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**WeirFoulds**LLP

February 10, 2012

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VIA FACSIMILE AND E-MAIL

File 01207.00031

City Clerk  
Etobicoke York Community Council  
City of Toronto  
Etobicoke Civic Centre  
399 The West Mall  
Toronto, Ontario M9C 2Y2

**Attention: Rosemary MacKenzie  
Administrator, Etobicoke York Community Council**

Dear Ms. MacKenzie:

**Re: South Etobicoke Employment Lands Review Area ("SEELRA")  
Industrial Zoning Study Zoning Amendment - Final Report (the "Final Staff  
Report")  
Item EY13.1 on EYCC February 14, 2012 Agenda**

We are solicitors for St. Marys Cement Inc. (Canada) ("**SMC**"), the owner of lands located at 194 New Toronto Street (the "**SMC Site**"), in the City of Toronto (the "**City**").

We are in receipt of the City's Notice of Public Meeting for February 14, 2012 before the Etobicoke York Community Council. We have also reviewed the Final Staff Report.

While SMC takes no position on the analysis, conclusions and the proposed amendments related to the SEELRA lands all as described in the Final Staff Report, it fully concurs with the recommendations related to the SMC Site at 194 New Toronto Street.

As the Final Staff Report correctly indicates, the SMC Site was subject to a very thorough site-specific land use impact assessment at the Ontario Municipal Board (the "**OMB**") necessitated by SMC's appeal of the City's Interim Control By-law 298-2010, as amended by Interim Control By-law 387-2011 (the "**ICBLs**"). This assessment included the proximity of residential areas, an expanding food processing cluster, Official Plan policies, the history of the industrial zoning in this area including land use approvals related to the SMC Site, incident reports received by the Municipal Licensing and Standards Division, Ministry of the Environment land use separation guidelines as well as the now repealed City-wide Zoning By-law 1156-2010. The OMB, in its

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decision released on June 17, 2011, copy attached, reconfirmed the land use appropriateness of a concrete batching plant on the SMC Site, repealed the ICBLs and approved SMC's proposed site plan.

SMC and the City are currently engaged in active discussions respecting final changes to the site plan. The process is proceeding expeditiously towards issuance of a revised site plan for the concrete batching plant at the SMC Site, as approved by the OMB.

Please provide us with any further Notice related to this matter, including notices of any public meetings and enactment of any implementing zoning by-law.

Yours truly,

**WeirFoulds LLP**



Michael J. McQuaid, Q.C.

MJM/PC:cl

cc: Brian Gallagher, City of Toronto (via e-mail)  
Sabrina Salatino, City of Toronto (via e-mail)  
Thomas Keefe, City of Toronto (via e-mail)  
Thomas Wall, City of Toronto (via e-mail)  
Austin MacMurdo, St. Marys Cement Inc. (Canada) (via e-mail)  
Debbie Kakaria, MHBC Planning (via e-mail)

4351385.1

ISSUE DATE:

**June 17, 2011**

Ontario

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

PL100554

IN THE MATTER OF subsection 38(4) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	St. Marys Cement Inc. (Canada)
Subject:	Interim Control By-law No. 298-2010
Municipality:	City of Toronto
OMB Case No.:	PL100554
OMB File No.:	PL100554

**APPEARANCES:****Parties ("Parties")**

St. Mary's Cement (Canada) Inc. ("SMC")

City of Toronto ("City")

**Counsel**

Michael McQuaid

Thomas Wall

**DECISION DELIVERED BY STEVEN STEFANKO AND ORDER OF THE BOARD**

[1] SMC has appealed the passage by City Council ("Council") of Interim Control By-laws ("ICBLs") 298-2010 and 387-2011 and Council's failure to approve the Site Plan which is set out in detail in Figures 6a-6f of Exhibit 14 ("Site Plan") in this proceeding. The ICBLs effectively preclude SMC from constructing a concrete batching plant ("batching plant") on property owned by it. A related minor variance appeal was withdrawn by SMC during this hearing and SMC's appeal of the City's Harmonized Comprehensive Zoning By-law No. 1156-2010 ("HCZBL") became academic when Council repealed the HCZBL on or about May 18, 2011, some 7 days before this hearing concluded.

**The SMC Site**

[2] The SMC property which is subject of this matter is a parcel approximately 2.5 hectares (6.2 acres) in size, generally located northeast of the intersection of Islington Avenue and New Toronto Street, in the former City of Etobicoke, now in the

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City of Toronto. The property is municipally known as 194 New Toronto Street and has approximately 154 metres of frontage along this street.

