

April 30, 2021

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VIA ONLINE SUBMISSION TO:

File 18969.00001

<https://ero.ontario.ca/notice/019-3449>

AND VIA E-MAIL TO:

Calinda.Manning@ontario.ca

Calinda Manning
MNRF - ROD - Integrated Aggregate Operations Section
300 Water Street
4th Floor, South tower
Peterborough, ON K9J 3C7

Dear Ms. Manning:

**Re: Comment by the Green Durham Association
ERO No: 019-3449: proposed changes to the site plan for a pit or quarry
Miller Paving Limited Proposal**

We are the lawyers for the Green Durham Association ("**Green Durham**"), a non-profit registered charity dedicated to protecting, preserving and enhancing the forests, farmlands and natural areas in Uxbridge, north Pickering and adjacent Greenbelt lands. Green Durham supports and promotes land protection and stewardship efforts on private lands and makes comments and advises on policies and decisions affecting land use.

We write to provide Green Durham's comments with respect to the two related applications being brought by Miller Paving Limited ("**Miller**") with respect to part of its lands located at 4419 Concession Road 7, Uxbridge (the "**Subject Lands**").

An application has been made by Miller to the Ministry of Natural Resources and Forestry ("**MNFR**") to change the final rehabilitation of a 10-hectare area of the licensed site to recognize existing grades and permit an industrial final land use. The portion of the site subject of the amendment is the south west corner of the licensed area.

If this amendment is approved, the licensee plans to request surrender of a 36.6-hectare area of the site (including the 10 hectares proposed for changes to the final rehabilitation plan) licensed under the *Aggregate Resources Act* (the "**ARA**"). A site plan control application has been filed

with the Township of Uxbridge, with the purpose that, upon surrender of the area from the *ARA* licence, the land would be regulated by the municipality.

Discussion

There are a number of issues that we wish to identify for the MNR that would preclude Miller's proposal. In essence, the current and proposed uses are illegal and non-conforming uses of the lands that would not be permitted under the *Oak Ridges Moraine Conservation Act* ("**ORMCA**") or *Oak Ridges Moraine Conservation Plan* ("**ORMCP**") and would violate the requirements of the *ARA* to remediate the lands. The uses of the lands under the zoning have been further restricted by a licence and site plan under the *ARA*, which renders the current and proposed uses illegal. In addition to being illegal, the uses were not in effect on November 15, 2001, and as such would not be legal non-conforming uses that would be permitted under an exception to the *ORMCP*.

Aggregate Resources Act: Final Rehabilitation Requirements

Final rehabilitation of the property must be completed pursuant to the *ARA*. The lands cannot be subject to a site plan of the Town unless rehabilitation is first completed.

Miller Paving is required, as a licensee under the *ARA*, to perform progressive and final rehabilitation of the site in accordance with the *ARA*, the regulations, the site plan, and the conditions of the licence to the satisfaction of the Minister. The wording of section 48(1) of the *ARA* is unequivocal as to this requirement.

Other provisions of the *ARA* reinforce that rehabilitation must be completed. "Final rehabilitation" is defined as "rehabilitation in accordance with [the *ARA*], the regulations, the site plan and the conditions of the licence or permit performed after the excavation of aggregate and the progressive rehabilitation, if any, have been completed".

As well, under section 19(1) of the *ARA*, "the Minister may accept the surrender of a licence on being satisfied that...rehabilitation has been performed in accordance with the *ARA*, the regulations, the site plan, if any, and the conditions of the licence". As such, before a licence is surrendered, the Minister must be satisfied that rehabilitation has been performed in accordance with the *ARA*, the regulations, the site plan, and the conditions of the licence. The application before the Town is precluded by the fact that rehabilitation remains incomplete.

According to Ministry Policy A. R. 2.06.00, "once any rehabilitation that could be carried out without conflicting with the draft plan...is completed, MNR can surrender the licence as the new

rehabilitation requirements will be governed by the draft grading plan or plan of subdivision, which is enforced by the municipality".

Ministry Policy A.R. 2.01.11 states that the intent of the *ARA* is as follows:

to establish MNR as the lead regulatory agency, with respect to aggregate operations in designated areas, in order to ensure that aggregate operations provincially are regulated in a consistent and fair manner. While the Act provides many opportunities for municipalities to participate in this process (e.g. comments on new applications and amendments), it attempts to avoid the possibility of conflicting or inconsistent regulation of the industry.

