed amendments would affect the decision in this matter which was already before LPAT in a situation where the first part of the hearing had been held and the portion relating to a County maintenance fee had been adjourned.”

Arbour Farms’ Position

[77] Arbour Farms contends that it would be highly inappropriate to allow Simcoe County to reopen the January 2018 MOS, particularly since the other parties to the January 2018 MOS and the HRRA are not currently before the Tribunal.

[78] Ms. Mullin asserts it is also inappropriate for Simcoe County to attempt to “go behind” the language of the January 2018 MOS or to rely on without prejudice communications to suggest its motivation for settling, and in any event, in her view the motivation is irrelevant – what matters are the terms to which the parties agreed.

[79] Ms. Mullin submits that Simcoe County’s argument in this respect amounts to no more than this: Simcoe County entered into an agreement in 2018 based on a set of legislative circumstances. The legislative circumstances have now changed, so Simcoe County should be relieved of its agreement. She submits this position is untenable.

Findings

[80] The position of Simcoe County was well known from early on in this dispute. Simcoe County objected to the private arrangement that resulted in the HRRA that directed pit traffic onto Simcoe County roads. The County set out to offset the impacts to its roads by negotiating a maintenance fee for their use.

[81] Arbour Farms resisted and this issue was ultimately put off to Phase 2. The ARA legislation has now been amended; denying Simcoe County the opportunity to argue the maintenance fee. Now, by this motion, Arbour Farms refuses to address the second part of that deal.

[82] In Mr. Green's view, by consequence of losing the right to ask for a maintenance fee, the Tribunal should permit Simcoe County to open up the January 2018 MOS and review whether it should be able to argue the validity of the HRRA and an appropriate haul route.

[83] What Simcoe County is requesting the Tribunal allow is for Simcoe County to go back in time so that it can adjust its negotiation tactics that lead to the January 2018 MOS. This line of argument is based on the premise that Simcoe County would have done things differently if only they had known that the Province would have responded by amending the ARA legislation to remove the right to a maintenance fee that was previously legal by the legislation and re-iterated by *Giofam*.

[84] The Tribunal is of the view that if it permitted reaching back in time to modify one's tactics or strategy for negotiation in response to changed circumstances, nothing would ever have finality. The Tribunal will not countenance such an approach that allows a party to adjust a position previously agreed upon in a settlement, in this case the agreement that lead to the January 2018 MOS. Following that settlement, was the agreement reflected in the December 2018 MOS, which ultimately lead to the settlement hearing on January 21, 2019. The decision of Vice-Chair Conti in Phase 1 of this matter, issued August 30, 2019, arose from the Phase 1 hearing and stands - the OPA and ZBLA are approved. The Tribunal finds that there is no basis and it is inappropriate to re-visit any of the previous agreements or orders that have been made in this matter.

[85] The Tribunal finds that no hearing on Phase 2 of the matter has yet been convened, and the Tribunal finds that no decision has been made in respect of Phase 2.

Conclusion

[86] In this motion hearing, Arbour Farms requests an Order of the Tribunal determining that the effect of recent amendments made to s. 12 of the ARA are that the Phase 2 hearing on this matter is no longer required, and that the Tribunal should direct the Minister of MNRF to issue the Class A licence under the ARA to permit a sand and gravel pit operation on the subject lands.

[87] As described above, the Tribunal has determined that no decision has been made in Phase 2 of this matter, and therefore the transition provision s. 12 (1.2) of the amendment applies. This transition provision directs that s. 12 (1.1) applies. This amendment of the ARA prohibits the Tribunal from having regard to ongoing maintenance and repairs to address road degradation that may result from proposed truck traffic to and from the site when considering whether a licence should be issued or refused. This is the precise issue that the Tribunal was to consider during Phase 2 of this matter. Due to the amendments to the ARA, the Tribunal no longer has jurisdiction to consider a maintenance fee when considering whether a licence should be issued. Therefore, given that Phase 2 was to consider this issue, there is no longer any issue before the Tribunal to adjudicate. As noted by Ms. Mullin, and agreed by the Tribunal, there is no point to continuing to Phase 2.

[88] In Vice-Chair Conti's decision issued on Phase 1 on August 30, 2019, he stated in para. 38:

> [38] Furthermore, the Tribunal finds that the proposed license application is acceptable and the license should be issued subject to the provisions and conditions contained in the Site Plan. The Tribunal will withhold its final order directing the Minister to issue the license until it is informed by the parties that the outstanding matter regarding the payment to be made to the County of Simcoe has been resolved.

[89] Vice Chair Conti determined the proposed licence application was acceptable and should be issued, but withheld the final order pending the outcome of Phase 2. By this motion, this panel of the Tribunal has determined that Phase 2 is no longer within the Tribunal's jurisdiction to order. Therefore, this panel of the Tribunal directs the Minister to issue the licence subject to the provisions and conditions contained in the Site Plan provided to the Tribunal in the Phase 1 hearing of this matter.

ORDER

[90] The Tribunal allows the motion by Arbour Farms and directs the Minister to issue the Class A licence for a sand and gravel pit on the subject lands as described in the Tribunal's Order issued August 30, 2019, under File No. PL150119.

[91] The Tribunal may be spoken to if there are issues in implementing this order.

"Helen Jackson"

HELEN JACKSON
MEMBER