MUNICIPAL AUTHORITY TO REGULATE MINERAL AGGREGATE OPERATIONS

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INTRODUCTION

Municipalities in Canada do not have direct powers under the Canadian Constitution and can therefore only exercise those powers that the provincial legislatures delegate to them. In what follows, we explore how municipalities in Ontario use the powers delegated to them to regulate mineral aggregate operations within their jurisdictions. We also discuss the limitations on those powers. While mineral aggregate operations are subject to a myriad of statutory, regulatory, and policy provisions in Ontario, this paper is not intended to explore each provision. In addition, the following is not meant to be an exhaustive exploration of powers used by municipalities to regulate mineral aggregate operations in Ontario, but rather, the purpose of this paper is to provide an overview of five commonly utilized municipal powers only and to discuss the limitations on those powers and the use thereof.

In this paper, we adopt the definition of 'mineral aggregate operations' as set out in the Provincial Policy Statement, 2014:

Mineral aggregate operation:

a) lands under license or permit, other than for *wayside pits and quarries*, issued in accordance with the *Aggregate Resources Act*;

b) for lands not designated under the *Aggregate Resources Act*, established pits and quarries that are not in contravention of municipal zoning by-laws and including adjacent land under agreement with or owned by the operator, to permit continuation of the operation; and

c) associated facilities used in extraction, transport, beneficiation, processing or recycling of *mineral aggregate resources* and derived products such as asphalt and concrete, or the production of secondary related products.

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MUNICIPAL POWERS

Municipal Act, 2001, S.O. 2001, c. 25

In Ontario, the *Municipal Act, 2001,* S.O. 2001, c. 25 ("*Municipal Act*") confers a broad range of powers to municipalities pursuant to sections 10 and 11 as well as several specifically enumerated powers. All powers delegated to municipalities are to be interpreted broadly and where there is ambiguity as to whether a municipality has authority to take a particular action, the ambiguity is to be resolved to include the authority (see s. 8 of the *Municipal Act*).

i) Municipal Act Section 124 - By-laws to Regulate Pits and Quarries

The most direct delegation of power to regulate mineral aggregate operations in the *Municipal Act* is section 124, which contains a specific grant of power permitting municipalities to establish general requirements for the operation of a pit or quarry:

> *Pits and quarries*
>
> 124 (1) Without limiting sections 9, 10 and 11, a local municipality may,
> (a) regulate the operation of a pit or a quarry;
> (b) require the owner of a pit or a quarry that has not been in operation for a period of 12 consecutive months to level and grade the floor and sides of it and the area beyond the edge or rim that is specified in the by-law. 2006, c. 32, Sched. A, s. 65.
>
> (2) Repealed: 2006, c. 32, Sched. A, s. 65.
>
> *Non-application of by-law*
>
> (3) A by-law under this section does not apply to a pit or a quarry, as those terms are defined in the *Aggregate Resources Act*, located in a part of Ontario designated in a regulation under subsection 5 (2) of that Act. 2001, c. 25, s. 124 (3).

This authority has been utilized by municipalities such as the Town of Erin, the Corporation of the United Townships of Dysart, Dudley, Harcourt, Guilford, Harburn, Bruton, Havelock, Eyre and Clyde (commonly referred to as the Municipality of Dysart et al.), the Township of Oro-Medonte, the Township of Strong, and the Town of Halton Hills to regulate matters involving hours of operation, areas of ingress and egress, operational standards such as set-backs, rehabilitation, and maintenance standards, as well as to require owners of pits and quarries to level and grade the floor and sides. These by-laws can be found at Appendix "A". Section 124 by-laws are particularly useful in areas of the province that are not designated pursuant to the *Aggregate Resources Act,* R.S.O. 1990, c. A.8 ("ARA"). In these areas, there is little provincial oversight of pits and quarries and for that reason, municipal regulation is in the public interest.

One of the most common areas of regulation found in the section 124 by-laws, is a restriction on hours of operation. The Ministry of Natural Resources and Forestry ("MNRF"), the main regulatory body for pits and quarries in Ontario, has not taken a clear position on this matter. Therefore, it remains unclear as to the MNRF's position on whether an aggregate operator must abide by a municipal by-law that regulate the hours of operation where a pit or quarry is operating pursuant to an ARA site plan that is silent on hours of operation.

