David R. Donnelly, MES LLB
david@donnellylaw.ca

April 28, 2022

Via email to townclerk@milton.ca

Mayor Gordon Krantz
Town of Milton
150 Mary Street
Milton ON L9T 6Z5

Dear Mayor,

RE: Liability Concerns re Proposed James Dick Construction Limited Quarry, Milton

This letter addresses the possible risk to the Provincial Government if Municipal Affairs Minister S. Clark issues a Minister's Zoning Order ("**MZO**") or other regulation to stop the proposed James Dick Construction Limited ("**JDCL**") quarry at 9210 Twiss Road, Town of Milton, Ontario.

I. Brief Conclusion

The law of Canada is clear: provinces and municipalities can re-zone or even "down-zone" land without attracting liability, as long as the change in land use does not "remove all reasonable uses of property." A legal claim by JDCL for compensation for an MZO would most likely be styled as a claim for *de facto* expropriation, which would fail. At present, JDCL does not possess a mineral extraction license for the site. In any event, there is a statutory prohibition on seeking compensation for *de facto* expropriation under the Ontario *Planning Act*.[1]

In addition, JDCL is not entitled to compensation for the issuance of any other protective instrument under the *Aggregate Resources Act* ("***ARA***")[2], *Greenbelt Act*[3], or *Niagara Escarpment Planning and Development Act* ("***NEPDA***")[4], etc., as long as

[1] R.S.O. 1990, c. P.13.
[2] R.S.O. 1990, c. A.8.
[3] S.O. 2005, c. 1.
[4] R.S.O. 1990, c. N.2.

the Provincial Government acts in good faith and in general conformity with provincial and municipal policies.

Finally, JDCL will not be entitled to challenge an MZO under the North America Free Trade Agreement ("**NAFTA**"), as Chapter 11 has been removed from the United States Mexico Canada Agreement ("**USMCA**").

II. Introduction

JDCL has applied to the Ministry of Northern Development, Mines, Natural Resources and Forestry for a Class A Category 1 & 2 licence for a 29.4 hectares (73 acres) site with an extraction area of 25.7 hectares (63.5 acres) for sand, gravel, and bedrock. The maximum annual extraction is proposed to be 990,000 tonnes. According to the Town's 2010 Official Plan Amendment No. 31 ("**OPA 31**"), the proposed site is located within a Wellhead Protection Zone (Schedule "L") and Greenbelt Plan Natural Heritage System Area (Schedule "A"). While the Region of Halton approved OPA 31 on November 22, 2018, a number of developers including JDCL has appealed OPA 31 (now adjourned *sine die*). An MZO would effectively bring the site into conformity with the Greenbelt Plan and into conformity with the Milton Official Plan.

III. Provincial Government Possesses Significant Power

There are at least five ways the Ford Government could stop the proposed JDCL quarry by introducing simple regulatory changes:

1. **Minister's Zoning Order:** An MZO remains the most efficient and comprehensive method of stopping the quarry. An MZO would cure the grand-fathered zoning by replacing the site with zoning that is consistent with its Greenbelt status and recognition as a sensitive environmental site in the Official Plan;
2. **Niagara Escarpment Plan Designation:** The Province of Ontario, Town of Milton, Halton Region, Niagara Escarpment Commission, or a private citizen may initiate a Niagara Escarpment Plan ("**NEP**") Amendment, bringing the Reid Road Reservoir lands into the NEP "Escarpment Natural Area" or "Escarpment Protected Area", which prohibits extraction;
3. **Regulation under the Greenbelt Plan**: A change to the Greenbelt Plan Regulations could increase the quarry "no go" boundary to include parts of Milton, re-defining rural "settlement areas" to include Campbellville and surrounding residential areas for the purpose of the Regulation;
4. **ARA Regulation:** *ARA* Regulations can prohibit areas where blasting may occur. The province could amend O. Reg. 244/97 as follows: "28. A licensee or permittee shall be prohibited from blasting if located within 1

km from a 400 series highway." A new Regulation or Amendment to the *ARA* would accomplish the same goal of stopping the quarry; and

5. **Environmental Assessment Act**: In addition, the Minister of Environment, Conservation and Parks could simply make a decision under the *Environmental Assessment Act*[5] prohibiting extraction at the site, which would kill the quarry.

