

October 13, 2009

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Mr.F. Kelleher
General Manager Lower Trent Conservation Authority
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Dear Sirs and Madams:

**Re: OMB Decision No: 3374 issued December 1, 2006 OMB File No: PL060195 re,
Shelter Valley Aggregates Ltd. pit license and rezoning and Agreement between Shelter
Valley Aggregates Ltd and the Corporations of the Townships of Alnwick/Haldimand and
Cramahe and the County of Northumberland relating to Turk Road Haul Route**

Introduction

This letter is written on behalf of Valley Voices Residents Association (Valley Voices) a non share corporation incorporated to express the concerns of the residents in the vicinity of Shelter Valley, Township of Alnwick/Haldimand in the county of Northumberland by way of an appeal and referral request of an application by Shelter Valley Aggregates Limited(Shelter Valley) for a Class A license under the *Aggregate Resources Act* and amendment to Township of Alnwick/Haldimand Zoning By-law 10-2006.The appeal and referral was addressed by the OMB in the decision identified above and attached hereto(**Attachment #1**).The Township of Alnwick/Haldimand supported the application and the rezoning. The appeal and referral were addressed by Minutes of Settlement between Valley Voices and Shelter Valley.

Since the OMB decision there has been a development resulting from direct dealings between Shelter Valley Vice President John Morgan and the Ministry of the Environment which appear to impact my clients and set aside what my clients had understood would be key tool for protection of the environment along the proposed Haul Route from the pit to County Rd 25.

It is necessary to provide a little background information in order to identify the development of concern.

Background

OMB

Valley Voices was able to resolve its concerns on the impacts of the proposed license and rezoning in Minutes of Settlement with Shelter Valley with Shelter Valley filed with the OMB as Exhibit 31.A revised site plan and notes for the *Aggregates Resources Act* license was part of the Minutes and the OMB decision. The Haul Route was a concern to Valley Voices and was satisfied by a Note on the revised Site Plan which was approved by the M.N.R. A Note on Page 2 of the Operational Plan of the revised Site Plan section 1.2.5 PROPOSED ENTRANCE/EXIT states:

There shall be no extraction, processing or transportation of aggregate materials from the site unless and until a final approval pursuant to the Class Environmental Assessment process has been obtained for the construction, reconstruction and/improvement of the Haul Route and the Intersection.

The Turk Road allowance and the intersection with County Road #25 and the intersection of the driveway access with Turk Road will be constructed, reconstructed and/or improved in accordance with a separate agreement between the Licensee and the municipalites having jurisdiction over such roads and intersection. Material from the pit may be used for the aforesaid works but no aggregate from the pit may be shipped to market until an Entrance Permit has been issued by the Township of Alnwick/Haldimand for the new entrance/exit.

Extract from the notes from the revised site plan are attached hereto (**Attachment #2**)

THE AGREEMENT

The “separate agreement” referred to in the note had been entered into before the OMB decision. The Agreement was between Shelter Valley and the Townships of Alnwick/Haldimand and Cramahe and the County of Northumberland related to the Turk Road Haul Route. . A copy of extracts from that Agreement is attached (**Attachment # 3**).

The Haul Route is defined in Schedule “B” to that Agreement as:

Turk Road, being the portion of the road allowance between Concession 2 and 3, in the former Township of Haldimand and the road allowance between Concession 4 and 5 in the Township of Cramahe extending from the intersection of Turk Road and a private entrance leading to the gravel pit on the Subject Lands (in a location to be established to the satisfaction of the Municipality) easterly to the intersection of Turk Road and Country Road 25

According to a Discussion Paper prepared by consultants for Shelter Valley, the Turk Road East Haul Route extends east for about 550 m as a surface treated road and then 2800m as a maintenance road/farm access lane for a total of 3350 m to County Rd 25. About 1300m of the road is in the township of Cramahe and the balance in the Township of Alnwick /Haldimand. The preliminary environmental review of the Turk Road East Haul route notes that it is “an unmaintained road for 3.2 km which crosses 2 portions of Tubbs Corners Headwater SNA” and “2 small headwater streams which are tributaries of Cold Creek whose source is less than 100m upstream of the road crossing” According to the review the main environmental impact is the crossing of Cold Creek and it is noted that there is a need to consult with Department of Fisheries and Oceans as it relates to fish habitat.