The *ARA* provides for a comprehensive regime for the rehabilitation of lands used for aggregate extraction. That regime should be utilized.

Summary: The Use of the Lands is Illegal and Non-conforming

The Applicant appears to be seeking to control the use of lands through a site plan agreement. Site plan agreements cannot be used to control the use of land – that is done through zoning bylaws.

Summary of the Current and Proposed Uses and the Land Use Planning Context

Current and Proposed Uses

The current use of the property is for aggregate resource extraction under the *ARA*. An active pit and mineral aggregate operation exist on the site under licence #6578. In the M3-1 Zone of the property, an area has been used (illegally) since approximately November 2014 for a contractor's yard, outdoor storage of trailers, lumber, scrap metal, pipe, fuel tanks, various equipment, and other materials and structures. The M5-1 Zone has been used illegally for outdoor storage since approximately 2009 to 2010. Any use of the site for a contractor's yard including outside storage would be contrary to the *ARA* licence since its issuance on January 18, 1995.

Miller proposes to continue and expand these uses. Miller seeks to remove a 36-hectare area at the southwest corner of the property from *ARA* site plan control. Miller proposes to import fill and construct an equipment storage building with parking. Existing buildings and structures on the property would be maintained. Approximately 1,000,000 cubic metres of fill would be imported over a ten-year period. Miller proposes that under a site plan with the Town, the lands would

eventually consist of rehabilitated slopes, naturalized areas, an asphalt plant and stockpiling area, an asphalt shingle recycling facility, and an indoor/outdoor equipment storage.

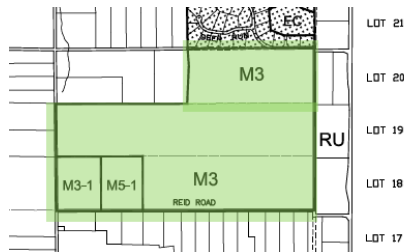
The uses noted above are contrary to the *ARA* License and are therefore not legal. The MNRFB has repeatedly directed Miller to remedy these breaches of its licence, but the Owner has not remedied the situation.

The Licence and Site Plan under the *ARA*

Aggregate extraction at the subject site is governed by a licence and site plan under the *ARA*. The site plan specifies the nature of the aggregate extraction activities that can take place and their location. The site plan does not allow for the storage of materials associated with a contractor's yard and the importation of materials other than aggregate as specified in the site plan. An activity not set out in the site plan is not permitted in the licence. Miller has installed a contractor's yard and brought in other materials contrary to the licence and site plan. The site plan also requires progressive rehabilitation, which has not been done, and final rehabilitation, which Miller seeks to avoid.

The Zoning

The Subject Property was zoned under Uxbridge Zoning Bylaw 81-19 in Schedule A3 as M3, M5-1 and M3-1:



In the M3-1 Zone, in addition to other uses permitted in the M3 Zone, use was permitted for a contractor's yard, including outside storage. The Miller application proposes an equipment storage building and outdoor storage facilities within the M3-1 Zone on the basis that it is permitted in accordance with Uxbridge Zoning Bylaw 81-19. In the M5-1 Zone, an additional use was permitted for an asphalt plant, which exists at the property. The M5-1 Zone does not permit a contractor's yard or outside storage. The applicant proposes to import excess fill in all of the M3, M3-1, and M5-1 Zones. Under the *ARA* licence and site plan, importing fill is not a permitted use.

Uxbridge Official Plan Designation

Under the Town of Uxbridge Official Plan, the lands are designated as "High Aquifer Vulnerability" and "Countryside Area". Site plan alteration is not permitted in areas of high aquifer vulnerability in Countryside Area lands. The current and proposed uses would not conform with the Uxbridge Official Plan.

Durham Region Official Plan Designation

The land is designated in the Durham Region Official Plan (the "**DROP**") as an "Aggregate Resource Extraction Area". Once aggregate resource activities are no longer licenced, the DROP requires that site alteration must conform with the *ORMCP*. The current and proposed uses would not conform with the *ORMCP*, and thus would not conform to the DROP.