[3] For the most part, industrial uses surround the SMC lands; CN Rail to the north, Campbell Soup Company and Daily Break Food Bank to the south, York Chicken and Pioneer Lighting to the East and Lantic Sugar to the west. Dwight Avenue is also east of the Lantic Sugar lands and further east of this roadway is residential development. The closest dwelling, as noted in a City staff report, is approximately 110 metres from the site.

[4] The subject property was purchased a number of years ago by SMC. At the time of purchase the former Etobicoke By-law permitted a batching plant use as did the former Etobicoke Official Plan. In fact, the current City Official Plan need not be amended to allow the facility. Only the HCZBL (now repealed) and the ICBLs prohibit such a use.

[5] The New Toronto Street site will allow SMC to service the Etobicoke to Port Credit market which is an area that SMC cannot reach effectively from any other SMC locations in Toronto.

#### **Development History of the Site**

[6] Following its acquisition of the subject lands SMC proceeded to obtain the requisite City approval to construct a batching plant at its property. A brief chronology of steps taken and approvals given is a useful history of SMC's ownership:

- (a) July 12, 2001...site plan application submitted by SMC.
- (b) November 5, 2002...site plan approved by the City.
- (c) September 21, 2005....City executes Site Plan Agreement ("SPA") with SMC.
- (d) October 7, 2005...Executed SPA registered on title to the SMC lands.
- (e) October 17, 2005...Pursuant to the SPA, SMC conveys a portion of its land to the City for road widening and that conveyance is also registered on title.

- (f) May 11, 2006...SMC requests modifications to the SPA to reduce the size of the batching plant and the City agrees with such modifications.

[7] It is clear therefore, that SMC obtained the City's approval a number of years ago to construct the batching plant. However, construction did not go forward within 3 years as referenced in the SPA and as a result, site plan approval technically expired. Unfortunately for SMC, the City subsequently passed the HCZBL (now repealed) and the ICBLs.

[8] The site plan approval process was reactivated by SMC on August 24, 2010 and I am now being asked to approve the Site Plan.

#### **Area Compatibility Study**

[9] In addition to the batching plant development initiatives undertaken by SMC over the years, the area in which the SMC property is located has been identified in various resolutions and discussions, as an area which should be studied to determine appropriate compatibility between employment uses and sensitive land uses.

[10] In April of 2005, City Council passed a resolution ("2005 Resolution") which stated, inter alia, that City staff review the applicability of the industrial zoning category in New Toronto in consultation with the local community and Industrial Association. Unfortunately, that review was not completed.

[11] Then, in May 2008, City staff, in email communication set out at Tab 15 of Exhibit 22 in this proceeding, indicated that "we are just initiating a review of the I.C2 Zoning for South Etobicoke". And later in September of 2008, another email stated that there should be a "hand off" between the study and the comprehensive zoning project then underway. Again, although the review was clearly in the minds of staff, it was not completed.

[12] In March of 2010, immediately before the passage of Interim Control By-law 298-2010, City staff, in a report ("March 31, 2010 Report") which recommended By-law 298-2010, once more raised the issue of a review. The report stated in part:

The By-law will enable the Chief Planner and Executive Director of City Planning to study and review the impact of these industrial uses on the surrounding area

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and, together with the completion of the new City-wide zoning by-law, recommend revised zoning regulations and other policies for uses in this area.

[13] When this hearing commenced, earlier this year, notwithstanding the language of the March 31, 2010 Report, the review or study raised as early as the 2005 Resolution, had still not been done. It was not until the half way point in this hearing that the City advised a study or review had finally been documented. It was contained in a Staff report dated May 6, 2011 ("May 6 Report") and was marked as Exhibit 28 in this proceeding. The May 6 Report not only post dated Interim Control By-law 298-2010 but also Interim Control By-law 387-2011, the By-law which extended By-law 298-2010 for one year.