All ARA site plans issued after June 27, 1997 are required to include hours of operation. However, prior to this date, it was common place for no hours of operation to be included on ARA site plans where no restrictions were required; as a result, there are numerous pits and quarries throughout Ontario that are operating pursuant to a site plan that does not include hours of operation.

ii) Municipal Act Section 129 – By-laws to Prohibit and Regulate Noise, Odour, Dust, etc.

Municipalities can enact by-laws to prohibit and regulate noise, vibration, odour, dust, and outdoor illumination pursuant to section 129 of the *Municipal Act*:

> *Noise, odour, dust, etc.*
>
> 129 Without limiting sections 9, 10 and 11, a local municipality may,
>
> (a) prohibit and regulate with respect to noise, vibration, odour, dust and outdoor illumination, including indoor lighting that can be seen outdoors; and
> (b) prohibit the matters described in clause (a) unless a permit is obtained from the municipality for those matters and may impose conditions for obtaining, continuing to hold and renewing the permit, including requiring the submission of plans. 2006, c. 32, Sched. A, s 69.

The purpose of section 129 is to permit municipalities to control noise, vibration, visual, and other forms of pollution. Municipalities such as the City of Kingston, the Township of South Frontenac, and the City of Kawartha Lakes have included specific provisions in their noise by-laws to establish prohibitions on the hours of operations of pits and quarries, attached at Appendix "B". Again, the MNRF has not clearly addressed this matter in its policies. Therefore, the MNRF's position is unclear respecting whether an aggregate operator must abide by a municipal noise by-law that regulates the hours of operations.

Respecting mineral aggregate operations more broadly, it is common for municipal noise by-laws to include prohibitions on the hours of operation of, and/or the use of, auditory signalling devices (back up beepers for instance) and construction equipment (which typically includes material handling equipment, excavators, haulers, etc.). Such provisions can be a useful tool in the regulation of pits and quarries, as well as the operation of concrete batching plants, asphalt production facilities, aggregate transfers stations, and other mineral aggregate operations. By-laws regulating vibration, such as the Town Caledon By-law 2008-31, attached at Appendix "C", have also been used to regulate these uses with a varying degree of success.

Where a mineral aggregate operation is operating pursuant to an Environmental Compliance Approval ("ECA") under *the Environmental Protection Act*, R.S.O. 1990, Chapter E.19 (the "EPA"), the ECA would prescribe the activities that emit noise, noise mitigation measures that are required (if any), when such activities can take place, and the level of noise that may be emitted. As discussed below, it is likely that a municipal noise by-law would not apply to a mineral aggregate operation operating in accordance with an ECA. The situation is less clear where no ECA applies and no indication of hours of operation included on a site plan.

iii) Municipal Act Section 142 – Site-Alteration By-Laws

Aggregate extraction is an interim land use. Not only are pits and quarries well suited for fill operations given that they are located on existing haul routes and have the equipment required to manage fill, but fill importation can also improve rehabilitation. Depending on surrounding land uses and other applicable policies, sites that were previously used for extraction can be turned into productive wildlife habitat, wetlands, golf courses, recreational parks, urban uses, conservation lands, forestry, or agriculture through the importation and dumping of fill.

Municipalities can regulate the placing or dumping of fill pursuant to subsection 142(2) of the *Municipal Act*, subject to certain exemptions which are set out at subsection 142(5) of the *Municipal Act*:

> *Site alteration*
>
> 142 (2) Without limiting sections 9, 10 and 11, a local municipality may,
> (a) prohibit or regulate the placing or dumping of fill;
> (b) prohibit or regulate the removal of topsoil;
> (c) prohibit or regulate the alteration of the grade of the land;
> (d) require that a permit be obtained for the placing or dumping of fill, the removal of topsoil or the alteration of the grade of the land; and
> (e) impose conditions to a permit, including requiring the preparation of plans acceptable to the municipality relating to grading, filling or dumping, the removal of topsoil and the rehabilitation of the site. 2006, c. 32, Sched. A, s. 76 (1).
> ...
> *Exemptions*
> (5) A by-law passed under this section does not apply to,
> ...
> (e) the placing or dumping of fill, removal of topsoil or alteration of the grade of land undertaken on land described in a licence for a pit or quarry or a permit for a wayside pit or wayside quarry issued under the *Aggregate Resources Act*;
> (f) the placing or dumping of fill, removal of topsoil or alteration of the grade of land undertaken on land in order to lawfully establish and operate or enlarge any pit or quarry on land,
> *i.* that has not been designated under the *Aggregate Resources Act* or a predecessor of that Act, and
> *ii.* on which a pit or quarry is a permitted land use under a by-law passed under section 34 of the *Planning Act*;

