

Environmental Review Tribunal
Tribunal de l'environnement



ISSUE DATE: May 11, 2021

CASE NO(S):

21-030

PROCEEDING COMMENCED UNDER section 41 of the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, as amended,

Appellant: Federation of Tiny Township Shoreline Associations
(File No. 21-030)

Appellant: Corporation of the Township of Tiny
(File No. 21-031)

Instrument Holder: CRH Canada Group Inc.

Respondent: Director, Ministry of the Environment, Conservation
and Parks

Subject of appeal: Decision to issue a Permit to Take Water from a
source pond, issued under section 34.1 of *Ontario
Water Resources Act* for the washing of aggregates
at the Teedon Pit

Reference No.: 6258-BRDJ2M

Property Address/Description: Lots 79 and 80, Concession 1

Municipality: Original Township of Tiny

Upper Tier: County of Simcoe

ERT Case No.: 21-030

ERT Case Name: Federation of Tiny Township Shoreline Associations
v. Ontario (Environment, Conservation and Parks)

APPEARANCES:

Parties

Counsel

Federation of Tiny Township
Shoreline Associations

J. Castrilli

Director, Ministry of the
Environment, Conservation and
Parks

I. O'Connor and M. Ritchie

CRH Canada Group Incorporated

J. Kahn

HEARD: May 3, 2021 by Telephone Conference Call
ADJUDICATOR(S): Hugh Wilkins, Member

ORDER

REASONS

[1] On January 13, 2021, the Director (“Director”), Ministry of the Environment, Conservation and Parks (“MECP”), issued Permit to Take Water No. 6258-BRDJ2M (“Permit”) to CRH Canada Group Inc. (“Instrument Holder”). The Permit was subsequently amended on January 19, 2021 to remedy a typographical error.

[2] On January 27, 2021 and January 29, 2021, respectively, the Federation of Tiny Township Shoreline Associations (“FOTTSA”) and the Township of Tiny (“Township”) filed applications for leave to appeal the Director’s decision under s. 38 of the *Environmental Bill of Rights, 1993* (“EBR”).

[3] On April 19, 2021, the Tribunal granted both leave applications.

[4] Under s. 42(1) of the *EBR*, the granting of leave stays the operation of the Permit until the disposition of the appeal (“automatic stay”), unless the Tribunal orders otherwise. On April 26, 2021, FOTTSA filed its appeal and on April 29, 2021, the Instrument Holder informed the Tribunal of its intention to file a motion seeking the removal of the automatic stay and to request the interim lifting of the automatic stay pending the disposition of the motion for its removal.

[5] On May 3, 2021, the Tribunal held a telephone conference call (“TCC”) at which it received inputs from the Instrument Holder, the Director, and FOTTSA regarding the form and content of the motion to remove the automatic stay, supporting materials for the motion, scheduling of the cross-examination of witnesses, and the scheduling of the

motion. It also heard submissions regarding the Instrument Holder's request for the interim lifting of the automatic stay.

Scheduling of the Motion

[6] During the TCC, the Instrument Holder, the Director, and FOTTSA agreed to the following due dates for the exchange and filing of materials regarding the motion for the removal of the automatic stay:

- **Wednesday, May 19, 2021** – Instrument Holder to serve and file its Notice of Motion and supporting materials to be relied on at the motion to remove the automatic stay;
- **Tuesday, May 25, 2021** – the Director to serve and file responding materials to be relied on at the motion to remove the automatic stay;
- **Friday, May 28, 2021** – FOTTSA and the Township to serve and file their responding materials to be relied on at the motion to remove the automatic stay;
- **Wednesday, June 2, 2021** – Parties to have completed cross-examinations of affiants; and
- **Monday, June 7, 2021** – Parties to serve and file written submissions to be relied on at the motion to remove the automatic stay.

[7] The Tribunal scheduled the hearing of the motion to remove the automatic stay for **Wednesday, June 9, 2021**. It will be held by video hearing.

[8] Subsequent to the TCC, the Township filed an appeal and became a Party to these proceedings on May 4, 2021. The Township informed the Tribunal on May 11, 2021 that it does not oppose the above-noted dates.

Interim Lifting of the Automatic Stay

[9] On the TCC, the Instrument Holder, the Director, and FOTTSA came to an agreement on consent regarding the proposed interim lifting of the automatic stay until the disposition of the motion to remove the automatic stay, subject to specific conditions. The conditions that were agreed to by the Instrument Holder, the Director, and FOTTSA are the following:

1. Catch Basin and Sump Pond
 - a. The high-level float control on the Sump Pond shall immediately be set by the Instrument Holder at least 0.3 metres below the elevation of the lowest point of the orifice of the catch basin in the Sump Pond berm for the duration of the interim Order.
 - b. For the duration of the interim Order, the condition of the Sump Pond's retention berm shall be assessed daily by staff of the Instrument Holder, and when appropriate by a qualified engineer. Any changes and/or repairs to the berm shall be approved in advance by the MECP, reported to the MECP within 24 hours of having been undertaken, and recorded in the Annual Report.
2. Well Sampling
 - a. If the Instrument Holder receives a complaint from a new residence pertaining to well water quality impacts, the Instrument Holder shall, subject to access being granted and possible, test the water quality of

the complainant's well (with the parameter list including metals, anions, turbidity, and total suspended solids ("TSS")) as soon as possible after receiving the complaint, report the results to the complainant and the MECP forthwith, and follow up with monthly monitoring (for the duration of the interim Order).

