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

ISSUE DATE: December 18, 2018 **CASE NO(S).:** PL160719

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 41(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Referred by:	Laurier Goulet and Florence Goulet
Subject:	Site Plan
Property Address/Description:	Mining Claim P-24983, Parcel 11515, SEC SS
Municipality:	City of Timmins
OMB Case No.:	PL160719
OMB File No.:	PL160719
OMB Case Name:	Goulet v. Timmins (City)

Heard: December 4 to 8, 2017 in Timmins, Ontario

APPEARANCES:

Parties	**Counsel*/Representative**
The City of Timmins ("City")	Kim Mullin*
Laurier Goulet and Florence Goulet ("Appellants")	Andre Goulet

DECISION DELIVERED BY DAVID L. LANTHIER AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] The Appellants made application for a Site Plan Control Agreement

("Application") to the City in order to permit the operation of a commercial sand, and gravel, operation ("Pit") on their lands located on the north side of the Mattagami River in the Township of Ogden Township, in the City of Timmins. As the City is not a designated municipality for the purposes of the *Aggregate Resources Act*, the provisions of that legislation do not strictly apply and the Ministry of Natural Resources and Forestry was therefore not responsible for this type of private land application. The Site Plan application was accordingly considered by City Council (following consultation with other external agencies as discussed in this decision).

[2] City Council considered the Appellants' Application on March 21, 2016 and again on June 27, 2016, when the application was refused. The Appellants appealed that decision to the Ontario Municipal Board ("Board"), as it then was, pursuant to s. 41(12) of the *Planning Act* ("Act").

[3] The prior Pre-hearing Conference ("PHC"), and the four-day hearing of the appeal between December 4 and December 8, 2017, were conducted by the Board. On April 3, 2018, the *Local Planning Appeal Tribunal Act, 2017* ("LPATA") was proclaimed in force, which provides that the Board will be continued as the Local Planning Appeal Tribunal (the "Tribunal"). This Decision, as it is now issued, occurs subsequent to the proclamation of LPATA, and accordingly the proceeding is continued under the jurisdiction of the Tribunal. Any reference to the Tribunal in this Decision is therefore deemed to also be a reference to the Board as it then presided over the four day hearing of the appeal, prior to proclamation.

HEARING AND WITNESSES

[4] At the outset of the hearing, the Tribunal was advised that the counsel that had previously been retained by the Appellants had withdrawn as their solicitor of record. Mr. Andre Goulet, the son of the Appellants advised the Panel that he would be representing his parents, and conducting the hearing on their behalf. The Appellants confirmed their agreement to this arrangement for representation.

[5] In the course of the hearing, the Appellants called five Witnesses, who were, where indicated, qualified by the Tribunal to provide expert testimony in their respective fields:

1. Dwight Eide, who was qualified to provide expert testimony on pit and quarry Applications and natural resource management;

2. Jean Jacques, a Forestry Technical Specialist with the Ministry of Natural Resources and Forestry appearing under summons;

3. David Vallier, General Manager of the Mattagami Region Conservation Authority appearing under summons;

4. Randall Pickering, a retired District Manager, who was qualified to provide expert testimony in the area of natural resource planning and management; and

5. Cindy Welsh, the Manager of Planning at the City of Timmins, who was qualified to provide expert testimony in the area of land use planning.

[6] The City called five Witnesses:

1. Janet Amos, who was qualified as an expert to provide testimony in the area of land use planning;

2. Paul Kirby, an engineer who was qualified as an expert to provide testimony in the specialties of environmental assessments, noise and vibration studies and noise mitigation;

3. Mike Jones, who was qualified to provide expert testimony in the subject matter of hydrogeology;

4. Chris Parent, a biologist qualified an expert in the specialty fields of wildlife biology and conservation of species at risk; and

5. Billy Singh, an engineer qualified in the speciality of geotechnical engineering, and specifically slope stability and streambank erosion.

[7] Five people requested, and were granted, Participant status for the purposes of the hearing, without objection from the parties. All of the Participants were residents in the vicinity of the Site:

1. Brad Sloan,

2. Robert Jones,

3. Carlos Aguiar,

4. Angela Aguiar, and

5. Catia Carrier.

[8] For the purposes of disclosure and transparency, the Panel Member confirmed that Mr. Sloan was personally known to him, as a former member of the Cochrane District legal community, in the sense only of professional familiarity. There were no concerns or objections voiced to the Panel, and Mr. Sloan's testimony was accordingly received in conjunction with the other Participant residents of Baker Lake.

ISSUES

[9] The issues in the hearing had been identified through the course of the PHC process, as prepared by the City, and the Tribunal had before it the Issues List prepared initially with the Appellant's former counsel, and then filed as Exhibit 17 in the hearing. The Appellants confirmed the form of the Issues List. As the evidence was introduced,

and the issues evolved through the course of the hearing, the Tribunal identified the following areas to be the subject matter of examination in determining whether or not the proposed aggregate Pit, as enabled through the site plan agreement, would be appropriate and represent good planning:

1. Slope Stability and bank erosion hazards;

2. Noise and noise impacts on the nearby residents;

3. Surface and ground water quality; and

4. Wildlife and species at risk.

[10] It should be noted that the entirety of the hearing was conducted, and based on, the Site Plan Application that had been submitted to the City and the issues list that has been presented to the Tribunal through counsel based on the issues raised by the Appellants in their Appeal. Rather surprisingly, it was not until closing argument on the final day of the hearing, that the Appellants indicated to the Tribunal that it had never been their intention to open an aggregate pit, and instead, as they always wanted, they now requested that the Tribunal consider approving a rezoning of the lands in question to allow for the construction of a residence on the Site. The Tribunals response to this very unusual positioning of the Appellants in closing argument (apparently rooted in a proposed residential use that preceded the aggregate application), is addressed at the conclusion of this Decision.

PHYSICAL AND PLANNING CONTEXT

[11] Ms. Amos, the Planner for the City, was the first witness to testify in accordance with the Procedural Order, for the purposes of providing non-contested contextual evidence with respect to the lands and the Application.

[12] The legal description of the lands owned by the Appellants confirms that the

whole of the property is composed of a patented mining claim part of which extends across to the south and west bank of the Mattagami River. Those parts of the parcel on the other side of the river were not relevant to the issues before the Tribunal. For the purposes of the issues arising in this Appeal, it is of consequence that the Appellants' title to the Site are subject to a reservation in favour of the Crown under the Patent (Exhibit 3, Tab 47) which excludes the strip of land along the Mattagami River (the "River") 200 feet in width extending inwards from the high water mark.

[13] The planning and physical context of the Site, for this hearing, was uncontested for the most part, save and except for the boundary lines of the two zones covering the Site, and some dispute regarding the classification of the proposed industrial use of the Site. The Site (being the portion of the parcel of land on the north and east side of the river) can be described as a peninsula of sorts, comprised of an irregularly shaped area that is, in part, created by the River as it flows along and around the west and south boundaries of the property. The west and south boundary of the site is thus formed by the undulating shoreline of the River, and the north and east boundary are the plotted points of the mining Claim, all of which is laid out in a number of the various exhibits (Exhibits 1, 5 and 16).

[14] The topography of the Site is important. The banks of the Site, along the westerly shore of the River are relatively steep, at 14 to 16 metres ("m"), and the watercourse is in close proximity to the slope of the embankment. The slope is gentler in grade near the middle of the peninsula with a greater slope toe (the area between the waterline and the bottom of the slope) but the slope again becomes steeper and higher (12 to 16 m high) along the southern and easterly section of the River.