ORMCP Designation

The land is designated Countryside Areas under the *ORMCP*. That designation prevails over any OP or zoning that may conflict with it. Although the *ORMCP* could permit small-scale commercial, industrial, and institutional uses, such small-scale uses must be shown to "not require large-scale modification of terrain, vegetation or both or large-scale buildings and structures". However, the application itself is considered by the Ministry to be and is submitted as a major site plan amendment. Miller's intended use of the Subject Lands is inconsistent with the Countryside Areas designation under the *ORMCP*.

There is an exception to compliance with the *ORMCP* for legal non-conforming uses that would otherwise be prohibited if such uses legally existed as of November 15, 2001, when the *ORMCP* came into force. The current and proposed uses of the lands do not fall into that category – they were not in existence at that time and in any case are not legal.

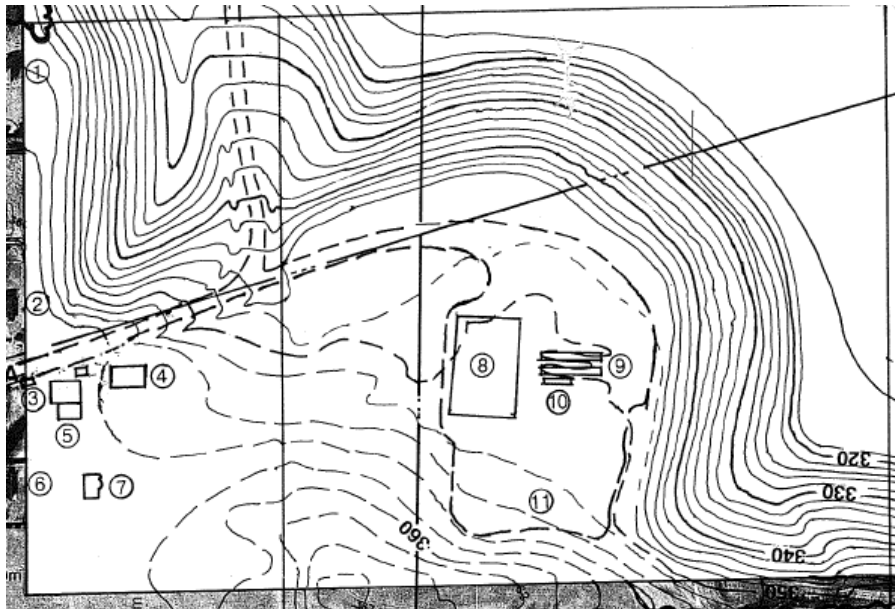
Discussion of the Illegality of the Current and Proposed Uses

The control of the lands under the *ARA*, the zoning, and the *ORMCA* and *ORMCP* are discussed in further detail below, followed by a discussion of the applicant's illegal use of the lands that would preclude its applications.

The Licence and Site Plan

Aggregate extraction at the subject site is governed by a licence and site plan under the *ARA*.

The picture below shows a portion of one of the site plan drawings showing the M3-1 and M5-1 Zones and the structures permitted therein:



The permitted structures in this area, which may be used with respect to aggregate resources extraction are as follows:

- 1) House
- 2) House
- 3) Weighscale
- 4) Barn
- 5) Barn
- 6) House
- 7) Concrete Silos
- 8) Asphalt Plant Area
- 9) Settling Ponds
- 10) Propane Tank
- 11) Storage Yard
- 12) Parts from previous asphalt plant

The site plan does not allow for the storage of materials associated with a contractor's yard. An activity not set out in the site plan is not permitted in the licence.

The site plan allows for an asphalt batching plant in the M5-1 Zone. The site plan provides for the stockpiling of reclaimed asphalt in the M5-1 Zone in the form of grindings of reclaimed asphalt as produced by an asphalt milling machine or by crushing chunks of asphalt pavement in an amount not to exceed 25,000 tonnes. The site plan does not provide for the importation of limestone, concrete, fill, or other such materials.

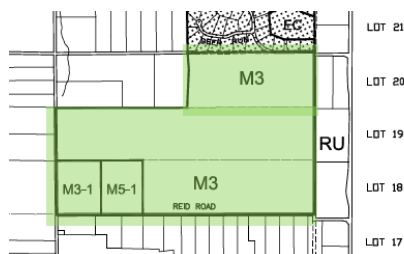
The site plan requires ongoing progressive rehabilitation of the site. The approved plan provides that rehabilitation of the site shall occur in areas where extraction is exhausted. The operation of the pit is planned under the site plan "to result in an attractive and useful site upon the termination of the extraction operations".

