

WHERE LIES THE PUBLIC INTEREST?

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ABSTRACT

Swine farm operators need to be aware of the interplay between the public interest and the current legislative scheme in existence in Ontario so that they can take steps to self regulate their operations and avoid excessive regulation by the government in the future. This paper reviews the current legislation affecting swine operations and discusses how the public interest plays a role in the application of the legislation.

“Whereas the *Farming and Food Production Protection Act, 1998* is intended to promote farm practices in a way that balances the needs of the agricultural community with provincial health, safety and environmental concerns; pursuant to subsection 9(1) of the Act I direct that an agricultural operation proposed to be carried on in an area which is the subject of an interim control by-law under the Planning Act shall be deemed not to be carried on as a normal farm practice until a by-law providing for nutrient management planning, minimum distance separation and manure storage has been passed”¹

By this Directive, the Minister of Agriculture, Food and Rural Affairs gave notice that public interest considerations under the *Planning Act* have precedence to the right to continue established normal farm practices.

This was done in the context that agriculture is the second largest industry in Ontario and annually contributes \$25 billion to the economy in this Province². Farming operations vary from the smaller “family farm” to larger operations that have been termed “intensive” agricultural operations. The growing national concern about the environment, along with a rash of media attention to specific environmental problems caused by farming operations, is shifting the scope and focus of the regulatory regime of these agricultural operations. As the above Directive released June 26th, 2000 from the Minister suggests, the government is prepared to give increasing weight to the public interest in developing agricultural policy and laws.

¹Ontario Ministry of Agriculture, Food and Rural Affairs, Directive from the Minister of Agriculture, Food and Rural Affairs, Ernie Hardeman dated June 26th, 2000 found at <http://www.gov.on.ca/OMAFRA/english/about/directive.html>

²Ontario Ministry of Agriculture, Food and Rural Affairs, Discussion Paper on Intensive Agricultural Operations in Rural Ontario, July 11, 2000 found at <http://www.gov.on.ca/OMAFRA/english/agops/discussion.html>

Swine operations in particular are a matter of public interest for a variety of reasons. As the number of intensive livestock operations increases, the issues surrounding manure management and how failure to manage manure properly poses a threat to the environment and human health have also increased.

When manure is spread on agricultural land it can be beneficial. Inept practices in application of manure and inattention when doing so, however, give rise to the potential for contaminants to enter both ground water and surface watercourses with resultant risk to human health and safety. How swine operations manage the volumes of waste they produce and how they work to prevent contributing to other environmental concerns are issues that will continue to come to the forefront if the swine industry does not take a strong and proactive role in regulating themselves.

The Canadian Pork Council's voluntary environmental Code of Practice for hog farmers is one example of standards hog farmers could follow to promote self regulation.

In the wake of Walkerton, the public's concern over farming practices is growing, and in turn, the public interest is being given more attention both by the media and by Government. Whether it is deserved or not, incidents such as the Walkerton disaster make it inevitable that farmers will experience more regulation in their practices in the future. Farmers' efforts at achieving a safe operation at the earliest opportunity will go a long way in giving farmers the ability to shape how their operations are guided by Government, instead of having the Government impose formal legal regulations.

The swine industry is a target of regulation. In fact, pig farmers have probably been the target of more regulatory legislation than any other agricultural industry over concerns about pig manure and its potential effect on the environment. As one swine researcher has said: "Pig manure is a potential environmental pollution problem that may impair the growth of Ontario's pork industry"³. No matter how important the agriculture industry is to Ontario, the public is being heard when they express their concerns. The public interest will be a more powerful force than the right-to-farm advocates if there is a conflict. The burden of avoiding that conflict rests upon the swine industry; however unfair that may seem to some, that is the political reality.