[15] The evidence is uncontested that the Site is the subject of restrictions relating to the topography and location, in relation to the high water mark and the 100 Year Flood line. The high water mark is established at 273 m above sea-level ("masl") and the 100 Year Flood line is established slightly higher than that line, being 274.7 masl (Exhibit 3, Tab 47, p. 1013). As was addressed in the evidence, some significant demarcation

lines are based upon the location of the high water mark and the 100 Year Flood Lines, which in turn affect a consideration of the issues relating to the proposed extraction area.

[16] The Site, in the larger context, is located approximately 500 m to the southwest of Baker Lake, on which a number of residents have seasonal or year-round residences – and the origin of the objections from the Participants. The other residential property in proximity to the Site is the residence on the shoreline to the immediate east of the east boundary of the Site (occupied by the Participant Ms. Carrier).

[17] The Site is within the Resource Development Area designation under the City's Official Plan ("OP"), as well as Mineral Development Zone. The property is zoned as Hazard (RD-HAZ) and Rural (RD-RU). The exact location of the boundary between these two zones is subject to some difference of opinion. This is relevant because an aggregate operation is permitted in the Rural zone but not in the Hazard zone.

[18] How the proposed operation would be classified as an Industrial Use was also a central issue in the hearing, as discussed below.

THE HISTORY OF THE PROPOSAL AND SITE PLAN APPLICATION PROCESS

[19] As the City of Timmins, in northern Ontario, is not designated as an applicable municipality to which the provisions of the *Aggregate Resources Act* apply, private aggregate pit operation applications are received by the City and approved by Council, requiring compliance with processes similar to those used by the Ministry of Natural Resources and Forestry ("MNRF") In this case the City utilized a process similar to a Category 9 Site application, which would ordinarily apply for an aggregate pit located on Crown land above the water table.

[20] The documentary evidence and testimony accounts for the Appellants' application for a Site Plan Control Agreement which would allow for the Site to be used for a commercial aggregate sand and gravel operation (which apparently followed an

earlier request to use the Site for residential use. Mr. Eide, through his consulting business Terra Technical Services Ltd. assisted the Appellants in assembling the required studies and coordinating the application requirements with the City of Timmins. The Application proposed an extraction area of 7.898 hectares ("ha") (or approximately 19.5 acres ("ac")) and proposed layout that was set out in a drawing appended to the proposed Site Plan Agreement, which was filed as Exhibit 1 in the hearing. The Technical Report that was provided by the Appellants was dated August 2014 and revised in June 2014 (Exhibit 3, Tab 47).

[21] Ms. Welsh, as the Senior Planner for the City, assumed responsibility for preparing the reports to Council, and prepared the initial Administrative Report in March of 2016 recommending the approval of the By-law that would result in the Site Plan Control Agreement ("Agreement"). This followed the assembly and review of the requested studies and the receipt of unsolicited input from concerned residents of the area. The consideration of the proposed Agreement was deferred and although not required for a Agreement, public consultation occurred in the spring of 2016. After some amendments to the Agreement, Ms. Welsh prepared a second report in June of 2016, again recommending the approval of the Agreement. Despite the recommendation, the motion for the by-law to approve the Agreement was defeated on June 27, 2016 without reasons.

POSITION OF THE PARTIES

[22] The Appellants submit that they, with the assistance of a number of consultants, satisfied all of the requirements imposed by the City and modified and addressed all concerns as they were raised, which resulted in a firm recommendation of the Agreement by the City planning staff. On the evidentiary record and information assembled for the City, the Appellants submit that the Agreement has regard for the relevant provisions of the Act, is consistent with the Provincial Policy Statement 2014 ("PPS"), "maintains the general intent and purpose of the OP", is consistent with the requirements of the City's comprehensive zoning by-law and Site Plan Control By-law,

and is good land use planning. Specifically, the Appellants submit that the use of the lands for the aggregate operations is compatible with surrounding land uses and there is no reason to reject the Application. The Appellants argue that the City has, after the fact, expended large sums of money to retroactively validate the refusal of the Application, and in fact, there was, and is, no reason to reject the Application. Despite the alternative request voiced during closing argument, the presentation of the Appellants' case, and evidence, advocated the approval of the Agreement by the Tribunal.

[23] The City's position is that despite the efforts of the Appellants, the studies and analysis of the Application were flawed in many respects through the Application process, and was an Application that "fell through the cracks". The proposed extraction area, relative to the constraints of the site and its geographical and physical context of the surrounding area, simply does not support an aggregate operation at this location and there were, at various steps in that process a failure to address the serious hydrogeology, environmental, wildlife habitat, noise, compatibility and other planning concerns that could not be addressed.

[24] The City submits that these failings and shortcomings in the analysis, some of which were identified in peer review and agency reviews, were not given proper review and should have been scrutinized by the City staff. These concerns have now been adequately reviewed and assessed by the City's expert witnesses and that evidence, argues the City, supports Council's original decision to deny the Application. For this reason the Appeal should be dismissed.

[25] The Participants, in their testimony, were unanimously opposed to the proposed aggregate operation under the Agreement, supported the position of the City, and requested that the Tribunal dismiss the Appeal.

EVIDENCE, DISUCSSION FRAMEWORK AND ANALYSIS

[26] The Tribunal, in undertaking its analysis of the evidence presented in the hearing

will compartmentalize the evidence into the subject matter study areas as they are related to the various policy and regulatory requirements of the PPS, the provincial legislation and regulations, and the City's planning instruments, and as they were addressed by the witnesses and within the documentary record before the Tribunal.

[27] As for the framework for review, both Ms. Welsh, who testified as to her assessment and review of the Application, and Ms. Amos, who conducted the desktop analysis and review, agreed that the evaluation of the Application necessitated consideration of the Act, consistency with the PPS, conformity (essentially) with the City's OP, consideration for the City's Zoning By-law. In that evaluation process, the City had also addressed those same matters outlined in section 12(1) of the *Aggregate Resources Act* that the Minister or the Tribunal must have regard for when considering the approval of a pit or quarry. It was the opinion of Ms. Amos that it was appropriate for the City to have given consideration to that section of the Act, and that it was also now appropriate for the Tribunal to also give consideration to those same factors in addition to the PPS, and the City's OP and Zoning By-law. Section 12(1) provides as follows:

> 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,
>
> (a) the effect of the operation of the pit or quarry on the environment;
> (b) the effect of the operation of the pit or quarry on nearby communities;
> (c) any comments provided by a municipality in which the site is located;
> (d) the suitability of the progressive rehabilitation and final rehabilitation plans for the site;
> (e) any possible effects on ground and surface water resources including on drinking water sources;
> (f) any possible effects of the operation of the pit or quarry on agricultural resources;
> (g) any planning and land use considerations;
> (h) the main haulage routes and proposed truck traffic to and from the site;
> (i) the quality and quantity of the aggregate on the site;
> (j) the applicant's history of compliance with this Act and the regulations, if a licence or permit has previously been issued to the applicant under this Act or a predecessor of this Act; and

(k) such other matters as are considered appropriate.

The Tribunal accepts this framework of legislative and policy considerations as appropriate for the review of the evidence.