As discussed further below, the Applicant is not in compliance with the *ARA* requirements.

The Zoning

The land uses of the subject property that would otherwise be permitted under the Zoning have been restricted by the uses that are prohibited under the *ARA* licence and site plan.

The Subject Property was zoned under Uxbridge Zoning Bylaw 81-19 in Schedule A3 as M3, M5-1 and M3-1:



In the M3-1 Zone, use was permitted for a contractor's yard, including outside storage. The Miller application proposes an equipment storage building and outdoor storage facilities within the M3-1 Zone. However, the contractor's yard and outside storage are contrary to the *ARA* site plan and licence.

In the M5-1 Zone, an additional use was permitted for an asphalt plant, which exists at the property. The M5-1 Zone does not permit a contractor's yard or outside storage. The applicant proposes to import excess fill to the M5-1 Zone. As noted below, Miller is not in compliance with the *ARA* site plan with respect to the type of fill being brought into the Subject Lands.

The Illegal and Non-conforming Uses

The Impact of the ORMCA and ORMCP on the Zoning

The zoning of the Subject Lands has been overridden by operation of the *ORMCA* and the *ORMCP*. The *ORMCA* prevails over any other general or special Act. As well, the *ORMCP* prevails over any official plan, zoning by-law or policy statement issued under section 3 of the *Planning Act*.

Section 5 of the *ORMCP* provides that no person shall, except as permitted by the *ORMCP*:

- (a) use land or any part of it;
- (b) undertake development or site alteration with respect to land; or
- (c) erect, move, alter or use a building or structure or any part of it.

Section 6 of the *ORMCP* provides a limited protection for legal non-conforming uses. A legal non-conforming use is established by each of the following, of which the first two items are most relevant to Miller's applications:

- **Existing:** meaning a use, building or structure in existence on November 15, 2001
- **Lawful:** the land, building or structure was **lawfully** used for that purpose on November 15, 2001
- **Continuous:** the land, building or structure continues to be used for that purpose
- **Expansion of existing buildings and institutional uses permitted only if no change in use or adverse effects to ecology:** An expansion of an existing building or structure must be shown by the applicant not to be a change in use and not to adversely affect the ecological integrity of the Plan Area
- **Conversion of existing use to a similar use only if** the conversion will bring the use into closer conformity with the Plan and will not adversely affect the ecological integrity of the Plan Area

To determine whether there is a legal non-conforming use of the lands, the examination is of the actual facts on November 15, 2001, rather than a consideration of what use could or might have been made of the lands under the zoning.

Miller's application states that the proposed application complies with the Zoning and Official Plan. That is not the case.

Photographs of the Subject Property show a pasture that it is believed was vacant and not used on November 15, 2001, and which was used as a horse pasture from 2012 until late 2014 or early 2015, when the contractor's yard was constructed. The following aerial photograph from 2009 shows that the Subject Site did not contain contractor's yards or outside storage:



Below is a picture taken in 2012 of the pasture that existed on the Subject Lands:



Today, there is a contractor's storage yard both in the M3-1 Zone, which was zoned for a contractor's yard and outside storage, and in the M5-1 Zone, which was not:



On first blush, it would appear that the use of the contractor's yard, including outside storage, would be a legal use as it is permitted in the M3-1 Zone. The Miller application proposes an equipment storage building and outdoor storage facilities within the M3-1 Zone on the basis that it is permitted in accordance with Uxbridge Zoning Bylaw 81-19. However, the zoning has been overridden by the *ORMCA* and the *ORMCP*.

Miller's proposed uses trigger section 5 of the *ORMCP*. By operation of section 5, Miller's proposal to install a contractor's yard, outside storage, and import fill on the Subject Lands would be to use land or any part of it, undertake development or site alteration with respect to land, or to erect, move, alter or use a building or structure, or any part of it, that is only permissible under the *ORMCP*. The only exception would be if the use constitutes a legal non-conforming use pursuant to section 6 of the *ORMCP*.

The uses proposed by Miller are not legal non-conforming uses, including with respect to the contractor's yard, outdoor storage, or importation of fill.

First, the contractor's yard and storage use was not in existence on November 15, 2001.

