



October 14, 2016

Sent via e-mail to mayor@burlington.ca

Mayor Rick Goldring
Burlington Mayor's Office
426 Brant St.
Burlington, ON L7R 2G2

Dear Mayor Goldring,

**Re: Tyandaga Environmental Coalition Inc.
Concerns with Forterra Aldershot Quarry Expansion**

On September 8, 2016, representatives of the Tyandaga Environmental Coalition Inc. ("TEC") met with representatives of Forterra Brick ("Forterra"), including its legal counsel, Mr. Ronald Webb, Q.C. and its aggregate environmental consultant, Mr. Bob Long.

The meeting started with Forterra's legal counsel advising that it was his client's intention to act as "good neighbours". What proceeded next was unprecedented in my experience, as Forterra took the following extraordinary positions:

- No consideration is being given to progressive clear-cutting of approximately 9,000 trees;
- Complying with the *Endangered Species Act, 2007*, administered by the Ministry of Natural Resources and Forestry, is "voluntary";
- Site access for TEC experts was repeatedly denied; and,
- Forterra admitted no archaeological assessment has ever been undertaken on the site, and stated flatly there is no duty to consult First Nations regarding potential impacts from quarrying.

Ms. Anne Sabourin, an experienced lawyer, took a careful note of the meeting.

Towards the conclusion of the meeting, when Forterra asked for residents' ideas on how to mitigate future impacts, I offered to conduct the balance of the meeting on a 'without prejudice' basis. Mr. Webb refused this standard request.

In general, virtually every time our clients asked for consideration their requests were flatly refused. For example, a suggestion was made to cut the trees progressively in phases e.g. 1, followed by 2 then 3. No explanation was given for this refusal, other than to say Forterra did not trust residents to make a similar request in future – which makes no sense as TEC asked for an agreement to this effect.

Requests were made to share technical reports regarding on-going borehole drilling and groundwater monitoring. The re-location of Indian Creek is a concern for residents; however, there was no willingness to share the mitigation strategy being proposed for altering this significant watercourse.

Dust deposition and air quality concerns were a significant issue for residents this past summer. Both extraction and plant operations are potential sources of airborne particulate. Forterra was asked if on-going air quality monitoring reports would be disclosed, as the public has a right to know what is being released into the neighbourhood. Forterra would not answer the question what, if any, monitoring was on-going, and refused to divulge reporting requirements. The Certificate of Approval (Air) per the *Environmental Protection Act* was issued by the then Ministry of the Environment over 15 years ago, and is repeatedly not available online for public review.

A request was made to Forterra to submit the new quarry to the Cornerstone Standards Certification ("CSC"), to ensure the operation meets the voluntary, high standards contained in this new, industry-based initiative that is publicly available, see:

http://www.cornerstonestandards.ca/wp-content/uploads/2015/03/APPROVED_Responsible-Aggregate-Standard_Version3.pdf.

Mr. Long stated that members of the Ontario Stone, Sand and Gravel Association ("OSSGA") were not interested in the standard. Mr. Long refused to consider adopting this CSC. The Acton Quarry, owned and operated by Dufferin Aggregates (a division of CRH Canada Inc. and OSSGA member), was granted CSC certification for its aggregate operations in February 2016.

Finally, TEC asked Forterra to consider "re-imagining" the site by considering a higher and better use of the land than simply tearing it apart to make bricks. The site is ideally located for institutional, residential, commercial or ecological uses. Almost all of these potential new uses would profit Forterra more substantially than brick making. TEC was told we were talking to the wrong people to initiate such a discussion. I reminded a Forterra employee present, Mr. Kelly, that in fact this proposition had been put to Forterra in our March 24, 2016 teleconference call.

Mitigation of existing and/or expanding industrial operations is part and parcel of planning in Ontario. One example is the recent redevelopment of the City of Toronto's waterfront, with residential condominium towers adjacent to the Redpath Sugar Ltd. sugar refinery, in

operation 24 hours per day at 95 Queens Quay Blvd. East. In that case, any future application for development adjacent to Redpath is required to provide noise, vibration and emission assessments with opportunity for review and comment from Redpath:

Sensitive land uses may be prohibited in the implementing zoning or limited (through massing and siting, buffering and design mitigation measures) in proximity to Redpath to ensure compatibility. In addition, noise and air emissions reports shall be required and vibration and illumination reports may be required, in support of development approval requests. Such environmental reports are to specify how compatibility will be achieved and maintained between Redpath and the proposed development and may include measures aimed at minimizing impacts.