[28] The framework for the analysis of the issues and evidence will accordingly be as follows:

1. It is first necessary to consider the evidence presented with respect to the classification of the proposed operations on the Site as this informs the review and assessment process in a number of ways;

2. Noise and related environmental, mitigation and compatibility concerns including Ministry of the Environment and Climate Change (“MOECC”) (now known as the Ministry of the Environment, Conservation and Parks) compatibility and distance separation guidelines;

3. Slope Stability and related erosion and mitigation measures, including consideration of the Mattagami River Conservation Authority (“MRCA”) regulations;

4. Hydrogeology and watercourses;

5. Wildlife and Fish Habitat and Species at Risk, inclusive of compliance with all MNRF policies and requirements such as the Natural Heritage Reference Manual and other wildlife and habitat guidelines;

6. General Planning Matters not otherwise addressed in the above areas including:

   (i) Consistency with the PPS;

   (ii) Conformity with the City OP;

(iii) Compliance with the City's Zoning By-law;

(iv) Consideration of the factors in s. 12(1) of the *Aggregate Resources Act*;

(v) Good Planning in the public interest.

[29] As an overview observation and finding, which is expanded upon in the analysis of the evidence and various findings set out below, the Tribunal has noted the realities and challenges facing the planning staff of a small northern Ontario municipality such as this one, in addressing an aggregate related application such as the one presented by the Appellants. As is often the case with complex aggregate extraction proposals, the application process and the planning assessment and multi-faceted, multi-disciplinary review processes required to cover all bases and concerns is not insignificant. In some case, planning staff may not have the resources available to address speciality areas and will look to other agencies and consultants for peer review and consultation.

[30] This does not however release the City's staff from completing its ultimate and independent review for consistency, conformity, compliance, and adherence to the many matters to be addressed and satisfied before approval of the Agreement. While the MNRF and the MRCA may undertake such review and assessment at the request of the City, ultimately (as the representatives of such agencies confirmed in their testimony) they do not make the final decision on such matters and it remains for the City's planning staff to ensure that all aspects of the review process have been examined when vetting applications such as the one that came before the City staff in this case.

[31] At the conclusion of the hearing, the Tribunal unfortunately must agree with the submission of counsel for the City that all aspects of the Appellant's proposal were not thoroughly reviewed and crucial and threshold matters "fell through the cracks" and were not addressed when the recommendation was made to Council. Ultimately this has resulted in a number of findings by the Tribunal that the City's review process has failed to scrutinize and deal with specific and important failings in the site plan

application.

[32] Upon the totality of the expert and other evidence now before the Tribunal, it is thus unable to approve the Site Plan and must dismiss the appeal.

CLASSIFICATION OF THE APPELLANTS' PROPOSED OPERATIONS

[33] As the MOECC Guidelines have been established and applied, the classification of the proposed industrial use by a planning authority is critical in determining compatibility and the protection of people and the environment from the nuisance impacts arising from the use of the lands. The MOECC Land Use and Compatibility Guidelines ("MOECC Guidelines") established to implement assessments under the *Environmental Protection Act*, were presented in the evidence and considered by the Tribunal (Exhibit 3, Tabs 20-25) as were the applicable provisions of the Zoning By-law 2011-7100 (the "ZBL") (Exhibit 3, Tab 15).

[34] The process involves the determination of a "Potential Influence Area" ("PIA") and "Minimum Separation Distances" ("MSD"), and a consideration of a number of considerations, including the evaluation of impacts, the appropriateness of setbacks, and required mitigation measures. A PIA definition is detailed but essentially means the area around a facility that is expected to suffer adverse effects from the property's use, such as the loss of enjoyment of normal use of a residence or material discomfort arising from noise, dust, vibrations.

[35] The MOECC Guidelines indicate that for new pit and quarry operations, the influence area is to be determined on a case-by-case basis through appropriate studies such as noise, dust, vibration or hydrogeological studies.

[36] In the D-6 Guidelines, there are three classifications of uses, with differing PIA's, where adverse effects may be experienced, and differing MSD's. The D-6-3 Guideline determine recommended distances between industrial areas and sensitive land uses, which are as follows: for Class I uses a 70 m PIA and a 20 m MSD; for Class II uses, a

300 m PIA and a 70 m MSD; and for Class III uses a 1,000 m PIA is recommended with a 300 m MSD. Sensitive land uses include residential uses. What is notable in the D-6 Guidelines, as explained by Mr. Kirby, is that the D-6 Guidelines, while helpful in assessing types of uses, expressly do not apply to pits and quarries as site specific studies are to be utilized. In the absence of such studies, the PIA's and MSD's for a Class III are to be used and not a Class II.

[37] The City's ZBL also includes standards for minimum distance separations in section 4.26 which are consistent with the MOECC classifications. There is a specific provision in section 4.26.3 applicable to Pits and Quarries which provides that the influence area between a new pit and any sensitive land use is 1,000 m (measured from the zone boundary of the RD-MX Zone or the maximum approved limit of the excavation, whichever is lesser), and the closest property line of the sensitive land use, unless technical studies and or the use of mitigative measures can demonstrate that the MSD can be reduced to 300 m.

[38] At the time that the Appellants filed their Application they did so upon the assumption (arising from Ms. Welsh's communication) that the proposed use was a Class II Industrial use, thus requiring a MSD of only 70 m and a PIA of 300 m. This was based on the definition in the ZBL where Class II Medium Industrial uses include manufacturing where there are periodic outputs of noise, odour, dust or vibration, frequent movement of products or heavy trucks during daytime hours and the outdoor storage of materials such as the "Raw product storage" of aggregates.

[39] The definition of Class III Heavy Industrial uses was not considered applicable by City staff or the Appellants. It refers to businesses with noise, dust or vibrations as part of their normal operations such as mills and refineries which are intended to be secluded from residential or other sensitive land uses in order to limit any potential adverse effects on the environment or surrounding area. The City's Planning Staff, and the Appellants elected not to apply the specific sections of 4.26.3 referred to above (which require the 1,000 m PIA and the MSD of 300 m).

[40] Mr. Eide, whose experiences was in the field of pit and quarry applications and natural resource management, indicates that because he had determined that blasting and drilling would not occur, and crushing operations would occur only occasionally through the year, had accepted the City staff's classification of the aggregate Pit as a Class II Industrial use. Mr. Eide conceded in cross-examination that he had simply assumed the operation would be a Class II Industrial, and that no one had said otherwise to him. When the various provisions of the MOECC Guidelines were put to Mr. Eide suggesting that the operation required a case-specific study or at the very least was a Class III use requiring the greater PIA and MSD, Mr. Eide further conceded that since the Appellants were not asked to do the study, or to consider the proposed Pit operation as a Class III Industrial use, none of this was considered because it was not brought to his attention.

[41] Ms. Welsh confirmed, in her testimony that the Planning Staff had not consulted with the MOECC with respect to the application, and had not considered or required the completion of an appropriate noise/vibration study, or circulated the application or Agreement to the MOECC. Neither had the staff initiated any internal traffic study to be completed to consider the impact of haulage traffic on the same roads used by the nearby residents. Ms. Welsh's report, and her testimony, indicated only that "Noise and dust levels are addressed in the MOECC D-6 Guidelines and other related legislation" and referred to the vegetative buffer and berms and setbacks as the satisfactory mitigation measures, all in the absence of any noise/vibration studies.

[42] The City's position at this hearing is that the aggregate Pit is: (a) a Class III Industrial use; (b) subject to the special Pit provisions in s. 4.26.3 of the ZBL; and/or (c) properly the subject of a properly completed comprehensive and quantitative noise impact assessment. Upon such provisions, the MSD should be not less than 1,000 m PIA or a 300 m MSD.