A recent Task Force Report prepared for the Ministry of Agriculture, Food and Rural Affairs suggests that more restrictive legislation is on the way for Ontario farmers⁴. There are several pieces of legislation in Ontario already in existence which regulate farming activities, and if operators of livestock facilities are not prepared to regulate themselves by keeping their operations within the boundaries of the current regulations and through taking preventative

³de Lange, K. Winter 1998. Calculate nutrient balances on your own pig farm. *PigPens*. Vol. IV No.1

⁴Ontario Ministry of Agriculture, Food and Rural Affairs, Task Force on Intensive Agricultural Operations in Rural Ontario, Consultation, February 21, 2001 found at www.gov.on.ca/OMAFRA/english/agops/report.html

steps to avoid the pollution hazards that are potential problems in swine farming, the public interest may direct the legislation in a manner with which the agricultural industry will not be happy.

Certain federal and provincial laws are designed to address the public interest and protect resources of land, water and air from environmental contaminants. Swine farmers should be familiar with the current regulations in place that impact on their operations. A better understanding of the role that the public interest plays in the laws that already exist in Ontario will help those operators who wish to avoid excessive regulation achieve that goal in the best way possible. The following is a summary review of the current legislation which impacts on the balance between the rights of farmers and the rights of the public. An understanding of that balance should provide swine farmers with some insight into the legislative policies which impact upon their operations and suggestions on how swine farmers can be proactive in self regulating their own operations.

BUILDING CODE ACT, 1992⁵

The *Building Code Act* is of interest to any farmer who is preparing to construct a new swine operation or expand an operation already in existence by building new structures, including barns and manure storage facilities. The *Building Code Act* does not address the public interest, per se, because subsection 8(2) states that a building permit must be issued if the proposed structure complies with all applicable law.

There is little or no discretion which the building inspector or chief building official can bring to the decision about whether or not to issue a permit. If the proposal complies with “applicable law”, the permit must be issued.

The public interest, however, is a product of the “applicable law”, most pertinent of which are usually Zoning By-laws passed by local municipalities under the *Planning Act* and manure management By-laws passed under the *Municipal Act*.

PLANNING ACT⁶

The *Planning Act* gives municipalities the authority to create Zoning By-laws which regulate the location, type and dimensions of buildings. Official Plans are also creatures of the *Planning Act* which are, in turn, implemented through Zoning By-laws passed pursuant to section 34 of the *Planning Act*.

Zoning By-laws and Official Plans often incorporate minimum distance separation formulae which are standards set by the Ministry of Agriculture, Food and Rural Affairs requiring

⁵S.O. 1992, c.23.

⁶R.S.O. 1990, c.P.13.

certain separation distances between agricultural operations and their neighbours. Regulation of livestock density upon a lot and limitations upon the size of any intensive livestock operations are also issues that are starting to show up in Zoning By-laws and Official Plans.

Zoning By-laws and Official Plans can be appealed to the Ontario Municipal Board. The Board brings to its deliberations many policy considerations but overarching all is a question of the public interest. In the recent decision of the O.M.B. in the case of West Perth Township's Zoning By-law⁷, the Board did not speak of the public interest, per se, but for the reasons set out in that decision, the Board endorsed provisions in the Zoning By-law which restricted the size of intensive livestock operations to 600 livestock units per lot. The Board also approved a section which prescribed that 30% of the land base required for a livestock operation must be owned by the livestock operator.

These regulations then feed back to a building inspector who cannot issue a building permit unless such provisions are complied with.

The *Planning Act* also provides for site plan control. This permits a municipality to regulate site grading for the disposal of waste waters from the lands and buildings, including facilities used for the storage of manure. This site plan control authority is not usually exercised by municipalities for agricultural operations. If there is a need, however, whether real or perceived, this is a tool that is available when nutrient management, including contingency planning, is not satisfactorily managed by the agricultural industry itself. Again there are appeals to the Ontario Municipal Board in connection with site plan approvals and development agreements imposed as conditions of plan approval.

The ultimate weapon in a municipality's *Planning Act* arsenal is an Interim Control By-law passed under subsection 38(1). This is akin to a Zoning By-law that prohibits certain types of uses of land, such as intensive livestock operations, without notice, process or hearing from those affected. It is a short term, maximum two year measure (see subsection 38(2)) which gives a municipality a chance to study a perceived problem, putting a stop to any development in the interim. This is the sort of By-law which is addressed by the Minister of Agriculture, Food and Rural Affairs in the Directive quoted at the beginning of this paper.