#### **The Evidence**

[14] Austin McMurdo, Bridget Mills, Corey Kinart and Debra Kakaria all provided evidence in support of the SMC position. Mr. McMurdo, a long standing employee of SMC, discussed the history of the property and the key features of batching plants. He also explained why it was necessary to operate a batching facility at 194 New Toronto Street. Mr. Kinart, a mechanical engineer by profession, was one of the authors of an Acoustic Assessment Report supporting the proposal. He pointed out that his report was prepared in accordance with Ministry of Environment ("MOE") guideline documents and he discussed, among other things, the nature of sound and impacts created thereby. In his expert opinion, sound emissions from the proposed facility will comply with the applicable sound level criteria under typical "predictable worst case" operating conditions. Bridget Mills provided expert evidence in relation to air quality. She authored the Air Quality report which was entered in this proceeding as Exhibit 20. She referred to the MOE D-6 Guidelines for facilities such as the one proposed and pointed out that SMC would require, prior to commencement of its operations, an MOE Certificate of Approval. Lastly, Debra Kakaria provided expert land use testimony. In her view, the proposal was consistent with the 2005 Provincial Policy Statement ("PPS"), conforms to the City OP and represents good planning. It was acknowledged by the Parties that the Growth Plan for the Greater Golden Horseshoe had little bearing on the proposed batching plant.

[15] Brian Gallagher and Ian Graham, both City employees, gave expert land use evidence in opposition to the batching plant. Mr. Gallagher pointed out what he

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thought would be noise and dust impacts from the operation, and opined that the proposed use may be incompatible with existing uses in the area. He was also of the view that further study was required to determine whether the impact of a batching plant was appropriate for the area. Mr. Graham has been with the City since 2005. He was hired to assist in the preparation and finalization of the HCZBL which, as I have already mentioned, earlier in these reasons, has been repealed by City Council. In his opinion, a batching plant should only be permitted in what the HCZBL referred to as an "EH" or heavy industrial zone. Under the HCZBL, the SMC site was not part of an EH zone and therefore a batching plant was prohibited.

[16] Jem Cain and Jane Doherty provided testimony in this hearing as participants. Ms Cain lives more than 1 Kilometre from the site and Ms Doherty resides in the residential subdivision east of the site. Essentially, they expressed concern that the SMC site was too close to a sensitive residential land use to the east and that significant air pollution would be created by the SMC operations.

#### **Issue**

[17] In view of the repeal by the City of the HCZBL, the issues to be determined are whether the ICBLs should be repealed and the Site Plan approved? In that regard, I will refer to relevant Board jurisprudence as well as evidence related to air quality and noise.

#### **Analysis and Discussion**

##### **(i) Board Jurisprudence**

[18] Board jurisprudence is particularly helpful when assessing the propriety of an interim control by-law. Such jurisprudence has established that there are 4 tests to be applied to any such assessment.

[19] As outlined in the Board decision of Bracebridge (Town) Zoning By-law 98-80 (Re), [1999] 28. O.M.B.R. 327, those 4 tests are:

- (i) that s.37 (now s.38) must be interpreted strictly in view of the fact that it permits a municipality to negate development rights;

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- (ii) that the municipality must substantiate the planning rationale behind the authorising resolution and the interim control by-law;
- (iii) that the by-law must conform with the official plan;
- (iv) that the authorized review must be carried out fairly and expeditiously.

[20] Mr. Makuch in Re Township of North Frontenac Interim Control By-law No. 20-99 (Re) [2000] 40 O.M.B.R. 476 even goes so far as to say when discussing interim control provisions that:

The interim control provision under s.38 of the *Planning Act* is a powerful tool that should be used sparingly and only under extenuating circumstances.

[21] When I apply the tests referred to above to the ICBLs, in my view, the ICBLs fall short of meeting those tests.

[22] For one thing, the review mentioned in the fourth test, took approximately 6 years to complete. The 2005 Resolution first mentioned a review and, even though the topic was the subject matter of subsequent emails and report, it was not completed until May 6, 2011. Delay and inaction have been the operative words for the review in question. Completing the review process in 6 years, is not proceeding expeditiously.

[23] In terms of the City OP, the Parties have acknowledged that an official plan amendment is not required to carry on a batching plant use. Moreover, the City, in the period 2002-2006, approved a batching plant for the very site which is the subject matter of this proceeding. How then can an interim control by-law which effectively prohibits that use conform with the official plan? It cannot, in my opinion.

[24] When I apply the 4 tests referred to above to the facts of this case, including the requirement that s.38 be strictly interpreted, the ICBLs are simply not sustainable.