[43] The only expert evidence received by the Tribunal in this hearing, on this issue, was provided by Mr. Kirby who was of the opinion that the City's Planning Staff, in

preparing their report and making their recommendations, had incorrectly misclassified the proposed aggregate Pit because there was no blasting or mining operation, and thus minimized the industrial consequential effects of the Pit by relying upon only the "storage" of the aggregate and not the operations to extract and not the aggregate extraction or crushing operations. Mr. Kirby's opinion was that in examining the MOECC Guidelines, with the types of proposed operations, the use was properly a Class III industrial use, but in any event, based upon the ZBL itself, required a 1,000 m PIA and a minimum 300 m MSD.

[44] The Tribunal prefers the reasoned analysis and opinion of Mr. Kirby and the City in this hearing, rather than the conclusions reached by the Planning Staff and Mr. Eide on behalf of the Appellants. Cumulatively the Tribunal has considered and accepts, on the evidence: the absence of any consultation or review by the MOECC; the absence of any comprehensive site-specific noise impact assessment anticipated under the MOECC Guidelines; Mr. Kirby's careful review of the industrial categorization criteria and reasoned determination that the industrial uses fit within the Class III Industrial category; the provisions of s. 4.26.3 of the City's ZBL; and the clear and unchallenged reality that there are a number of residences clearly within 1,000 m of the extraction area of the proposed Pit that would be susceptible and sensitive to noise and vibrations determined to exist under a properly completed impact assessment. Cumulatively, this evidence, and these determinations leads the Tribunal to conclude, that the industrial use categorized by the City's Planning Staff, and the Appellants, significantly minimized the industrial character of the proposed use and, in turn, the objectionable nature of the emissions from the proposed operations that would exist in proximity to sensitive residential land uses.

[45] In the absence of the necessary quantitative noise impact assessment, at the very least, the Tribunal would accept Mr. Kirby's opinion that a minimum 1,000 m PIA and a minimum 300 m MSD should be applied to the review of the Appellants' application and the Agreement. This logically impacts the analysis of the evidence and findings in regards to noise, dust and other emissions, and the issues of compatibility

and distance separation.

NOISE, VIBRATION, DUST EMISSIONS, ENVIRONMENTAL COMPATIBILITY AND DISTANCE SEPARATION

[46] The Appellants provided no expert evidence in relation to matters of noise and vibration assessments, or comprehensive quantitative environmental impact studies in relation to emissions that would emanate from the Pit operations. As indicated, in the review process that led to the reports to Council, Ms. Welsh, on behalf of the planning staff, did not circulate the application or the proposed site plan to the MOECC and no such impact assessment was required of the Appellants.

[47] Mr. Pickering, in his testimony, indicated that if this Application had been processed by the MNRF as a pit on Crown lands, the Ministry would have required the completion of a full impact assessment with respect to noise and dust, as it might impact nearby residents including those on Baker Lake. Given that the MNRF had no approval role in this Application it took no steps to consider that this requirement was met, and did not have any role to play in monitoring this issue.

[48] What has been provided within the Appellant's materials was a "Noise Attenuation Technical Study" (Exhibit 3, Tab 47, pp 1007-1010). In cross-examination Mr. Eide confirms that he had prepared this study. Mr. Eide's Curriculum Vitae, and answers to questions put to him, confirms he is not an engineer, has no education or certifications in related to noise, emissions, environmental studies or academic fields in science. The Study is a compendium of some segments of the MOECC Guidelines and a subjective narrative referencing portions of these guidelines and a non-specific noise study prepared for a crushing contractor to describe noise mitigation, sources of noise and "acceptable "sound level limits. The document contains no data or scientific analysis leading to a number of general statements to support the proposed berms and buffers. These general statements include propositions that "Measuring noise levels is not a simple matter" and "Reducing noise in not particularly rocket science".

[49] The Tribunal is unable to consider this document submitted by the Appellants in the Application, as it may have informed the planning department, and as it is submitted in this hearing, as probative in any respect on the matters of noise, such that would contradict or alter the expert opinions of Mr. Kirby.

[50] More significantly, based on the evidence of Ms. Welsh and Mr. Eide, the Tribunal finds that the Appellants and the City's processes on the important consideration of noise emissions was essentially restricted to the (mistaken) determination that the PIA was 300 m and the MSD was 70 m was incorrect and thus, their process of locating the radius perimeters on the site plan and determining that there were no residential uses within the MSD was also incorrect. Without the benefit of any impact assessment, a number of general assumptions were applied by Mr. Eide relating to such things as intermittent crusher operations, available noise abatement equipment "if required", the value of a vegetative buffer and the topography of the Site. Mr. Eide, and the Planning Staff, considered this sufficient. The Tribunal finds that this approach was, and is, woefully lacking, falling well-short of the type of analysis and assessment that must be undertaken with respect to noise and vibration studies, and should have been undertaken.

[51] On the additional concern with respect to dust emissions, Mr. Eide's report on behalf of the Appellants, (and essentially his consideration of this potential impact arising from the proposed Pit operation in his testimony) was also significantly constrained in its scope, as he concluded: "With respect to MOECC guidelines, dust is dealt with in the same manner as noise and mitigated in a similar way." The Tribunal finds that the attention directed to this known environmental contaminant was, and is, also lacking.

[52] The materials submitted by the Appellants to the City in support of the Application, and the evidence in the hearing, confirm that sensitive land use, and specifically a rural residence, is within 300 m of the proposed land use, and is noted on the Site Plan approximately 100 meters to the east (Exhibit 1). The next closest

residence, on Baker Lake, is approximately 400 m to the north of the property. Mr. Sloan, Mr. Jones, Mr. and Mrs. Aguiar, and Ms. Carrier all testified as to the location of their residences on Baker Lake (and in Ms. Carrier's case, on the River), as noted on the title block Map (Exhibit 3, Tab 70). All of them, and Baker Lake itself, are within the 1,000 m PIA.

[53] Mr. Kirby's testimony, is thus accepted by the Tribunal, as being persuasive in determining the correct (minimum) PIA and MSD areas at play in this proposed operation, and the significant shortcomings of the Appellant's supportive studies which omitted the necessary and required comprehensive and quantitative noise impact assessment, inclusive of acoustic modelling. It is this type of quantifiable study, which would determine all potential noise sources (including haulage), undertake acoustic modeling of all noise, consider topography, geography, surfaces, that would more accurately determine emissions and impacts, and inform the determination of what, if any, mitigation measures are necessary or effective.

[54] Mr. Kirby's opinion is that the Appellants have failed to adhere to approved MOECC methodologies and no accurate determination has been made as to the extent of the adverse noise and dust emissions from the Pit or the haulage roads that would impact the nearby residential lands. Mr. Kirby's opinion was that the Appellants have incorrectly undertaken the process of identifying all sensitive receptor locators in proximity to the Site partly because the AID and MSD have been improperly reduced and partly because the Appellants completed the exercise "in reverse".

[55] Mr. Kirby also opines that as there has been no consultation with the MOECC, Mr. Kirby is of the view that all required MOECC approvals have not been considered. Specifically, Mr. Kirby's opinion is that, based upon the application of s. 9(1)(a) of the *Environmental Protection Act*, and the regulations, the Appellants would be required to secure an Environmental Compliance Approval from the MOECC.

[56] The Tribunal, in considering all this evidence, finds that the proposed Agreement,

and specifically the provisions relating to Noise and Dust, are inadequate, inappropriate and fail to adhere to the applicable provincial legislation, regulations and guidelines for an operation such as the one that would be facilitated by the proposed Agreement.

SLOPE STABILITY, EROSION AND MRCA REGULATIONS

[57] Given its context within the topography and geography of the area, and in particular its immediate proximity to the River, the Appellants proposed extraction from the Site necessitates compliance with all applicable regulations and guidelines as they apply to development within the jurisdiction of the MRCA.