Most municipalities in Ontario surrounding large urban areas have passed site alteration by-laws with rigorous application requirements to ensure appropriate oversight and to safeguard the environment. These by-laws do not just regulate the placing of fill, but also the removal of topsoil, the altering the grade, and the stockpiling fill. Section 142 only allows such by-laws to prohibit and regulate. Thus, if the criteria and conditions in the by-law for permitting the site alteration are met, the municipality has no discretion to refuse the granting of the permit.

The approach to approvals for fill operations varies between municipalities.

Ontario has produced voluntary soil management guidelines for municipalities to adopt to try to regulate and ensure that only clean fill would be deposited on receiving sites ("Guidelines"). Municipalities are encouraged to implement the Guidelines through by-laws in connection with any permits or approvals required which involves the removal, movement, temporary storage and placement of excess soil.

For the purpose of the Guidelines, "excess soil" is soil that has been excavated and moved off site, either permanently or temporarily. "Soil" is defined by Ont. Reg. 153/04 which is the Records of Site Condition part of the EPA. The Guidelines do not apply to materials not caught by the two definitions, such as compost, engineered fill products, asphalt, concrete, re-used or recycled aggregate product and/or mine tailings, and soil mixed with debris, such as garbage, shingles, painted wood, ashes or other refuse. Soil removed from brownfield sites often include materials that do not qualify as "excess soil" and should be prohibited in any event by local site alteration by-laws.

Site alteration by-laws, such as Town of Uxbridge By-law 2010-084, attached at Appendix "D", can be a useful tool to:

- regulate the type of fill proposed to be dumped or placed to ensure that only clean fill be dumped or placed within the municipality (i.e. to require that soil meets the standards set out in Table 1 of the Soil, Ground Water and Sediment Standards referenced in O.Reg. 153/04);
- regulate the amount of fill that can be dumped or placed;
- regulate the hours of operation for the dumping or placing of fill;
- regulate the location of the dumping or placing of fill (i.e. preventing the placing or dumping of fill on environmentally sensitive lands);
- require erosion control measures;
- regulate the finished grade; and,
- require permit agreements that include requirements for security, oversight, and cost recovery.

Pursuant to section 391 of the *Municipal Act*, municipalities may pass by-laws imposing fees and/or charges for services, including fee for services rendered relating to a site-alteration by-law enacted pursuant to section 142 of the *Municipal Act*.

Planning Act, R.S.O. 1990, c. P. 13

The *Planning Act,* R.S.O. 1990, c. P. 13 ("*Planning Act*") is provincial legislation that sets out the regulatory framework for land use planning in Ontario and provides authority, and the limitations thereof, for municipalities to control the use of land and establishes how land uses are controlled.

i) Planning Act Sections 16-17 - Official Plans

ii) Planning Act Section 34 - Zoning By-Laws

Pursuant to section 34 of the *Planning Act*, the making or establishment of a pit or quarry is a land use which requires *Planning Act* approval:

> *Zoning by-laws*
>
> 34 (1) Zoning by-laws may be passed by the councils of local municipalities:
>
> *Restricting use of land*
>
> 1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or abutting on any defined highway or part of a highway.
>
> ...
>
> *Pits and quarries*
>
> (2) The making, establishment or operation of a pit or quarry shall be deemed to be a use of land for the purposes of paragraph 1 of subsection (1).

Section 12.1(1) of the ARA permits the Minister to issue a licence only if a zoning by-law allows the site to be used for the making, establishment, or operation of pits and quarries.

Other mineral aggregate operations such as concrete batching plants, asphalt production facilities, aggregate transfers stations, etc. are also land uses that require *Planning Act* approval.