IV. *De Facto* Expropriation

The current laws of Canada and the United States are equally clear: provinces, states and municipalities can re-zone or "down-zone" land without compensation, up to the point of complete expropriation.

No less an authority than the Supreme Court of Canada (the "**SCC**") has ruled that "freezing" development and adopting restrictive land use regulations does not amount to *de facto* expropriation, including the resulting decrease in the value of land.[6]

Like any business, it is true that JDCL expects to profit handsomely from its quarry application, expecting a windfall if the Ontario Land Tribunal rules in its favour regarding its *ARA* Application. A key consideration is: what rights does JDCL presently have on the land? This is significantly different than what zoning presently exists on the land e.g. you have no "right" to build a home without a building permit.

Absent a rotten motive or the outright taking of the rights of the landowner, developers do not acquire rights when assembling land and do not have a right to be compensated for adverse land use regulation. From time-to-time, developers will threaten to bring lawsuits based on the expectation of profits lost to government action, but very rarely follow through. That does not stop developers from threatening lawsuits and making outrageous claims for damages. The principle that land ownership is not a right to develop is well established.

The Nova Scotia Court of Appeal has issued the clearest statement of this principle, that government has the right to protect citizens and the environment through land use regulation:

> In this country, extensive and restrictive land use regulation is the norm. Such regulation has, almost without exception, been found not to constitute compensable expropriation. It is settled law, for example, that the regulation of land use which has the effect of decreasing the value of the land is not an expropriation.[7]

---

[5] R.S.O. 1990, c. E.18.
[6] *Canadian Pacific Railway v. Vancouver (City*), 2006 SCC 5 (SCC).
[7] *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General), 1999 NSCA 98 (CanLII)* at para. 42.

This reasoning was echoed by the SCC when considering *Canadian Pacific Railway v. Vancouver (City)*.[8] The Canadian Pacific Railway ("**CPR**") owned a land corridor that it no longer used for business operations. The City of Vancouver (the "**City**") Council passed an Official Development Plan by-law designating the land corridor for use as a public thoroughfare for transportation and uses such as heritage walks, nature trails, and cycling paths.

CPR asserted that the City's by-law was a *de facto* expropriation because the by-law was effectively a "taking", preventing re-development for any profitable purpose.[9] The SCC held that *de facto* expropriation claims require two elements:

1) acquisition of a beneficial interest in the property or flowing from it; and
2) removal of all reasonable uses of the property.[10] [Emphasis added.]

The Court held that neither requirement had been met. An MZO on the JDCL property or other instrument would simply preserve current rights to use the land, not change them.

V. Private Property Rights in Canada and their Limits

There is a commonly held misconception that property rights in Canada include the right to compensation for land use regulation decisions, e.g. Greenbelting. On the basis of this misconception, many developers and property owners suggest that because a particular by-law or Act "freezes" land use zoning and denies any right to seek compensation to those who are affected by it[11], this amounts to constructive expropriation without compensation and as such violates property rights and the *Canadian Charter of Rights and Freedoms* (the "***Charter***") Section 7.[12]

However, unlike the United States Constitution, the *Charter* contains no guarantee of a right to private property. This was confirmed by the Ontario Court of Appeal in *A & L Investments Ltd v. Ontario.*[13] In this case, a group of landlords sued the Ontario government in relation to new rent control legislation[14], which permitted rent increases at a lower rate than previously available under the old Act. The new

---

[8] *Canadian Pacific Railway v. Vancouver (City)*, 2006 SCC 5.
[9] *Ibid*, para. 31-37.
[10] *Ibid*, para. 30.
[11] s. 19 Greenbelt Act – No compensation/No expropriation: (1) no cause of action arises as a direct or indirect result of this Act; (2) no remedy: no costs, compensation or damages are owing or payable to any person and no remedy, including but not limited to a remedy in contract, restitution, tort or trust, is available to any person in connection with anything referred to in subsection 1; (6) nothing done or not done in accordance with this Act or the regulations made under it constitutes an expropriation or injurious affection for the purposes of the Expropriation Act.
[12] Canadian Charter of Rights and Freedoms, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[13] [1997] O.J. No. 4199
[14] *Residential Rent Regulation Amendment Act*, 1991, S.O. 1991, c.4.