[58] There were a number of plans and drawings that were drawn to the attention of the Panel in the course of the evidence. The Site Plan (Exhibit 1), the aerial and land photographs and drawings showing the zoning areas, right of way and extraction areas and various slope, toe slope, flood line, high watermark, watercourse, and embankment demarcations (Exhibit 16 and Exhibit 3, Tabs 60 to 70) were reviewed and considered by the Tribunal, primarily as introduced through Mr. Singh's testimony.

[59] The testimony of Ms. Welsh and Mr. Eide, when coupled with the documentary evidence, indicates to the Tribunal that, much like the process undertaken for determination of noise and dust emission concerns, insufficient and incomplete consideration was given to matters of slope and bank stability and slope erosion in the Appellants' Application.

[60] Mr. Eide's reports filed on behalf of the Appellants, while addressing some specifics of the extraction area, watercourses and drainage, and topography in the "Field Notes" section of the document (Exhibit 3, Tab 47 – pp 934-939) contains little consideration of slope stability and erosion concerns, relative to the proposed extraction area.

[61] In this case, the MRCA was at least consulted (whereas the MOECC was not). Within the Appellants' submissions, correspondence from Ms. Welsh dated April 25,

2014 reproduces comments received by the City from the MRCA. The letter from MRCA that contained these comments was submitted as Exhibit 9.

[62] The comments from MRCA indicated that there were concerns about the Pit development and closure because of the location of the Site and the steepness of the slopes, and identified the need to address such areas as slope stability and contouring, as well as drainage. The real possibility of flood concerns, in this area of the River, was noted by MRCA since a major washout had occurred upstream in the 90s as a result of improper erosion control measures. Despite these comments Ms. Welsh's planning report indicated only that MRCA had provided comments, and provided the summary conclusion that "The runoff or upland drainage, from the Crown Lands to the north, will not be disturbed". No basis for this determination was provided.

[63] The Appellant's materials, and the Planning Staff's consideration of these issues, preceding Council's deliberation of the Agreement, thus did not sufficiently deal with the concerns and matters raised by MRCA.

[64] Mr. Vallier, the General Manager with the MRCA testified as to the involvement of MRCA in the application. Mr. Vallier was not involved in the consultation at the outset of the application and his evidence in chief was very limited. Mr. Vallier testified that he could provide no opinion in regards to the appropriateness of the Application and could only indicate that the Pit would be located outside the flood plain line and therefore no permit was required from MRCA. Since the 200 foot right of way was reserved to the Crown under legal title to the Site, and with the elevations, the proposed area for extraction by the Appellants had been moved back from the flood line mark and as a result MRCA determined that there would be no activity within the flood plain. Mr. Vallier was careful to clarify that no engineered flood plain mapping existed for this part of the River, and flood line limits were extrapolated from other data. This had been confirmed in a communication to the Appellants dated August 23, 2011 (Exhibit 10). Mr. Vallier indicated that unless the Top of Stable Slope was determined, the MRCA accordingly had no role to play in the application or approval process.

[65] The extent of MRCA's lack of involvement in the Application process was confirmed in cross-examination when Mr. Vallier identified his email to the City, which was forwarded after the refusal of the Application was reviewed. After confirming that MRCA had not, at the time, addressed anything relating to slope stability or stable slope allowance outside of the flood plain (and therefore not within the jurisdiction of MRCA) Mr. Vallier confirmed in his email as follows:

> ….I do agree with the peer review consultant in that due to the fact that property abuts a regulated river (under the MRCA Regs) that input or direction should have been provided to the effect of having a slope stability assessment completed. Once you have identified where the top of stable slope is, we can then further delineate where development can take place i.e. 15 m back from tope of stable slope (see diagram) and not just back 61 metres from the river and 15 metres from the property to the north.

[66] Mr. Vallier confirmed in his testimony that this email reflected his current position, and he advised that having now considered the matters raised by Mr. Singh, he believed that it would be appropriate to determine the top of slope.

[67] It was the City's submission was that no clear reason was provided as to why MRCA signed off on slope stability. On the evidence presented, it appears to the Tribunal clear that MRCA decided that they had no role to play in reviewing or approving the proposed development because it was beyond the floodplain and had not fully reviewed or investigated slope stability for that reason. It is equally clear, on the evidence, that the City believed that this aspect of the proposed operations had somehow been vetted by MRC and that no issues existed. Mr. Eide, and the Appellants, saw no need to address any matter of slope stability or erosion control.

[68] The Appellants provided no expert testimony, or other testimony in regards to the matter of compliance with MRCA's erosion hazard and steep slope policies within O.Reg. 165/06 (Exhibit 3, Tab 18) and other regulatory and best-practice engineering controls required for an Application of this nature.

[69] Mr. Pickering, now retired, had been the District Manager for the Timmins District

MNRF, had co-chaired a planning team with the Mattagami River System Water management Plan for three years, and had some familiarity with the file relating to the aggregate Pit and was aware of the prior request for a proposed residence on the land. Mr. Pickering confirmed that since this was not a permit application under the *Aggregates Resources Act*, the MNRF was not the approval authority and had not undertaken any comprehensive investigation or review of this application. Mr. Pickering indicated that because of the location of the proposed Pit adjacent to the Mattagami River, which was prone to flooding, had this been a pit on Crown lands it would properly have been examined by a specialized section of the Ministry's engineering and hydrology at the regional level and most certainly the MOECC would have been involved. None of this occurred in this instance.

[70] Mr. Singh's retainer was to provide a geotechnical engineering review of the Appellant's submission prepared by Mr. Eide. The Tribunal was provided with a detailed and comprehensive overview of the slope stability and erosion concerns relating to the Appellant's proposed operations, and permitted by the draft Agreement by Mr. Singh. Mr. Singh's expert testimony is uncontroverted since he alone turned his mind to the concerns and expected investigations required because of the Site's location.

[71] Mr. Singh reviewed the legislative background to the controls in place for slope stability and erosion controls first under the *Conservation Authorities Act*, and subsequently extended through a set of detailed provincial guidelines, amendments to the Act, and the PPS, as well as both the "parent" regulations and regulations governing individual conservation authorities such as the MRCA. Mr. Singh confirmed that such regulations are rooted in the goals of the PPS which require that all development protect public health and safety and property.

[72] The Tribunal finds that in order for this Agreement to be considered and approved, the requirements of s. 12 of the *Aggregate Resources Act*, and the regulatory framework identified by Mr. Singh firmly requires a determination by the planning

authority as to the effect of the Pit on the environment and the surrounding rural community, and the effects on surface water resources, inclusive of the River and other watercourses. Compliance with the MRCA regulations and best engineering practices would be required to ensure that the Pit operation occurs in areas sufficiently set back from the top of the steep natural slopes of the River to avoid risks to the slope stability and of erosion.

[73] The MRCA Regulation, reviewed by Mr. Singh, grants MRCA authority over the river valleys that have depressional features, the extent of which is determined through a process that requires a determination of certain finite limits, or “boundaries” of the river valley, dependent upon the stability of the slope. The process, in its basic form under the regulatory framework, is intended to ensure that no development occurs inside of an upper limit of the slope of any slope or bank along a river that is potentially subject to natural hazards such as flooding, erosion or slope collapse.