Pursuant to section 24 of the *Planning Act*, all by-laws passed by municipalities must conform to the municipality's Official Plan passed pursuant to section 17 of the *Planning Act*. An Official Plan contains a municipality's objectives and policies to guide the physical development of all lands within the boundary of the municipality. It provides direction for the use, intensity, and form of development as well as strategic direction for the provision of municipal services and facilities. Therefore, Official Plans determine where and under what circumstances uses (including mineral aggregate operations) may be located.

Official Plans and zoning by-laws can also be an important tool to prevent potential land use conflicts and to ensure adequate protection of mineral aggregate operations by implementing policies such as those set out in the D-series (Ontario Environmental Land Use Planning Guides) and in particular Guideline D-6 ("D-Series Guidelines"). The D-Series Guidelines provide environmental considerations and a policy framework for industrial land use, sensitive lands, sewage and water services, and private wells. It classifies industrial uses based on potential for impact on sensitive land uses and suggests appropriate areas of influence or separation distances

and policies for each classification, subject to additional study. The D-Series Guideline also proposes that industrial users be identified in plans and their areas of influence or off-site separation distances be clearly indicated. It also sets out studies that may be considered as part of development applications submitted by both industrial users and proponents of sensitive land uses. The Environmental Noise Guideline NPC-300 ("NPC-300") also provides a great deal of guidance to avoid land use conflict.

There is a provincial mandate to ensure that aggregate resources are protected for long-term use. Through the Provincial Policy Statement, 2014 ("PPS"), policy 2.5.2.1, the Province has required that as much mineral aggregate as is realistically possible shall be maintained close- to-market supply. This minimizes transportation costs as well as social and environmental impacts including air quality, greenhouse gas emissions, and fossil fuel consumption (see PPS policy 2.5.2.2). The County of Brant Official Plan ("Brant OP") at policy 2.3.4.2(a) includes the following policy direction:

> *As much of the mineral aggregate resource shall be made available to supply mineral resource needs, as close to market as possible.*

Pursuant to policy 2.5.2.4, municipalities must protect existing mineral aggregate operations so that they are permitted to continue and be protected from development or activities that would preclude or hinder their continued use or expansion. To comply with this policy, Municipal Official Plans should limit and control incompatible or the development of sensitive land uses near mineral aggregate operations and mineral aggregate deposits. This ensures that mineral aggregate operations can be established and access the resource. Typically, Official Plan policies will require demonstration that a proposed development would not preclude or hinder long-term availability of the identified mineral aggregate deposits. The Brant OP at policy 2.3.4.2(g)-(h) provides:

> *(g) Development and changes in land use which would preclude or hinder the establishment of new mineral aggregate operations or access to resources shall not be permitted in or adjacent to mineral aggregate resource areas unless it has been demonstrated that:*
>
> *i. resource use would not be feasible; or*
> *ii. the proposed land use or development serves a greater long-term public interest; and*
> *iii. issues of public health, public safety and environmental impact are addressed.*
>
> (h) *Applicants for development or land use change within or adjacent to a mineral aggregate resource areas shall be required to submit an Aggregate Impact Assessment which provides information assessing the potential impact of the proposed development on the resource in accordance with i. to iii. above*.

The County of Simcoe Official Plan at policy 4.4.2 provides:

> *High potential mineral aggregate resource areas shall be protected for potential long-term use. As much of the mineral aggregate resources as is realistically possible shall be made available as close to markets as possible. Demonstration of need for mineral aggregate resources, including any type of supply/demand analysis, shall not be required, notwithstanding the availability, designation or licensing for extraction of mineral aggregate resources locally or elsewhere.*

Official Plan policy should recognize that aggregate extraction is an interim land use. Official Plans can provide direction for rehabilitation of mineral aggregate operations in terms of preferred after uses or coordinated after-use planning pursuant to PPS policies 2.5.3.1-2.5.3.3. The Brant OP, for example, requires that the assessment of proposals for the establishment of new licenced mineral aggregate operations include an assessment of rehabilitation plans.

Planning for the availability of mineral aggregate resources includes ensuring haul routes are available so that products can be transported to markets. Official Plan policies may include a description of municipal road networks that are designed to facilitate the movement of people and goods around and through the municipality.