The construction yard and outdoor storage use commenced between about November 2014 to May 2015. The commencement of this use is evidenced by photographs that we have been provided with by Green Durham (including some reproduced above), images available from Google Maps, and as stated in the Ministry's Inspection Report pursuant to the *ARA* dated November 19, 2020 (the "**The 2020 Inspection Report**").

Second, Miller's use of the lands was illegal.

Miller's site operates under licence pursuant to the *ARA* and an approved site plan as to how the site is to be operated. The site plan is a legal document that is prescriptive in nature. If the site plan is silent on an activity, then it is not a permitted use. Section 15 of the *ARA* provides that "every licensee shall operate the licensee's pit or quarry in accordance with this Act, the regulations, the site plan and the conditions of the licence".

As well, under section 66 of the *ARA*, even if some use of the lands would otherwise be allowed under municipal zoning, any such zoning bylaw becomes inoperative to the extent that it conflicts with the *ARA*, the regulations, and the provisions of licenses, permits and/or site plans.

Miller refused to comply with the Ministry's directions set out in correspondence to Miller Paving dated September 23, 2010 and in two Inspection Reports under the *ARA*, one dated May 11, 2015 (the "**2015 Inspection Report**"), and the other dated November 19, 2020 (the "**2020 Inspection Report**").

The Ministry's reports described above include directions to Miller to correct illegal conduct, including conduct related to the important environmental objective of the eventual rehabilitation of lands within the Oak Ridges Moraine.

The 2020 Inspection Report indicates that since 2010, Miller has continuously failed to comply with MNRF directions with respect to the following:

- Failure to remove the contractor's yard in the M3-1 Zone built in or about November 2014 to May 2015 to store contractor's equipment

- In fact, Miller has continuously *expanded* the contractor's yard in defiance of the Ministry's directions
- The 2020 Inspection Report noted that the contractor's yard was not being used in a manner consequential to the aggregate site, was being used significantly more than during the previous inspection, and had been a compliance issue since at least 2010
- The 2015 Inspection Report indicated at Item 7 that regardless of the M3-1 Zoning, the location of the foundation pad for the construction storage yard was not identified in the *ARA* site plan and that the site plan does not address the storage of material associated with a contractor's yard. As such, the use was not permitted within the licensed property
- Failure to remove a contractors storage yard in the M5-1 Zone which is not in compliance with the licence
- Failure to remove construction equipment unrelated to aggregate extraction
- Failure to remove concrete, off-site material, fill materials, and recyclable aggregate materials (other than permitted reclaimed asphalt pavement) in the vicinity of the asphalt plant.
 - Concrete recycling (storage/crushing) is not a permitted use on the site plan. A stockpile of reclaimed asphalt pavement, not exceeding 25,000 tonnes in size, may be stockpiled within the M5-1 Zone
- Failure to complete progressive rehabilitation:
 - The 2015 Inspection Report set a date for progressive rehabilitation of the Subject Site where extraction had been exhausted according to the approved site plan, which due date was not complied with

In addition, Miller continues to commence working operations at the property prior to 7:00 am contrary to Miller's Environmental Compliance Approval issued by the Ministry of the Environment and Climate Change. In their June 13, 2019 submission to the Township for Application for Site Plan Approval, Miller indicated that it has been importing fill into Boyington Pit #3. Importing fill is not permitted under their existing licence, nor Township by-laws.

As such, the M3-1 Zone is inoperative with respect to the contractor yard, storage use, importation of fill and other uses that are not permitted under the ARA site plan. As noted, the contractor yard and outdoor storage is not permitted under the M5-1 Zone in any case.

The Proposed Land-use would otherwise be Contrary to the ORMCA and ORMCP

The Applicant appears to be seeking to control the use of the Subject Lands through the site plan process, which is impermissible. Miller's proposed use of the lands is not in conformity with the zoning as amended by the *ORMCA* and the *ORMCP*. An amendment of the Official Plan and Zoning Bylaw to allow the proposed use would be required, but would not likely be granted because it would be contrary to the *ORMCA* and *ORMCP* and the other planning instruments that must conform to the *ORMCA* and the *ORMCP*.