[10] The Instrument Holder, the Director, and FOTTSA submitted that with these conditions, and given its short duration, the interim lifting of the automatic stay satisfies the requirements in Rule 110 of the Tribunal's *Rules of Practice and Practice Directions* ("Rules"), which require for such motions that:

110. The Party shall provide evidence and submissions in support of its motion respecting:

- (a) how the relevant statutory tests that are applicable to the granting or removal of a stay are met;
- (b) whether there is a serious issue to be decided by the Tribunal;
- (c) whether irreparable harm will ensue if the relief is not granted; and
- (d) whether the balance of convenience, including effects on the public interest, favours granting the relief requested.

[11] With respect to the requirement in Rule 110(a) regarding evidence and submissions on how the relevant statutory tests are met, the Instrument Holder, the Director, and FOTTSA submitted that under s. 42(1) of the *EBR*, the Tribunal has broad authority regarding the lifting of an automatic stay and there are no bans restricting the Tribunal from lifting the automatic stay in this case. Section 42(1) of the *EBR* states:

42(1) The granting of leave under section 41 to appeal a decision stays the operation of the decision until the disposition of the appeal, unless the appellate body that granted the leave orders otherwise.

[12] The Tribunal notes that under ss. 45 and 46 of the *EBR*, the Tribunal has similar powers on appeal and is to use similar procedures to those that would be applied if the Instrument Holder had filed an appeal of the decision. The statutory provisions that the Instrument Holder would have been required to rely upon, had its permit application

been refused and it subsequently appealed or had it appealed conditions in the Permit, are s. 100(3) and (4) of the *Ontario Water Resources Act* (“OWRA”).

[13] Section 102(3) of the *OWRA* sets out public interest considerations that are to be addressed on requests for stays of s. 100 appeals. Section 102(3) of the *OWRA* states:

102(3) The Tribunal shall not stay the operation of a direction, order, report or decision if doing so would result in,

- (a) danger to the health or safety of any person;
- (b) impairment or serious risk of impairment of any waters or any use of waters; or
- (c) injury or damage or serious risk of injury or damage to any property or to any plant or animal life.

Based on the provisions in ss. 45 and 46 of the *EBR*, the intent of ensuring environmental protection under s. 42(1) of the *EBR*, and the public interest nature of the considerations in s. 102(3) of the *OWRA*, the Tribunal finds that it should take these considerations into account when making its decision on whether to lift the automatic stay.

[14] Given the Tribunal’s broad authority provided under s. 42(1) of the *EBR*, the Tribunal finds that it has jurisdiction to grant the proposed interim lifting of the automatic stay. The Tribunal finds that the proposed conditions are reasonable and will address the concerns set out in s. 102(3) of the *OWRA* over the short duration of the proposed interim lifting of the automatic stay. It finds that the relevant statutory tests under the *EBR* have been met and the public interest considerations set out in s. 102(3) of the *OWRA* have been satisfied. Given that the proposed interim lifting of the automatic stay is not opposed and, given the Tribunal’s findings that it has jurisdiction and that the applicable statutory tests have been met, the Tribunal finds that it is not necessary to analyze the remaining elements listed in Rule 110 relating to evidence and submissions in support of a motion for the lifting of a stay.

[15] On May 7, 2021, the Township informed the Tribunal that it does not oppose the interim lifting of the automatic stay based on the conditions agreed to by the Instrument Holder, the Director, and FOTTSA.

[16] The Tribunal grants the request for the interim lifting of the automatic stay subject to conditions, as requested.

ORDER

[17] The Tribunal orders that the hearing of the Instrument Holder's motion for the removal of the automatic stay will be held by video hearing on **Wednesday, June 9, 2021** commencing at **10 a.m.** The Case Coordinator will provide the video hearing details.

[18] The Tribunal orders that documents for the motion will be exchanged and filed by the following dates:

- **Wednesday, May 19, 2021** – Instrument Holder to serve and file its Notice of Motion and supporting materials to be relied on at the motion to remove the automatic stay;
- **Tuesday, May 25, 2021** – the Director to serve and file responding materials to be relied on at the motion to remove the automatic stay;
- **Friday, May 28, 2021** – FOTTSA and the Township to serve and file their responding materials to be relied on at the motion to remove the automatic stay;
- **Wednesday, June 2, 2021** – Parties to have completed cross-examinations of affiants; and

- **Monday, June 7, 2021** – Parties to serve and file written submissions to be relied on at the motion to remove the automatic stay.

[19] The Tribunal grants the Instrument Holder's request for the interim lifting of the automatic stay, subject to the following conditions:

1. Catch Basin and Sump Pond

- a. The high-level float control on the Sump Pond shall immediately be set by the Permit Holder at least 0.3 metres below the elevation of the lowest point of the orifice of the catch basin in the Sump Pond berm for the duration of this Order.
- b. For the duration of this Order, the condition of the Sump Pond's retention berm shall be assessed daily by staff of the Permit Holder, and when appropriate by a qualified engineer. Any changes and/or repairs to the berm shall be approved in advance by the MECP, reported to the MECP within 24 hours of having been undertaken, and recorded in the Annual Report.

2. Well Sampling

- a. If the Permit Holder receives a complaint from a new residence pertaining to well water quality impacts, the Permit Holder shall, subject to access being granted and possible, test the water quality of the complainant's well (with the parameter list including metals, anions, turbidity, and TSS) as soon as possible after receiving the complaint, report the results to the complainant and the MECP forthwith, and follow up with monthly monitoring (for the duration of this Order).

[20] This Member is not seized.

*Motion to Remove Automatic Stay Scheduled
Request for the Interim Lifting of the Automatic Stay Granted*

“Hugh Wilkins”

HUGH WILKINS
MEMBER

If there is an attachment referred to in this document,
please visit www.olt.gov.on.ca to view the attachment in PDF format.

Environmental Review Tribunal

A constituent tribunal of Ontario Land Tribunals

Website: www.olt.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248