A Interim Control By-law passed by Ashfield Township in Huron County with respect to nutrient management plans has been recently upheld in Court.⁸

Interim Control By-laws are subject to appeal to the Ontario Municipal Board.

⁷*Re West Perth (Township) Zoning By-Law No. 100-1998*, [2000] O.M.B.D. No. 707.

⁸*Country Pork Ltd. v. The Corporation of the Township of Ashfield and Chief Building Official of the Corporation of the Township of Ashfield*, (October 2000) Leitch J. (unreported) Court File No. 30858

MUNICIPAL ACT⁹

The *Municipal Act* is probably of primary importance in a growing number of swine operations as municipalities are passing By-laws which call for nutrient management and manure storage plans. These Nutrient Management By-laws also tend to regulate new construction by incorporating the Minimum Distance Separation calculations published by Minister of Agriculture, Food and Rural Affairs. Often these MDS calculations parallel provisions in a Zoning By-law.

Section 102 of the *Municipal Act* authorizes By-laws for the health safety, morality and welfare of the inhabitants of the municipality in matters not specifically provided for in the Act, and joined with section 210 every municipality in Ontario has the authority to pass By-laws for Nutrient Management Plans, Minimum Distance Separations and Manure Storage By-laws. If this statutory authority was found to be inadequate for these purposes by a Court, recourse could be had to the business licensing provisions of the *Municipal Act*.

It is doubtful, however, that the statutory authority for a Nutrient Management By-law will be challenged because many farmers are voluntarily preparing these plans. The other reason is that the response to a successful Court challenge will be a legislative one by the Government which will respond to the public interest by legislating formal Nutrient Management Plans. Such legislative initiatives are already in contemplation and it would not serve the interests of the swine industry to precipitate an over-reaction to a successful Court challenge.

It is worth noting that *Municipal Act* By-laws usually have application to existing operations. Existing land uses and building are protected from the application of Zoning By-laws under the *Planning Act* by what is known in the vernacular as “legal non-conforming” status. The notion of a legal non-conforming use simply does not apply to a *Municipal Act* Nutrient Management By-law.

It is also worth saying that, in the majority of cases, when a municipal council passes a By-law under the *Municipal Act* in accordance with what it perceives to be the public interest, there is no appellate supervision by the Municipal Board. The only real recourse is through the ballot box - the ultimate test of the public interest.

THE CANADIAN PORK COUNCIL GUIDELINES

The Code of Practice developed by the Canadian Pork Council is a series of guidelines that swine farmers are encouraged to follow so their production practices are continually reviewed to ensure that they are in harmony with the environment.¹⁰

⁹R.S.O. 1990, c. M.45.

¹⁰Canadian Pork Council. Canadian Code of Practice for Environmentally Sound Hog Production found at <http://www.cpc-ccp.com/codeeon.html>

The Canadian Pork Council has stated that a principal objective in their design of these guidelines was to provide “provincial and local governments with a code of environmentally sound practices which can be incorporated into regulations affecting hog practices”¹¹.

It further recognizes the need for farmers to develop their industry in a manner which shows respect for society’s concerns over pollution. If farmers accept and adopt these guidelines for their operations, their efforts to self regulate their industry will be strengthened. The Code is also a valuable tool for use in nuisance complaints which fall under the *Farming and Food Production Protection Act, 1998* as it can be used by a swine farmer to show that their operation was in accordance with “normal farm practices”.

FARMING AND FOOD PRODUCTION PROTECTION ACT, 1998¹²

The *Farming and Food Production Protection Act, 1998* is the “right to farm” legislation and it stands for the proposition that it is in the Provincial interest that in agricultural areas, agricultural uses and normal farm practices be promoted and protected in a way that balances the needs of the agricultural community with provincial health, safety and environmental concerns.