[74] The question is where the line of that limit is to be drawn. That line is referred to the 100 year Erosion Limit or the Erosion Hazard Limit. Where the slope is stable, the linear limit of control is the “stable top of bank, plus 15 metres inland”. Where the slope is unstable, the process of determining the upper boundary of the valley (and thus the control by the MRCA) is a bit more complicated, requiring a determination by qualified experts of the predicted long term stable slope projected from the existing stable slope or, if the toe of the sloe is unstable from the predicted location of the toe of slope, plus 15 metres. These calculation processes are understood when viewing cross-section diagrams outlining the concepts and the real-time calculations based on field data.

[75] Mr. Singh’s report, in support of his testimony, contained a succinct summary of the regulatory framework:

> In summary, current Policies direct development away from natural slopes (shorelines, valleys) and also prescribes setback allowances based on the slope and erosion related hazards. Accordingly, new development is directed to tableland at a safe distance beyond the hazard limits. Under the policies even if a slope has achieved its stable angle and there is no toe erosion, the Erosion Hazard Limit is the top of

> slope plus the applicable erosion access allowance. If a slope has inadequate stability (due to steep inclination and/or potential toe erosion) the Erosion Hazard Limit will therefore be established further inland accordingly, thus further reducing the tableland available for development.

[76] With respect to the Site, Mr. Singh undertook a slope rating exercise utilizing a series of assessment criteria and testified that the Slope Rating Chart for the subject Site was 38.0 (Exhibit 20). The criteria thus indicates that the Site has a "moderate potential" for instability, thus requiring a detailed report with a variety of field work, surveying, and testing—none of which has been done by the Appellants.

[77] Mr. Singh's opinion was that the required slope stability assessment and investigation of the slopes on the River, had obviously not been completed, and was strongly recommended. The assessment process would include a Top of Bank staking exercise. In Mr. Singh's opinion, based on his review of the information available, the manner in which the Appellants currently had proposed the extraction and buffer area would in fact involve the removal of a portion of the southwesterly portion of the slope – something that could result in drainage from the base of the Pit down to the River in heavy rains or melt and thus pose a long-term risk of detrimental erosion.

[78] Mr. Singh concluded that the single cross-section completed by the Appellants was insufficient and additional cross-sections were required to ascertain the exact and appropriate location of the extraction area and depth of the Pit relative to the slopes. As well, since the proper Top of Bank staking exercise, and an assessment of the slope toe erosion allowance, had not been completed, the potential limits of the extraction area (as set out in the Site Plan) could very well be further reduced.

[79] With the aid of photographs and the diagrams, and site examination, Mr. Singh also identified additional site specific concerns that would also require further examination and investigation, including the presence of a watercourse on the Site which had not bene identified by the Appellants, and the contours of an older abandoned pit on the Site. These too, in Mr. Singh's opinion, needed to be assessed. Although Mr. Singh's scope of work did not include the type of full investigation and

assessment required before consideration of any site plan agreement, his opinion was that there was sufficient information available that pointed to deficiencies in the parameters of the extraction areas. These parameters were unsupportable without proper investigation and in his view, the 61 m setback identified by the Appellants was, in Mr. Singh's view, "not nearly enough" to ensure that slope stability was maintained.

[80] Mr. Singh in summary, outlined the deficiencies in the proposed site plan as it related to the necessity of ensuring that the stability of the Site's steep banks on the River, and erosion controls were addressed – matters that the MRCA had fairly identified in its comments to the City's planning staff. Further work, in Mr. Singh's opinion was required to ensure that drainage and site grading would prevent any surface erosion on the slow. Ultimately nothing should be done to permit operations under any agreement until, and unless, the required investigation and analysis had been properly completed by a professional engineer, and only with prior approval by applicable regulatory agencies.

[81] The Tribunal accepts Mr. Singh's evidence in its entirety and finds that the proposed location of an excavated pit at the proposed elevation, to the indicated depths, in proximity to the steep slopes of the River, and surrounded to the west, south and east by riverbank, necessitates a thorough and complete geotechnical assessment of the site development. For the reasons indicated, upon Mr. Singh's testimony, the Tribunal finds that the Appellants' application was, and is, wholly deficient in this regard and any site plan agreement could not be considered or approved, until such assessment work is completed.

HYDROGEOLOGY AND WATERCOURSES

[82] The Tribunal was provided with expert hydrogeological evidence by Mr. Jones, which was uncontroverted and unchallenged. Mr. Jones had undertaken a desktop peer review of the only other evidence before the Tribunal in relation to hydrology and the water table beneath the site, which is a report prepared by Mr. Dan Cook on behalf

of EXP for the Appellants (Exhibit 3, Tab 47, pp 1027-1028).

[83] The location of the water table is of crucial importance in any aggregate operation as the proposed bottom depth of the Pit, in this case, is at 1.5 m. above the ground water table. The depth of the excavation must be determined with care as the miscalculation of the depth of the ground water table can have significant adverse impacts.

[84] Mr. Jones, in his testimony, and in his report, addressed a number of concerns relating to the Appellants' report submitted to the City in regards to the location of the water table. They are:

(a) The Appellants' determination of the ground water table is based, in part, on data from wells drilled to the north and east of Baker Lake. Mr. Jones indicates that these wells are, based on the data, located in a different watershed than the Site and the well information logs referenced (Exhibit 3, Tabs 49 to 53) are thus unreliable to establish the water table on the Site;

(b) Test pits that were dug on the Site were not useful as they did not intersect the water table, and alternative drilled test holes were not obtained as required under reporting standards for aggregate resource applications

(c) EXP estimated the location of the ground water table by linear extrapolation between Baker Lake elevation and the River elevation, a distance of 400 m and a resultant linear slop of 0.03 m/m. Mr. Jones is of the opinion that the other site information raises doubt as to EXP's use of the extrapolation method to determine the table depth.

(d) Due to the topography and elevation of the plateau of the Site, relative to Baker Lake and the River, in Mr. Jones's view, the expectation would be that the water table would rise beneath the Site and then fall to the River. If so, the extrapolation assumptions, and EXP's estimated location of the water

table would be incorrect.

(e) Using an alternative estimation exercise based on the soils and the elevations of a watercourse on the Site, that may be related to the water table, Mr. Jones estimates that the water table on the Site might actually be between 285 and 288 masl (versus the 283 masl estimate of EXP).

(f) The vegetative cover on the Site would also, to Mr. Jones, suggest an elevated or “perched” water table on the Site, thus higher than the determined depth of the water table arrived at by EXP.

[85] The Tribunal has reviewed the Report of EXP submitted in support of the Application by the Appellants and relied upon by Ms. Welsh in her opinion and recommendations and the evidence of Mr. Jones as the attending expert. The evidence of Mr. Jones, as the only expert qualified by the Tribunal on the subject, is sufficient to raise concerns with respect to the veracity of the estimated water table on Site as submitted by the Appellants. Upon this evidence the Tribunal is unable to determine, with certainty, the depth of the water table, which ultimately would affect the acceptability of the proposed depth of the extracted Pit under the Agreement.

[86] The Tribunal accepts Mr. Jones recommendation that properly drilled test holes, as would ordinarily be required for any such aggregate permit application, should have been done and would, ultimately, have resulted in a precise and reliable determination of the depth of excavation of the Pit.

[87] In the absence of certainty, similar to the lack of reliable determination of matters relating to slope stability and erosion control, and noise, vibration and dust emissions, the Tribunal must again find that it would be inappropriate to consider this matter to be sufficiently addressed for the purposes of the Site Plan Application, and another reason to consider the Application insufficient and incomplete.