Miller seeks to avoid rehabilitating exhausted aggregate lands that it has reaped the benefits of and instead seeks to convert the lands to industrial use. This purpose is clearly contrary to the *ORMCA* and the *ORMCP*, whose objectives include the following:

- (a) protecting the ecological and hydrological integrity of the Oak Ridges Moraine Area
- (b) ensuring that only land and resource uses that maintain, improve or restore the ecological and hydrological functions of the Oak Ridges Moraine Area are permitted
- (c) maintaining, improving or restoring all the elements that contribute to the ecological and hydrological functions of the Oak Ridges Moraine Area, including the quality and quantity of its water and its other resources and
- (e) providing for land and resource uses and development that are compatible with the other objectives of the Plan.

The Proposed Uses are Contrary to Land Use Policy under the *ORMCP* and Official Plans

The subject lands are not intended for the type of use contemplated by Miller's Applications.

ORMCP: Countryside Designation

The Miller lands are located within the Oak Ridges Moraine Conservation Plan Area of the Oak Ridges Moraine Conservation Plan Land Use Designation Map and are designated therein as "Countryside Area".

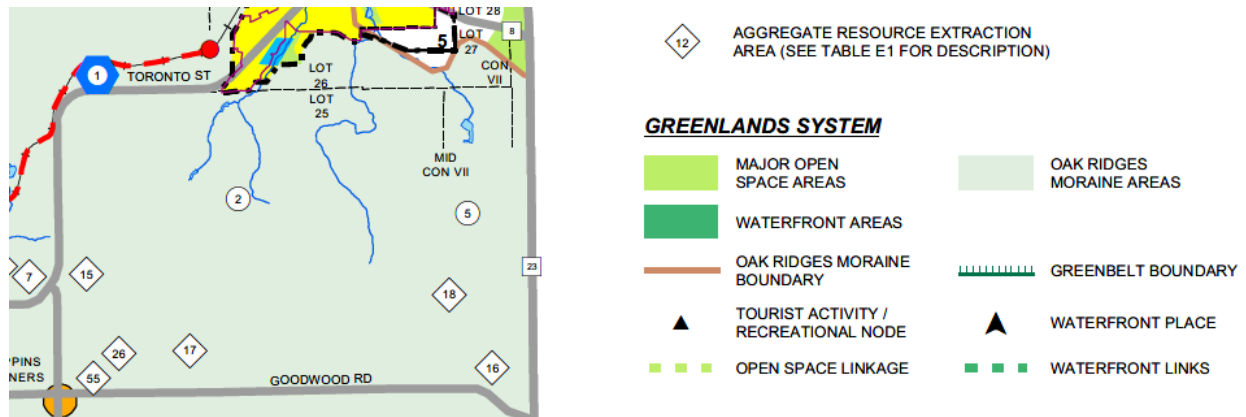
With respect to the "Countryside Areas" designation, Section 13 of the *ORMCP* provides that the purpose of Countryside Areas is to encourage agricultural and other rural uses that support the Plan's objectives, including by maintaining, and where possible improving or restoring, the health, diversity, size, and connectivity of key natural heritage features, key hydrologic features and the related ecological functions.

Section 13(3) of the *ORMCP* permits a number of uses for Countryside Areas, including for fish, wildlife and forest management; conservation projects and flood and erosion control projects; and agricultural uses, among others. Small-scale commercial, industrial, and institutional uses may be permitted pursuant to section 40 of the *ORMCP*. Among other criteria required to satisfy section 40, such small-scale uses must be shown to "not require large-scale modification of terrain, vegetation or both or large-scale buildings and structures". However, the application itself is considered by the Ministry to be and is submitted as a major site plan amendment.

Miller's intended use of the Subject Lands is inconsistent with the Countryside Areas designation under the *ORMCP*.

Durham Region Official Plan

Under the DROP, the Subject Lands are located within the "Greenbelt Boundary", within the "Oak Ridges Moraine Areas" of Schedule "A" – Map "A2" Regional Structure, and are identified as an "Aggregate Resource Extraction Area" by a number "18" in the Diamond symbol located north of Goodwood Road (Highway 21) and west of Lakeridge Road (Highway 23):



Schedule E – Table 'E1' – cont'd
Aggregate Resource Extraction Areas

Area Identified on Schedule 'A'	Location			
	Former Municipality	Lot(s)	Concession(s)	Area (Ha)
16	Uxbridge Twp.	Part of 16	7 & 8	51
17	Uxbridge Twp.	Parts of 16 & 17	5	49
18	Uxbridge Twp.	18, 19 & Part of 20	7	196

Sub-Section 9D of the DROP applies to "Aggregate Resource Extraction Areas".