LIMITS ON MUNICIPAL POWERS TO REGULATE

Aggregate Resource Act, R.S.O. 1990, c. A8 – Section 66

Section 66 of the ARA provides that municipal regulation of aggregate operations in Ontario is limited to subject matters that are not covered by the ARA, regulations made pursuant to the ARA, and the provisions of licences and site plans under the ARA:

Act overrides municipal by-laws, etc.

> 66 (1) This Act, the regulations and the provisions of licences and site plans apply despite any municipal by-law, official plan or development agreement and, to the extent that a municipal by-law, official plan or development agreement deals with the same subject-matter as this Act, the regulations or the provisions of a licence or site plan, the by-law, official plan or development agreement is inoperative. 1999, c. 12, Sched. N, s. 1 (4).

Given the clear language of section 66, a *conflict* between the Act, regulations, licences, and site plans under the ARA and an impugned municipal by-law is not required to cause the by-law to be inoperative; all that is required is that the impugned by-law deal with the same subject matter as those instruments. Section 66 therefore replaces the general test for inoperability where a by-law must conflict with provincial statute or powers derived therefrom to render it inoperable with a test that has a much lower-threshold.

The purpose of section 66 in rendering by-laws inoperative if they deal with the same subject matter as the ARA is to ensure that pits and quarries within designated areas are regulated pursuant to the ARA by the MNRF, rather than by municipalities. This is supported by section 2 of the ARA and Policy A.R. 2.01.11 issued by MNRF. Section 2 of the ARA states that the purpose of the ARA is to:

> (a) to provide for the management of the aggregate resources of Ontario;
>
> (b) to control and regulate aggregate operations on Crown and private lands;

The guiding principle in Policy A.R. 2.01.11 issued by MNRF states that:

> "The intent of the legislation is 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."

Pursuant to paragraph 67(1)(i) of the ARA, the Minister of Natural Resources and Forestry ("Minister") is authorized to make regulations respecting the control and operations of pits and quarries. Section 7 of Ontario Regulation 244/97 ("O. Reg. 244/97") requires:

> *Applications for licences and the operation of pits and quarries shall in accordance with "Aggregate Resources of Ontario: Provincial Standards, Version 1.0" published by the Ministry of Natural Resources*

The Aggregate Resources of Ontario: Provincial Standards, Version 1.0 ("Provincial Standards") identifies operation requirements that apply should a site-plan be silent on same.

The Provincial Standards include a requirement to erect and maintain fencing along the boundary of sites, site standards, restrictions on where extraction can occur, and the prohibition of blasting on a holiday between 6 p.m. on any day and 8 a.m. on the following day.

ARA site plans are required to include matter such as hours of operation, internal haul roads on the site, locations of entrances and exits from the site, location of buildings and other structures erected on the site, location of stockpiling of materials, location and phasing of tree screens, and other conditions (operational or otherwise) at the discretion of the Minister.

Based on the foregoing, it is clear that section 66 is highly restrictive of municipal authority to regulate pits and quarries given the wide-range of subject matter addressed by the ARA, O. Reg. 244/97, the Provincial Standards, licences, and site-plans, as well as the low-threshold required by section 66 of the ARA to establish inoperability of a municipal by-law.

The validity of section 124 and section 129 by-laws, where those by-laws are being used to regulate the operation of pits and quarries in designated areas may be the subject of litigation in the coming years without legislative reform or the issuance of strong policy direction from the Minister. It is clear that a noise by-law, for example, which purports to regulate hours of operation of a pit or quarry would be inoperative if the pit or quarry had a site-plan that includes hours of operation (which all are required to do if they were issued after June 27, 1997). However, where a site plan or licence under ARA is silent on hours of operation, it is less clear whether municipal noise by-laws apply to such aggregate operations.

In cases where a site-plan is silent on hours of operation, a noise by-law would be open for challenge pursuant to section 66 of the ARA, since operational requirements of pits and quarries as well as both environmental impact of pits and quarries and hours of operation all fall within the 'subject matter' of the ARA. In addition, it is clear that the Ontario legislature's intention is that the MNRF shall be the lead regulatory agency for aggregate operations, and not municipalities. Further, a general noise by-law could be challenged as it allows the municipality to regulate indirectly what it cannot regulate directly pursuant to section 124 of the *Municipal Act*; as discussed above, section 124 of the *Municipal Act* provides that municipal by-laws regulating the operation of pits and quarries do not apply in an area designated by the ARA.