[88] Mr. Jones also testified as to surface water drainage. It is the failure of the

Appellants submission to report the watercourse located on the Site that again raises doubt as to the conclusion of the Appellants, in their submission, that the existing drainage pattern on the Site will not be altered (and then echoed by Ms. Welsh in her report and recommendation).

[89] While it may be insufficient in some circumstances to raise or create mere apprehensions of doubt or concern regarding an applicant's submissions to support a planning application, in this case the Tribunal finds that there is uncontradicted expert evidence to call into question the sufficiency of the required investigations and assessment necessary to ascertain the all-important water table level and the impact of the proposed extraction area on surface drainage. The Tribunal is unable to conclude that the necessary technical studies have been completed to conclude that the proposed operations under the Agreement would be consistent with provincial policies and regulatory requirements necessary to satisfy the requirements of s. 12(1) of the *Aggregate Resources Act*.

WILDLIFE AND FISH HABITAT AND SPECIES AT RISK

[90] A determination that the proposed aggregate operation is consistent with the natural heritage policy provisions in the PPS, and conforms to the City's OP polices reflecting similar policies of protection of species, habitat and ecological functions, and the various regulatory provisions, standards and guidelines under the legislation necessitates the completion of an Environmental Impact Assessment ("EIA") to support consistency, conformity and compliance.

[91] Such an EIA was not completed in relation to the Application nor provided to the Tribunal in this hearing. In this case the Appellants relied, and rely, upon the 4½ pages in the Technical Report (Exhibit 3, Tab 47, pp. 926-930) relating to natural environment, significant wetlands, significant habitat of endangered and threatened species and fish habitats, and some supporting material, to satisfy these requirements. Mr. Eide, who has some related experience with MNRF in responding to applications, and workplace

training and experience in various aspects of the Ministry's wildlife and natural resource management and habitat protection and enforcement, was solely responsible for preparing this part of the report. The evidence presented to the Tribunal confirms that despite his familiarity with aggregate applications, Mr. Eide has no qualifications as a biologist, zoologist or in specialty areas relating to species at risk ("SAR"), experience in conducting environmental or wildlife assessments, or assessment and designations of Significant Wildlife Habitats ("SWH") or wetlands.

[92] Mr. Eide's evidence was considered against the evidence of Mr. Pickering who confirmed, as he did with respect to hydrology and slope stability, that the MNRF took no active or supervisory role with respect to compliance with requirements relating to fish and wildlife habitat or SAR in this Application. He confirmed that ordinarily the MNRF, if it were undertaking a thorough review of an application for such a pit on Crown lands, would require scientific evidence following established procedures in order to determine the presence or non-presence of significant wildlife habitats, sturgeon habitat in the Mattagami River, and the presence and potential impacts upon SAR and migratory bird surveys. Mr. Pickering confirmed that the reports required for such studies involved technical field work, assessment reviews and surveys relating to species and the use of fundamental methodologies employed for such wildlife and habitat assessments.

[93] Based upon Mr. Pickering's evidence alone, as supported by the documentary evidence, it is clear to the Tribunal that the Appellant's technical submissions in support of the application did not include the type of field work, data collections, surveys, and comprehensive analysis necessary to satisfy the policy and regulatory requirements relating to wildlife habitat, SAR and environmental impact assessments.

[94] The insufficiency of the Appellant's supporting studies in relation to such matters was made clear through the evidence of Mr. Parent who was qualified to provide expert testimony in the field of environmental impact assessments, wildlife inventories, SAR and habitat assessments. Mr. Eide's technical report was the subject of a desktop

assessment and review by Mr. Parent to determine if the report's conclusions were complete and appropriate and whether there were requirements of the *Endangered Species Act (2007)* to be addressed.

[95] Mr. Parent provided a detailed and persuasive overview of the relevant PPS policies and the provisions of the City's OP as set out primarily in section 2.9.6, as well as the Aggregate Resources Policies and Procedures Manual and the Natural Heritage Reference Manual. Mr. Parent indicated that neither Mr. Eide, nor any qualified person, had undertaken an inventory of species following proper methodologies, or an assessment and inventory of potential habitats. Ordinarily performed functions such as screening exercises, ecological site assessments, and the classification and mapping of lands and potential habitats, which would lead to determining the existence of Significant Wildlife Habitat were not completed according to Mr. Parent. This was, in the Tribunal's view, clearly supported by the absence of records, information or raw data within the collection of materials provided to the Tribunal by the Appellants purporting to satisfy these environmental requirements for the Application.

[96] Mr. Parent testified that without undertaking such a proper comprehensive environmental impact assessment, it was not possible to know the full extent of what potential species or habitats might be impacted by the proposed operations. In Mr. Parent's opinion, on even a cursory view, the Appellants' limited technical information submitted to the City had failed to consider three endangered species and six threatened species of birds in this area and failed to properly identify and consider reported SAR in the Timmins area and then assess their requirements against the potential habitat of such SAR on the Site or on adjacent lands. Mr. Parent's evidence was that criteria for at least seven types of significant wildlife habitat were identified by him that should have led to an investigation to determine candidate lands for significant wildlife habitat. The limited fieldwork that had been completed by the Appellants' consultant, Mr. Eide, did not, in Mr. Parent's opinion, meet the requirements of the policies, regulations and guidelines, necessary to determine the absence or presence of species.

[97] Succinctly, Mr. Parent's conclusion was the Appellants' technical reports provided wholly deficient conclusions regarding habitats of endangered or threatened species on the Site or on adjacent lands, which were provided without any technical field work, surveys, and without adequate supporting documentation to verify that proper methodologies had been employed. As such, the Appellants' supporting information failed to satisfy the requirements of the PPS or the City's OP, and did not follow the standards employed in aggregate pit applications of this kind. Mr. Parent testified that "the absence of evidence is not evidence of the absence of endangered, threatened species and SAR", and by failing to adequately provide analysis, methodology and rationales for processes followed, the site plan Application did not satisfy the requirements of the PPS or the City's OP.

[98] The Tribunal in not persuaded by the evidence provided by Mr. Eide that the cursory steps and reporting provided to the City satisfies the requirements upon the Appellant under the policies, regulations, guidelines and manuals that were thoroughly explained by Mr. Parent. Upon all of the evidence, the Tribunal is also not persuaded that the application for the harvesting permit, also processed through the MNRF, would somehow validate the sufficiency of the limited work undertaken by Mr. Eide or, itself, satisfy the requirements of the PPS or the City's OP in this appeal.

[99] The Tribunal accepts the uncontroverted expert evidence provided by Mr. Parent in regards to the insufficiency and failings of the Appellant's technical work and studies submitted to the City, and now placed before it in this hearing. The Tribunal finds that information submitted by Mr. Eide on behalf of the Appellants is not consistent with sections 2.1.5, 2.1.7 and 2.1.8 of the PPS, does not conform to section 2.9.6 of the City's OP, and does not satisfy the requirements as set out in s. 12(1)(a) of the *Aggregate Resources Act*.

PLANNING—THE PPS

[100] The Tribunal has carefully considered all of the planning evidence provided by

Ms. Amos and Ms. Welsh, and their respective reports prepared by them, and all of the other specialty opinion evidence provided by the experts in this hearing, in order to determine whether the proposed Agreement, and the operations that would be permitted under its terms, are consistent with the PPS and finds that the Agreement is not consistent with the PPS.

[101] An overview of the subject areas outlined above, in each case, leads the Tribunal to conclude that insufficient data and evidence has been provided to the Tribunal by the Appellants to allow for a conclusion to be reached that the Agreement is consistent with the PPS. Sections 2.5.1 and 2.5.2.2 of the PPS require that aggregate resources be preserved for the long term, and that extraction process must minimize environmental impacts. The Appellants' proposed Agreement and operations are not consistent with the PPS.