Council acknowledges the important role of the Ministry of the Environment in reviewing and providing comments and recommendations on such reports. The City shall consult with both the Ministry of the Environment and Redpath during the development approval process and during the design process for public spaces in the vicinity of the Redpath property to ensure compatibility¹.

Before extraction begins, it is my client's sincere desire that the City re-visit how compatibility with nearby residents is to be achieved.

Forterra is proposing to extract shale rock to a depth of 10 metres. This highly invasive activity will decimate any archaeological resources, including burials that are located on the site. This area has high potential for significant cultural heritage resources, as this part of Ontario was highly used by Anishnawbe, Huron-Wendat, Neutral, Seneca, Mohawk and other First Nations. Although it is true Forterra has no specific duty to consult First Nations, **this does not relieve the Government of Ontario of this duty**. In practice, it is the responsibility of proponents to produce an archaeological assessment from a licensed archaeologist, compile a consultation record, and finally obtain clearance from the Ministry of Tourism, Culture and Sport ("MTCS") before proceeding with extraction. There does not appear on the record an explanation why First Nations' rights were waived, in this case.

In *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511, the Supreme Court held :

The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the principle of the honour of the Crown, which must be understood generously.

[...]

The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or

¹ *Pier 27 Toronto Inc. v. Toronto (City)* [2011] O.M.B.D. No. 1025

constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. Consultation and accommodation before final claims resolution preserve the Aboriginal interest and are an essential corollary to the honourable process of reconciliation that s. 35 of the Constitution Act, 1982, demands.

The City is bound by the obligation and must now act.

In conclusion, the City's intervention is urgently needed to avoid a serious conflict between the obviously incompatible land uses of residential versus natural resource extraction. The 'we were here first' line does not cut it anymore, as quarry impacts on human health, species at risk, water quality, First Nation's rights, and other concerns are all now well documented.

The City needs a plan to require that tree cover and significant wildlife habitat, including endangered species habitat, is preserved on site. There is no "grandfathering" of species extirpation in Ontario.

The rights of Burlington's citizens represented by TEC have not been adequately protected by the City, as evidenced by an extremely weak legal justification for not requiring a caution be registered directly on title, rather than buried in a lengthy subdivision agreement, warning buyers of the quarry and potential for future expansion to the East Cell.

My client asks you to take the lead in the following:

1. Establishment of a Citizens' Liaison Committee for the Aldershot Quarry with the City as a representative;
2. Request for the complete disclosure of all air and water quality monitoring reports by Forterra;
3. Request for production of environmental and technical reports dealing with species at risk and tree cover mitigation;
4. Initiation of a process for ensuring First Nations are consulted, and that a long overdue archaeological assessment is produced for review by the Ministry of Culture, Tourism and Sport;
5. Coordination of a meeting with TEC and Forterra to discuss a broad range of topics, including mitigation e.g. leaving tree cover, re-zoning of land, progressive rehabilitation, re-development, etc. If Forterra refuses the City's invitation, the meeting(s) should proceed in any event; and,
6. Sending correspondence to the Ministry of Natural Resources and Forestry regarding the potential need for a major site plan amendment, given the revelation of new information on natural heritage features on site.

TEC requests a meeting with you and City Staff to discuss moving forward with a strategy to preserve an important component of Burlington's natural legacy and the Greenbelt.

Please do not hesitate to contact me at 416-572-0464, or by email to david@donnellylaw.ca, cc'ing anne@donnellylaw.ca, should you have any questions or comments concerning this correspondence.

Yours truly,

A handwritten signature in blue ink, appearing to read "D.R. Donnelly", with a horizontal line underneath and a large flourish at the end.

David R. Donnelly

Cc: R. Webb
G. Carr
R. Craven
M. Meed-Ward
J. Taylor
J. Dennison
P. Sharman
B. Lancaster
M. Dokis
L. Lesage
T. Cowie
D. Mowat
F. Sault
E. McMahon
K. McGarry