Conversely, it should be noted that section 129 of the *Municipal Act* does not specifically exempt aggregate operations from the application of that section. This is juxtaposed with subsection 135(12)(g) of the *Municipal Act* (regulation of the destruction of trees) and subsection 142(5)(e) of the *Municipal Act* (regulation of fill), both of which specifically provide that by-laws passed under these sections do not apply to lands licenced for pits and quarries under the ARA.

Section 66 of the ARA also restricts municipal powers for land use control. The authority to zone, for example, is limited to controlling the location of aggregate operations since section 12.1(1) (discussed above) of the ARA cedes this authority to municipalities. Compliance with a zoning by-law, however, is limited to ensuring that the designation is "correct" in that a pit or quarry is a permitted use. Compliance does not extend to regulatory or day-to-day operational aspects such as depth of extraction, setbacks, or rehabilitation requirements since these are properly the subject matter of the ARA. While the MNRF is obligated to have regard to planning policies and comments of the municipality, the issuance of the licence, and subsequent variations from the Aggregate Resources of Ontario Provincial Standards, can override municipal by-laws dealing with the same subject matter as the ARA.

Section 66 also exempts a licenced/permitted site from the requirement for a development permit system under subsection 70.2(1) of the *Planning Act*.

Environmental Protection Act, R.S.O. 1990, Chapter E.19 – Section 179

In many cases, an ECA under the EPA is required for mineral aggregate operations. Pursuant to section 9 of the EPA, no person shall use, operate, construct, alter, extend or replace any plant, structure, equipment, apparatus, mechanism or thing that may discharge or from which may be discharged a contaminant (including noise and vibration) into any part of the natural environment other than water, except under and in accordance with an ECA. A further exception is if the activity engaged in is prescribed in Ontario Regulation 524/98 ("O. Reg. 524/98"), which includes the crushing and screening of aggregate if mobile equipment is below grade.

Subsection 179(1) of the EPA states that where there is a conflict between the provisions of two Acts regarding the natural environment or a matter specifically dealt with in the EPA, the EPA shall prevail:

Conflict with other legislation

179 (1) Where a conflict appears between any provision of this Act or the regulations and any other Act or regulation in a matter related to the natural environment or a matter specifically dealt with in this Act or the regulations, the provision of this Act or the regulations shall prevail.

The test for conflict involves a two-pronged test. A by-law can be ultra vires for the following:

1. Operational conflict – is it impossible to simultaneously comply with the impugned by-law and the federal or provincial statute in question?

2. Frustration – whether the by-law frustrates the purpose of a federal or provincial legislative instrument.

Croplife Canada v Toronto (City), [2005] O.J. No. 1896, 2005 CarswellOnt 1877 (ONCA) at para 63, leave to appeal refused by SCC.

The standard for invalidating a municipal by-law on the basis of frustration of provincial purpose is high, as the Ontario Court of Appeal has directed that courts should not "struggle to create a conflict where none exists" between a municipal by-law and provincial legislative instrument, and rather, courts should require a "clear demonstration" of the by-law's invalidity.

Brantford (City) Public Utilities Commission v Brantford (City), [1998] O.J. No. 235, 1998 CarswellOnt 274 (ONCA) at para 30.
Friends of Lansdowne Inc v Ottawa (City), 2012 ONCA 273, 2012 CarswellOnt 531 (ONCA) at para 14.

Although not specifically listed, the courts in Ontario have interpreted ss. 179(1) to include conflicts between municipal by-laws and the EPA or the regulations. Therefore, if noise requirements under the ECA for a mineral aggregate operation *conflict* with the requirements in a municipal by-law noise by-law for example, then the municipal by-law has no effect on the mineral aggregate operation.

Ontario (AG) v Mississauga (City), 33 OR (2d) 395, 1981 CarswellOnt 1172 (ONCA) at para 27.