While that has the appearance of identifying the public interest it does not.

The Act establishes a Normal Farm Practices Protection Board and has given this Board the authority to protect “normal farm practices” from Court actions for nuisance and municipal by-laws that restrict such practices. Once it can be established that something is a normal farm practice, the Board has no basis for introducing a public interest factor.

It is true, therefore, that the Code of Practice developed by the Canadian Pork Council can be used by swine producers to establish a normal farm practice before the Board. The problem is that, if the practice is at odds with sound land use planning as endorsed by the Ontario Municipal Board or an interim control by-law passed under the *Planning Act* or basic common sense, the Normal Farm Practices Protection Board has no jurisdiction to take those matters into account. That is why the Minister issued the Directive quoted at the top of this paper that was issued on June 26th, 2000.

In effect the Code of Practice becomes a self-fulfilling situation. If enough swine operators follow the Code of Practice for a year or so, it becomes the norm and is, on that account, protected by the Normal Farm Practices Protection Board. If the Code finds public acceptance then it will have served the swine industry and the public interest well. If not, the public interest will prevail and those who obtain the protection of the Board’s jurisdiction will find it gone.

¹¹ Ibid. found at www.canpork.ca/introe.html

¹² S.O. 1998, c.1.

Regardless of the Board's jurisdiction, the *Farming and Food Production Protection Act, 1998* provides no protection from behaviours and practices which contravene the *Environmental Protection Act*¹³, the *Ontario Water Resources Act*¹⁴, the *Drainage Act*¹⁵ and the *Fisheries Act*¹⁶.

ENVIRONMENTAL PROTECTION ACT

Of these, this paper will touch only on the *Environmental Protection Act*.

Environmental pollution is the most discussed issue with respect to swine operations. The public's interest in both a healthy environment and pollution control are priorities in the *Environmental Protection Act*.

This Act prohibits the discharge of contaminants into the environment in concentrations greater than the prescribed amounts along with those which cause or are likely to cause an adverse effect (subsections 6(1), 14(1)). However, these sections do not apply to the application of manure to land which is being done in accordance with normal farm practices (subsections 6(2) and 14(2)).

Again normal farm practices represent a defence to pollution charges, but if those practices are conspicuously out of step the public perception of what should be done, the defence will be eroded. It would not take much imagination to guess the result of such a "normal farm practice" defence in a Walkerton scenario.

At the moment, swine farmers are more likely to find themselves caught by the provisions of this the *Environmental Protection Act* in situations where the environmental standards of their operations are far below safe levels. The *Environmental Protection Act* deals directly with issues of spills in sections 92 and 93 where it states that spills must be reported to the Ministry of the Environment, the owner and surrounding neighbours and also requires that the spill be cleaned up to prevent any adverse affects if possible.

There are suggestions of potential future requirements for "environmental farm plans"¹⁷ where farmers will be required to assess potential environmental farm risks on their farm and prepare a plan which addresses those concerns. Many farmers across the Province are already

¹³R.S.O. 1990, c. E.19.

¹⁴R.S.O. 1990, c. O.40.

¹⁵R.S.O. 1990, c. D.17.

¹⁶R.S.C. 1985, c. F.14.

¹⁷Canada-Ontario Agriculture Green Plan, Ontario Environmental Farm Plan Program found at <http://res2.agr.ca/london/gp/efp/efpmenu.html>

doing this on a voluntary basis, but if disasters similar to the Walkerton one continue to appear, these plans may end up becoming a focus of new laws.

CONCLUSION

Swine farmers will not be immune to increased regulation in the coming years, as the public's interest in keeping hog operations environmentally safe is not going unheard by the media and in turn, the politicians. Farmers should be well aware of the laws already in existence which allow the public's concerns to be heard. The swine industry should be placing pressure on itself to increase awareness among its members as to steps they can take to self regulate in the hopes of avoiding excessive regulation by the government. A failure to comply with the regulatory schemes in existence will only serve to increase the regulatory measures the government has to take to respond to the demand of the public.