PLANNING—THE CITY OFFICIAL PLAN

[102] Based upon all of the evidence provided the various experts produced by the City in this hearing, (which the Tribunal has accepted) that the Appellants' have failed to satisfy the regulatory, policy and guideline framework relevant to these specialty areas of, Ms. Amos concludes that the proposed Agreement does not conform to the City's OP, and the policies applicable to the Resources Development Area in which the Site is located.

[103] It is noted that the opinion evidence provided by Ms. Welsh was based upon an analysis that the Agreement, and the proposed operations, met the "general intent and purpose of the OP"—which is the test applicable to applications for minor variances under s. 45(12) of the Act. It is a standard of conformity to the OP that is required.

[104] In most respects, in area where the opinions have differed, the Tribunal prefers the evidence of Ms. Amos over that of Ms. Welsh. As their respective planning opinions are provided to the Tribunal, Ms. Welsh's planning opinions were based on her conclusions that the various speciality subject matters outlined above in this decision

were satisfactory, which, in each case, the Tribunal has found the materials to be deficient. This affects the strength of Ms. Welsh's planning opinions, as does her misapplied minor variance "general intent and purpose" test.

[105] The Tribunal's findings relating to the categorization of the proposed uses and the applicable MSD and PIA relative to the nearby sensitive residential land uses, are clearly not in line with the approach applied by Ms. Welsh in her opinions. This also leads the Tribunal to prefer the opinions of Ms. Amos and to conclude that the Agreement, and the proposed operations, does not conform with section 2.9.3 of the City OP.

[106] Based upon the evidence provided by Mr. Singh, and the findings made in regards to the sufficiency of the investigations relating to slope stability and erosion, the Tribunal also prefers the evidence of Ms. Amos, over that of Ms. Welsh, as it relates to the matter of conformity with sections 2.10.1 and 2.10.2 of the City OP. In the absence of the required slope stability and erosion investigations, the Tribunal finds that the Agreement does not conform with these sections of the OP.

[107] Based upon the evidence provided by Mr. Kirby, and the findings relating to noise and dust emissions, the Tribunal also prefers the opinion of Ms. Amos, over that of Ms. Welsh, as to whether the Agreement conforms to the compatibility policies of the City OP as set out in s. 3.4.4. Ms. Amos's opinions are persuasive in the matter of potential land uses conflicts because they are consistent with the findings of the Tribunal as it relates to sensitive land uses, and the correct separation distances and potential influence areas to be considered and applied.

[108] In summary, the Tribunal finds that the proposed Agreement, and the Pit operations that would be permitted under that Agreement, do not conform to the City's OP.

PLANNING—THE CITY ZONING BY-LAW

[109] The evidence in the hearing included evidence relating to the accurate boundaries of the zones within the City ZBL within the Appellants' Site. Extraction is not permitted in the RD-HAZ zone and is only permitted in the RD-RU zone. The Appellants' Site Plan (Exhibit 1) had determined the location of the boundary between the two zones (shown in red) and if applied, the proposed extraction area identified in the Site Plan (totalling 7.898 ha or 19.5 ac) would be wholly within the RD-RU zone.

[110] Mr. Eide confirmed that he had relied upon the data provided by the Planning Staff in determining the location of the boundary between the two zones, and had no direction otherwise from the City staff.

[111] The City's evidence in this hearing however, introduced through Ms. Amos, is that the Appellants' boundary between the two zones on the Site was, and is, incorrect. The City reviewed and corrected information relating to the boundary of the zone, which relies upon the enlargement of the schedules to the ZBL and GIS plotting and prepared a corrected plan indicating the correct location of the boundary. It is set out in Exhibit 16. The north boundary of the RD-HAZ zone is, according to the City's review of the data, thus significantly further inland based on the corrected plotting with the result that the actual extraction area within the RD-RU zone is significantly reduced to 2.83 ha instead of the 7.898 ha (or 7.0 ac instead of 19.5 ac)

[112] The result, in Ms. Amos's opinion, is that the Agreement clearly does not comply with the City's ZBL because it permits a sizeable portion of the Pit to be located within the hazard area where the extraction is not permitted under the ZBL.

[113] In response to this issue, Ms. Welsh, in her testimony, was fairly unable to agree that this revised zone boundary, as now presented to the Tribunal in the hearing, was the correct one. Neither was she able to challenge the revised zoning boundaries as presented by the City in the hearing. Ms. Welsh indicated that a survey would be necessary. A survey was never prepared by the Appellants for this Application or this

appeal.

[114] Given the various deficiencies found to exist in the data and conclusions relating to the proposed Agreement, the boundaries of the two zones on the Site, as they were utilized by the Appellants, do indeed appear to be at odds with the boundaries now depicted in the plan submitted by the City. Given the manner in which the evidence, as a whole, has been presented in this hearing, and the deficiencies in the Appellants' materials, time and again, the Tribunal would be inclined to find that the refined and depicted boundary line of the two zones set out in Exhibit 16, as submitted by the City in this hearing, is more likely to be the correct location of the zone boundaries.

[115] Based upon the review of the evidence relating to the classification of the uses as Category III (see above), Ms. Amos was also of the opinion that the Site Plan also failed to comply with the Minimum Separation Distances set out in section 4.26 of the ZBL.

[116] Again, upon the Tribunal's analysis of the evidence, and its findings relating to the categorization of the proposed uses, and the delineation of the zones (resulting in a reduction of the extraction area permitted by the ZBL) the Tribunal finds that the Agreement does not comply with the City's ZBL.

SUMMARY OF FINDINGS AND CONCLUSIONS

[117] In summary, upon all the evidence, including the testimony of the Participants as provided to the Tribunal, and upon the various findings and for the various reasons given, and having regard for the various matters set out in s. 12(1) of the *Aggregate Resources Act* that are to be considered in aggregate permit applications under that Act, the Tribunal finds that the Agreement before the Tribunal, as it is proposed by the Appellants is: not consistent with the PPS; does not conform to the City's OP; does not comply with the ZBL; and fails to meet a great many of the requirements and standards set out in the MOECC, MNRF, and MRCA guidelines, policies and regulations.

[118] Upon the evidence presented, with the irregularities, deficiencies, and omissions in the Appellants' investigations, reports and information, and in the absence of any evidence which might lead to alternatives with respect to the various sections of the Agreement, the Tribunal is unable to determine that there are any modifications to the Agreement that could possibly be made under the circumstances.

[119] Accordingly the Tribunal finds that the Site Plan Agreement, as it has been presented and reviewed by is not appropriate, does not represent good planning in the public interest, and cannot be approved.

THE APPELLANTS' REQUEST FOR OTHER ZONING

[120] As indicated, in the course of the closing argument, the Appellants submitted to the Panel Member that they would, as the first alternative, ask that the Tribunal "cancel" the Agreement and instead rezone the lands (in part by reconfiguring the boundary of the zones on the Site) to thus permit residential use.

[121] There were references, on occasion, within the hearing to a prior application for a residence on the Site. If that was the case, the Tribunal certainly has no evidence in regards to such an application. The Tribunal, in any event, does not have a zoning by-law appeal before it, within this appeal, and clearly has no jurisdiction to consider the request of the Appellants.

ORDER

[122] The Tribunal orders that the Site Plan is not approved and the Appeal is dismissed.

"David L. Lanthier"

DAVID L. LANTHIER
MEMBER