It is an open question as to whether the same argument can be made where a mineral aggregate operation does not have an ECA because the activity is prescribed by O. Reg. 524/98. In such a case, a mineral aggregate operator could argue that the legislature chose to exempt such activity and as such, the matter has been specifically dealt with in this Act.

To prevent potential conflicts between ECAs and the noise by-laws, it is prudent for municipalities to consider adopting policies that exempt stationary sources that operate pursuant to an ECA, so long as the requirements of the ECA are being adhered to. Alternatively, municipalities can consider adopting the noise requirements in the provincial NPC-300. NPC-300 is a guideline on the proper control of sources of noise emissions to the environment. The ECA standards on noise generally follow NPC-300. If the noise by-law contains the same standards as the ECA, then there is less risk that the noise by-law would be held inoperative due to a conflict under ss. 179(1) of the EPA.

Municipal Act, 2001 – Section 14

The *Municipal Act* contains important limitations on the exercise of municipal authority which must be adhered to or the municipal decision(s) or by-law(s) may be set aside on judicial review.

Section 14 of the *Municipal Act* provides that a by-law is without effect to the extent it conflicts with a higher-order Act, regulation or legislative instrument.

> *Conflict between by-law and statutes, etc.*
>
> 14 (1) A by-law is without effect to the extent of any conflict with,
> (a) a provincial or federal Act or a regulation made under such an Act; or
> (b) an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or regulation. 2001, c. 25, s. 14.
>
> *Same*
> (2) Without restricting the generality of subsection (1), there is a conflict between a by-law of a municipality and an Act, regulation or instrument described in that subsection if the by-law frustrates the purpose of the Act, regulation or instrument. 2006, c. 32, Sched. A, s. 10.

As section 14 requires a *conflict* in order to deem a municipal by-law to be without effect the same test discussed above with respect to section 179 of the EPA would apply.

Municipal Act, 2001 – Section 124(3)

Pursuant to section 124(3) of the *Municipal Act*, municipal authority to regulate pits and quarries is limited to only those parts of Ontario located outside of areas designated pursuant to section 5(2) of the ARA. The designated areas include all Crown land in Ontario, all land underwater in Ontario, and all private lands in numerous municipalities listed in Schedules 1-4 of O. Reg. 244/97 which cover the majority of the close to market lands in Ontario. Schedules 1-4 of O. Reg. 244/97 is attached at Appendix "E".

The effect of this is that the vast majority of pits and quarries in Ontario are exempt from the application of ss. 124(1)(a) and the by-laws passed pursuant thereto. To put this into context, between 2006 and 2018 approximately 2,047,000,000 tonnes of aggregate were produced in designated locations whereas 36,000,000 tonnes of aggregate were produced in non-designated locations – in 2018 alone 149,000,000 tonnes of aggregate were produced in designated locations whereas 2,000,000 tonnes of aggregate were produced in non-designated locations.

Previously, we discussed the fact that one of the most common areas of regulation found in section 124 by-laws is a restriction on hours of operation. We also discussed that the MNRF has not produced a clear policy respecting the application of such by-laws in cases where a site plan is silent on hours of operation. It should go without saying, however, that such a by-law must be valid.Since section 124 by-laws are inoperable in areas designated pursuant to the ARA, it is unlikely that the MNRF will require compliance with said by-laws in designated locations. As of the time of writing, we are not aware of any challenges to section 124 by-laws on this basis. However, this may be another subject of litigation in the coming years without legislative reform or the issuance of strong policy direction from the Minister, given the prevalence of section 124 by-laws in designated locations.

Municipal Act Section 142 – Site-Alteration By-Laws

The most fundamental limitation of site-alteration by-laws is found at section 142(5) of the *Municipal Act*. Pursuant to section 142(5), site alteration by-laws do not apply to the placing or dumping of fill, removal of topsoil, or alteration of the grade of land undertaken on land described in a licence for a pit or quarry, or a permit for a wayside pit or wayside quarry issued under the ARA. As a result, the placing or dumping of fill for the rehabilitation of pits and quarries in accordance with their respective site plans is beyond the reach of site alteration by-laws. However, such by-laws are applicable to legacy pits and quarries (where licences were surrendered without rehabilitation) and where aggregate operators wish to continue fill operations for additional rehabilitation after a licence is surrendered.