Policy 9D.2.4 provides as follows:

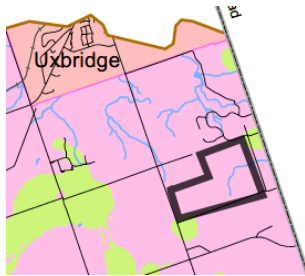
Once aggregate resource extraction activities are no longer licensed, such areas shall only be used, without amendment to this Plan, for those uses permitted within Prime Agricultural Areas and within the Greenlands System depending, as the case may be, on the immediate surrounding land use designations, and the respective zoning by-laws shall be appropriately amended forthwith, and the applicable Aggregate Resource Extraction Area designation and description shall be removed from Schedule 'A' and Schedule 'E' – Table 'E1' respectively, without amendment to this Plan.

Once aggregate resources extraction activities cease, in our submission DROP Policy 10B.2.1 would apply, and that only applications for development and site alteration that conform with the *ORMCP* would be considered. As noted above, Miller's intended use of the Subject Lands would not conform with the *ORMCP* because the use would require large-scale modification of terrain, vegetation or both or large-scale buildings and structures.

Town of Uxbridge Official Plan

Under the Town of the Uxbridge Official Plan and by way of Uxbridge Site Alteration Bylaw No. 2010-084, it may be that site alteration of the Subject Lands would be prohibited on the basis that the lands are within an area of aquifer vulnerability in a Countryside Area.

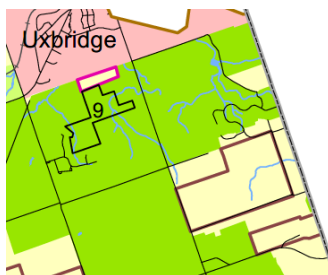
Under the Town of Uxbridge Official Plan, Schedule "J", "Oak Ridges Moraine Conservation Plan Area – Areas of Aquifer Vulnerability", the lands are marked as "High Aquifer Vulnerability". The Subject Property is shown below with a thick black border:



Oak Ridges Moraine Areas of Aquifer Vulnerability

- High Aquifer Vulnerability
- Low Aquifer Vulnerability

On the Uxbridge Official Plan, Schedule "H", "Oak Ridges Moraine Conservation Plan Area, Land Use Plan", the subject is designated "Countryside Area" and is identified as "Policy Area 1.9.9.1 Approved Mineral Aggregate Extraction Area".



- Policy Area 1.9.9.1 Approved Mineral Aggregate Extraction Area
- Countryside Area

Section 2.4 of the Uxbridge Site Alteration Bylaw No. 2010-084 provides as follows:

"Notwithstanding anything else contained in this By-law except for Section 3.1, no person shall cause, permit or perform a *site alteration* on any lands in the *Oak Ridges Moraine* that are designated by the *Oak Ridges Moraine*

Conservation Plan as:

- (a) "Natural Linkage Area",
- (b) "Natural Core Area", or
- (c) areas of high aquifer vulnerability or landform conservation areas in lands designated as "Countryside Area",**

unless such *site alteration* is directly associated with a building permit issued by the *Corporation* or any other development agreement with the *Corporation*, or unless such *site alteration* is directly associated with activities described in section 3.2 of this By-law.

For all of the foregoing reasons, Miller's proposed application to the MNRF would be contrary to the rehabilitation requirements under the *ARA* and contrary to the MNRF's directions that Miller bring the lands into compliance with its licence. It would be inappropriate to release lands from the *ARA* regime that are used in a manner that it not in compliance with law and that would not likely be approved under the current policy framework. Miller appears to be seeking to avoid its obligation to rehabilitate the exhausted aggregate lands and to instead convert the lands to an industrial use that would require amendments to the Official Plans and Zoning Bylaw. Those amendments would not be approved since they would be contrary to the *ORMCA* and *ORMCP*. Amending the rehabilitation and the application to surrender these lands should both be denied.

Should you have any questions or concerns, please contact the writer.

WeirFoulds LLP



Bruce H. Engell

BHE/MG

c: Client