**(ii) Air Quality and Noise**

[25] The City also argued that potential dust was an environmental consideration which warranted the ICBLs and that, even though the proposed facility was properly identified as a Class II facility, it is nonetheless "incompatible



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development" with the nearby food processing businesses based on the Legend language of Appendix C to the MOE D6 Guidelines. In terms of air quality, no individual with expertise in this field was called to support the City's position. Under those circumstances, it is difficult, if not impossible, to override the expert testimony of Ms Mills. In relation to the matter of incompatibility, the D6 Guidelines contain no definition of what constitutes incompatibility. As a result there is nothing to substantiate the argument made and whether incompatibility exists. In the absence of such confirmation, I am unable to accede to the City's position on the point.

[26] The issue of noise was also raised by the City by reference to a CBM report dated May, 2005, which contained, among other things, general statements in relation to noise. Blanket statements set out in a 6 year old document simply are not persuasive enough to trump viva voce testimony of an expert such as Mr. Kinart. Moreover, Mr. Gallagher acknowledged, during his testimony, that his main concern was air quality.

[27] Ms Mills, a chemical engineer, gave evidence relating to air quality at the proposed batching plant. In my estimation the key feature of her testimony related to the MOE D6 Guidelines with respect to emissions and air quality.

[28] The D6 Guidelines prescribe, inter alia, a minimum separation distance between facilities such as the proposed batching plant and other nearby uses. They also speak to potential influence areas for industrial uses. The minimum separation distance and potential influence areas are a function of whether the facility in question is categorized as Class I, Class II or Class III. If it is a Class III then the requirements are more onerous and if a Class I, they are far less onerous. As I have already mentioned, the Parties agree that the proposed facility is a Class II.

[29] In her evidence, she stated that the proposal complied with the minimum separation distance requirements, that maximum concentrate for particulate and nitrogen oxide were well below MOE air quality limits and that any fugitive dust from the site is expected to be well controlled because of the establishment and implementation of a Best Management Practices Plan which is required by the MOE as part of its Certificate of Approval process.

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[30] The analysis done for air quality by Ms Mills and for noise, by Mr. Kinart, was thorough, detailed and in my view unassailable.

[31] I am also satisfied that the proposed facility meets the Long Term Economic Prosperity policy set out in s.1.7.1 of the PPS. Appropriate impact assessments have been undertaken to ensure that the batching plant will be designed in a way which prevents adverse impacts from air quality and noise and SMC will also be required, as a condition to my approval of the Site Plan, to obtain the requisite Certificate of Approval from the MOE.

### **Conclusion**

[32] Based on all of the foregoing therefore, the ICBLs are hereby repealed and the Site Plan is approved subject to the conditions set out on Attachment 1 annexed hereto [save and except for condition 1(vii)] . If, in the finalization of a Site Plan Agreement, any additional condition is raised by the City and not agreed to by SMC, I may be spoken to by way of teleconference.

[33] It is so Ordered.

"Steven Stefanko"

STEVEN STEFANKO  
VICE-CHAIR

ATTACHMENT "1"

CONDITIONS OF APPROVAL:

1. The signing of a Site Plan Control Agreement and payment of the necessary fees associated with the preparation, execution and registration of same, and to include the following provisions:
  - i) the proposed development, including all landscaping, shall be undertaken and maintained substantially in accordance with the drawings referred to above;
  - ii) the owner agrees to maintain a covered conveyor system to transport raw materials from stock piles to the batching plant;
  - iii) the owner agrees to water all raw material stock piles during hours of operation to minimize the generation of dust;
  - iv) if the building permit for the erection, construction or installation of the approved construction has not been issued within two years of the date of approval of the plans and drawings, the approval shall be null and void and the plans and drawings must be resubmitted to the City for approval;
  - v) that the Chief Building Official or designate for the City, in case of amendments necessary to satisfy the requirements of the Ontario Building Code, be authorized to consent to minor variations to the approved plans and drawings; and conditions of approval, provided that the general intent of the plans and drawings are maintained;
  - vi) the owner enter into a servicing agreement for the provision of on-site services, including the provision of storm water management facilities and the posting of financial guarantees, if required by Works and Emergency Services- Technical Services Division;
  - vii) the owner to provide a land dedication comprising 1.5 metres (4.9 feet) along the New Toronto Street frontage to the satisfaction of Works and Emergency Services- Transportation Services Division.
2. Prior to the release of building permits, the owner will be required to:
  - a) post a financial guarantee relating to the landscaping plan to ensure compliance with the approved plan;
  - b) provide a certificate of approval or confirmation that a certificate of approval is not required from the Ministry of Environment;
  - c) pay the prevailing development charges and cash-in-lieu of parkland dedication payment in effect at the time of the issuance of a building permit.