Act voided orders the landlords had already obtained, giving them the right to larger rent increases into the future. The landlords claimed that this order to increase rents, under the old Act, amounted to a property right and that the new law created a compensable taking of their property rights. Furthermore, the landlords argued that this taking was a violation of their Section 7 *Charter* right to property.[15]

The Court denied the *Charter* claim, reasoning that Section 7 does not extend to economic rights generally meant by the term "property" nor does it extend to the right to carry on a business, to earn a particular livelihood or to engage in a particular professional activity. Section 7 does not protect an individual who is deprived of a source of livelihood, their occupation, or their savings.

The decision supported the position that in Canada (a) there is no constitutional right to private property and (b) landowners affected by regulation like an MZO are no more prejudiced in law than a residential property owner seeking to convert their land use to a commercial purpose but are denied. Even in situations where development interests have valid land use approvals, this does not constitute a right to develop and/or realize a profit.[16]

VI. NAFTA Challenge at St. Mary's Quarry vs. JDCL Quarry

The USMCA came into force on July 1, 2020, replacing NAFTA. The USMCA agreement removed Chapter 11 - the investor-state dispute settlement provisions relied upon by St. Marys Cement ("**SMC**") in seeking compensation for the Flamborough MZO. Therefore, JDCL will not be able to challenge the Province's issuance of an MZO under international legislation.

In 2006, SMC applied for permits to open a dolostone rock quarry on a 158-hectare site at the 11th Concession and Milburough Line within Hamilton, Ontario. In 2010, the then Minister of Municipal Affairs and Housing invoked an MZO to prevent the planned excavation by freezing the site's zoning as "agricultural."[17]

SMC brought a claim under Chapter 11 of NAFTA, alleging that their attempt to obtain a quarry operation licence on the site was frustrated by improper political interference. SMC alleged that a local citizen's group that had close ties to the governing party had prompted the Provincial Government to issue an MZO, which prevented re-zoning of the land, in effect preventing the approval of a quarry operation licence. The disputing parties agreed to a settlement, which included a

---

[15] *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[16] The doctrine of legitimate expectations does not apply – *Reference re: Canada Assistance Plan, British Columbia.*
[17] *Ibid.*

$15MM payment by the province of Ontario to SMC for costs incurred on the project. These circumstances are far different than the JDCL Reid Road quarry application.

VII. Conclusion

The law of expropriation in Canada is very clear. The Government of Ontario or a municipality may, through zoning by-laws, re-zone or "down-zone land" without compensation in the public interest up to the point of expropriation. Expropriation means the taking of land, however *de facto* expropriation is the rendering of the land unusable for any commercial purpose. JDCL cannot claim *de facto* expropriation because it will be in same place commercially the day after an MZO is issued as it was the day the property was purchased. JDCL does not possess a right to extract aggregate.

In summary, the answer to two important questions are clear, and not even debatable: 1. the issuance of an MZO cannot be considered a *de facto* expropriation, and will not attract legal liability for the Ontario government; and 2. A JDCL quarry MZO cannot be challenged under NAFTA Chapter 11, as that Chapter no longer exists.

Anyone who speculates that this opinion is wrong should provide a similarly detailed opinion with case law to back any claim to the contrary. If there is any doubt concerning the efficacy of an MZO to prevent JDCL from quarrying at the Reid Road Reservoir Quarry site, an *Environmental Assessment Act* decision or regulation under the *Greenbelt Act*, *NEPDA* or *ARA* could also be invoked to the same effect as an MZO.

In other words, there is nothing preventing Premier Ford from delivering on his promise of July 29, 2020:

> "I am not in favour of (the Campbellville quarry). I believe in governing for the people. And when the people don't want something you don't do it. It's very simple. I know the Mayor doesn't want it, no one wants it. I don't want it. We are going to make sure it doesn't happen one way or another".

Please do not hesitate to contact me at david@donnellylaw.ca with any questions or comments concerning this correspondence.

Yours truly,

David R. Donnelly

cc. Client
P. Gill
A. Siltala
J. Challinor II
R. Malboeuf
R. Di Lorenzo
M. Cluett
S. Ali
Z. Hamid
K. Tesser Derksen
C. Best