

# Municipal role in water taking confirmed by Divisional Court

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Ontario municipalities are applauding a recent court victory by a group of farmers and local citizens in the Grey Highlands. The Grey Association for Better Planning successfully brought a court action to stop a water storage facility that will facilitate bottling and selling the area's groundwater.

Assisted by Environmental Defence Canada – a non-profit environmental law organization – the association retained counsel to argue the case.

They successfully argued that water taking is a “land use” under the *Planning Act*, giving municipalities the authority to regulate water taking through official plans and zoning by-laws.

## Background

The case began in 1999 when a water bottler received a permit to take water from a property in the County of Grey under the *Ontario Water Resources Act*. The company proposed to take water at a rate of more than 400,000 litres per day, 356 days a year. The permit was unsuccessfully challenged by individuals at the Environmental Appeal Board (now the Environmental Review Tribunal).

Meanwhile, the official plans and zoning by-laws did not permit the land to be used for a water loading facility to take water for the commercial purpose of selling bottled water. The company asked the County of Grey and Township of Artemesia to amend their official plans and zoning by-law to permit the commercial water activity. The municipalities did not amend their by-law as requested.

The company appealed to the Ontario Municipal Board (OMB). The OMB relied on the opinion of the water bottler's planner that taking of water was not a land use and hence that the OMB and municipalities had no jurisdiction to deal with water taking. As a result, the OMB confined the hearing to issues related to storage and loading of water. The association was thus unable to raise its concerns about

hydrogeology and the impact of the water taking on groundwater aquifers before the OMB.

## Divisional Court Appeal

The association appealed the OMB conclusion that water taking was not a “use of land” to Divisional Court.

The court found the OMB to be in error. It found that the proper interpretation of the words, “use of land” in the *Planning Act* was a question of law to be decided by the OMB itself, not a question of fact to be decided on the basis of evidence of a planner.

Thus, the entire operation, including the taking of water, constituted a single use of land. The court criticized the OMB for splitting off water taking from the matters to be considered. The question before the OMB ought to have been whether the entire operation should be a permitted one.

The court sent the application back to the OMB, and directed the board to hear evidence on the entire operation, including water taking. The water bottling company has filed for leave to appeal the decision.

## Significance of Decision

The *Grey* case confirms the power of municipalities to use official plans and zoning by-laws to regulate water use as a land use under the *Planning Act*. It also confirms that this power exists alongside, and independent, of the provincial responsibility to issue water taking permits. MW