Under the Agreement the Haul route is acknowledged as an “unopened municipal road allowance” and “ there is currently a narrow path located on the road allowance (having a width of approximately 3.5 metres) used by local farmers to access adjoining agricultural fields.” upon construction and reconstruction of the aforesaid section of Turk Road and the intersection in accordance with the terms of this Agreement ,”Haldimand and Cramahe township councils will “ each pass a by-law assuming the section of Turk Road between County Road No 25 and the entrance/exit to the Subject Lands under their respective jurisdictions as a year round maintained open municipal road.”

The Agreement in Section 5(e), as a condition of final approval of the rezoning by-law and the provision of an E.A. Performance Guarantee by Shelter Valley, provides that the townships and the County, at Shelter Valley’s sole expense” shall retain Totten Sims Hubicki Associates to commence the applicable Municipal Class Environmental Assessment process (as determined by the townships and the County) for the construction and reconstruction and/or improvement of the Haul route and the intersection of Turk Rd and County Rd 25”

Section 5(h) of the Agreement requires Shelter Valley to post security in the form of an irrevocable letter of credit as E.A Performance Guarantee. The amount of the guarantee is the “estimated cost of carrying out the Municipal Class Environmental Assessment process for municipal roads for the Haul Route and Intersection”. The Agreement provides in section 17 that the Haul Route and Intersection “may be used by the townships, the County of the general public for the purposes for which the haul route is designed” Section 18 provides for municipal assumption of the Haul Route and Intersection after the Municipal Engineers had provided a Certificate of Assumption and the municipal councils have approved the written report of the Municipal Engineer that construction has occurred in compliance with the approved drawings, any changes to the drawings are provided, all costs and expenses under the Agreement are paid by Shelter Valley and assumption by-laws are passed. The entrance permit to the pit will not be issued under section 19(c) of the Agreement until the Certificate of Assumption has been issued. Similarly the Performance Guarantee is not to be returned until the Certificate of Assumption has been issued.

MOE INVOLVMENT SUBSEQUENT TO THE OMB DECISION AND THE AGREEMENT

On April 22, 2009 Shelter Valley Vice President John Morgan advised the Township of Alnwick /Haldimand of communication he had received from Michal Harrison Supervisor, Project Review Unit, Environmental Assessment and Approvals Branch (Fax attached as **Attachment #4**). The e-mail from Michael Harrison is attached as **Attachment # 5**. The e-mail was apparently sent to the clerk for the Township of Haldimand February 18, 2009 but Valley Voices had no information until the item was on the township council agenda for April 22, 2009 when they had a legal opinion dated March 9, 2009 which was also on the agenda (**Attachment #6**)

The Township failed to advise Valley Voices about the opinion until April 22, 2009 and although the April 22 Planning Committee meeting was a public meeting it was unclear to those who attended the meeting or from reading the minutes what the council had decided. It appears from e-mail with the municipal clerk that there was no decision as one was “not required of the council” .See e-mail from T Korotoki, clerk to John Webster Valley Voices **Attachment #7** .

It is interesting to note that there was some subsequent e-mail contact between Valley Voices and the Public Information Officer of the Environmental Commission who provided an opinion that “the municipality taking over a private road is a grey area”. Clearly there is miscommunication on status of the Haul Route and whether this was the position of the MOE is not clear.

The Issue

The Township has determined that Shelter Valley is “exempt from the E.A process concerning the upgrade” of Turk Rd Haul Route.

The Law

The Haul Route is an unopened road allowance but under section 28 of the *Municipal Act, 2001* local municipalities have jurisdiction over all road allowances made by the Crown surveyors. Under section 30 of the *Municipal Act, 2001* a highway is owned by the municipality that has jurisdiction over it and although there is no section to state that the unopened road allowance is a highway it appears from 31(4) of the *Municipal Act, 2001* and unopened road allowance is a highway. That section protects a municipality from liability until it passes a by-law assuming the highway for public use.

Ontario Regulation 345/93 made under the *Environmental Protection Act* is an exemption for Private Sector Developers. The Regulation defines a “private sector developer” as “a developer of land other than land belong to Her Majesty in right of Ontario, a public body or a municipality”

Mr. Harrison in his opinion states that “only private sector projects that fall under Schedule C and are servicing residential development are subject to the Schedule C planning process of the Municipal Class EA. In other words, proposed projects that are not Schedule C projects and not servicing residential uses are not subject to the Municipal Class EA....As a proponent driven, self-assessment process, any final decision as to how to proceed will result from your discussions with the municipality”

Mr. Fairbrother in his opinion state that “the construction of municipal roads are normally subject to the provisions of the Municipal Class Environmental Assessment” He refers to the private sector developer exemption which could make private sector developers subject to the Act, and concludes that they are not subject to the Act under the regulation and the MCEA does not apply. He concludes that “there are no legal requirements for the developer to follow the provisions of the MCEA”. He concludes that “the preparation of detailed design drawings in accordance with the terms and provisions of the Agreement must be followed.

Consultation/review of the plans with the County Cramahe and the Conservation Authority (if any low lying lands to be crossed or other matters within the Conservation jurisdiction) should still occur. Once the design of the road has been approved by the municipalities and any applicable agencies Paragraph 5(i) dealing with a letter of credit as the “construction Performance Guarantee” will occur”.

The difficulty with the approach taken is that there is no formal EA process. The work to be undertaken is the improvement of a highway which is to be used assumed and to be used for municipal purposes. The EA process which was relied on by Valley Voices as a means of insuring that the environmental concerns identified in the Study would be addressed allows for input from the public among others identifies potential environment issues before construction and better protects the environment. If there is no process and the Shelter Valley can construct a municipal roadway without a Municipal Class Assessment the very purpose of the Environmental Assessment Act is being defeated. Shelter Valley is permitting the characterization of a municipal highway as a private sector project to avoid legislation that will cause it more expense and delay but will protect the interest of the community whom the elected representative deem to be secondary to the interests of the aggregate producer.

Municipal roads are projects with the potential for environmental effects regardless of the person constructing them. There is no doubt that this is a municipal road and the fact that the Class EA was required in an agreement voluntarily entered into by Shelter Valley before the OMB decision is proof of its characterization as such.

Conclusion and request

In my opinion in these circumstances this is not a private sector development and it should subject to a Class EA. There is no clear exemption just an interpretation by MOE staff agreed to by the Township lawyer.

It is hoped that some of the recipients of this letter will review the background and reverse the decision. Although Shelter Valley had indicated it will continue with the environmental assessment without the force of the Act and administration by the MOE this is meaningless and is an opportunity for a municipality to by pass its duties to the public and make a mockery of the law.

We have information that the Ministry of Natural Resources may have issued the Category 3 license. The OMB Order directed the issuance subject to the “prescribed conditions and in accordance with the site plan and related notes” We would like to know who is responsible for enforcing note 1.2.5 and will be requiring the EA before extraction? Is this entire extraction going to occur without compliance with the site plan requirements and without any external environmental controls?

Therefore on behalf of Valley Voices we are requesting a careful review of the facts in this matter and of the decision of MOE staff which has resulted in the municipality determining that no assessment is required notwithstanding environmental impacts noted in an earlier report and which could affect the environment including fish within the jurisdiction of Oceans and Fisheries who we understand are represented in this jurisdiction by the Conservation Authority.

Yours Very Truly

M. Virginia MacLean, Q.C.

Copy without enclosures to: Mr. Drew Young
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