CITATION: Gilmor et al. v. Nottawasaga Valley and The Township of Amaranth, 2015 ONSC 5327
DIVISIONAL COURT FILE NO.: 14/404
DATE: 20150909

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Kruzick, Perell and Dunphy JJ.

BETWEEN:	
Alex Gilmor and Tania Gilmor Appellants	Arkadi Bouchelev and D. Bernstein, for the Appellants
– and –	
Nottawasaga Valley Conservation Authority Respondent	Kenneth C. Hill, for the Respondent
– and –	
The Township of Amaranth Third Party	David N. Germain, for the Third Party
	HEARD: August 19, 2015

REASONS FOR DECISION

Sean F. Dunphy, J.

Overview

[1] This is an appeal brought pursuant to s. 133 of the *Mining Act* R.S.O. 1990, c. M.14 of a July 31, 2014 decision of the Deputy Mining and Lands Commissioner (the "Tribunal") that denied the appellants, Alex and Tania Gilmor, permission to build on their land because the

proposed development would affect flood control. The Gilmors' application was opposed by the respondent Nottawasaga Valley Conservation Authority ("the NVCA"), which had refused to permit their development proposal. The NVCA's refusal led to the appeal to the Tribunal and to this further appeal.

[2] The Gilmors argue that the Tribunal misconstrued the law governing their application by presuming a general legislative prohibition on development, while the undisputed evidence established that the proposed development would have no impact on flood control, which was the sole factor the Tribunal needed to consider in the particular circumstances of this case.

[3] For the reasons that follow, I have decided to allow this appeal and to direct the approval of the proposed development without conditions or a rehearing of the application.

[4] Subsection 3(1) of Ont. Reg. 172/06 (hereafter the "NVCA Regulation") required the Tribunal to assess whether the proposed development would affect flood control and several other factors. Instead, the Tribunal interpreted the law to impose a general policy prohibiting development subject only to an exceptional discretion, and the Tribunal placed a heavy if not impossible onus on the Gilmors to justify an exceptional departure from the general prohibition. In so doing, the Tribunal made the same error of law that this court corrected in the case of *3437400 Canada Inc. v. Niagara Peninsula Conservation Authority*, (2012), 354 D.L.R. (4th) 756 (Ont. Div. Ct.). Properly interpreted, the NVCA Regulation does *not* prohibit development in designated areas; it only prohibits developments that are found to affect flood control or one of the other listed criteria (none of which were engaged in the immediate case).

[5] The Tribunal (and the NVCA) incorporated within its analysis of flood control a concern for safety should there be a flood at the property, but on the evidence, the proposed development will not have any effect on flood control as such, and the evidence revealed only a very low risk to safety, even in the event of a hypothetical extreme flood of rare severity. The Gilmors' application ought to have been approved based on the uncontradicted evidence before the Tribunal, and this court has the appellate jurisdiction to grant an unconditional approval. The Gilmors have other regulatory hurdles to cross before they can get final approval to complete their home. Neither the interests of justice nor efficiency and economy of proceedings would

justify requiring them to proceed through a third hearing on this matter six years after they commenced the application process.

Factual and Procedural Background

[6] In 2008, the Gilmors purchased land in Amaranth Township located at 555106 Mono Amaranth Townline Road with a view to building a home. The Gilmors' lot, along with the neighboring "10 acre lots," already developed into homes, was originally subdivided in the 1960's. The severance of such residential lots fronting along the public road was intended to improve the tax base of the township and to enable it to generate the revenues to build, improve and maintain rural roads. The Gilmors' lot was not, however, immediately developed into a residential property. When they purchased it, the lot contained only a shed, a garden and a driveway providing access from the public road.

[7] There are very few remaining undeveloped lots in the area. The Gilmors wished to build a home on their land as their neighbours have already done. They planned to use the existing driveway leading from the public road as access to the residence. The distance along the existing driveway to the site of their proposed home is typical of the area - about 50 metres.

[8] The process of applying for the necessary permits began in 2009. Things did not go smoothly, in part, because very unfortunately, the Gilmors complicated matters by commencing construction before securing all the necessary permits. Six years later, they have been denied the permits they require and their home is unfinished.

[9] Long after the original subdivision in the 1960's, the Gilmors' land was designated as part of an environmentally protected area. This changed the process needed to build a house on the subdivision lands. The reason for the designation was the existence of a small drainage ditch called the "Buttrey Drain" that crosses their lot behind the house that they proposed to build. The drainage ditch proceeds through their neighbour's lot (on which a house has been built) before passing to the east, through a culvert under the public road. From there, the ditch eventually drains into a creek that is a branch of the Nottawasaga River, the watershed of which is subject to the jurisdiction of the NVCA.

[10] The NVCA is governed by the *Conservation Authorities Act*, R.S.O. 1990, c. 27 (the "CAA"). The NVCA passed the NVCA Regulation pursuant to s. 28(1)(c) of the CAA, designating areas of potential flood hazard.

[11] Thus, the portion of the Gilmors' land upon which they proposed to build is on the fringe of (but nevertheless within) a potential floodplain regulated by the NVCA. In contrast, the rear portion of their land is beyond the floodplain. More precisely, the potential floodplain of the Buttrey Drain just includes the building site and extends approximately 425m to the west of the proposed house, which is itself about 50m west of the roadway.

[12] The Mono-Amaranth Townline road operates as something of a dam, blocking water gathered into the drainage ditch from crossing the road until it can pass through the choke point which is the culvert. Whether some portion of the current floodway of the Buttrey Drain is the "natural" floodway or not, it is clear that the current extent of the potential floodway is at least in part a product of the dam effect of the raised public road inhibiting water from passing freely from west to east at that point.

[13] The Gilmors applied to the NVCA for approval of their proposed development and there were numerous interactions between the NVCA, its staff, and the Gilmors. In determining whether to approve the Gilmors' proposal, in addition to considering flood control, as such, the NVCA examined the impact of the development on safety should a flood occur.

[14] Environmental studies showed no recent evidence of flooding in the area of the proposed development. However, the expert evidence was that if one models the occurrence of the "Timmins Storm" (a risk assessment for a rare but severe regional storm), there is risk of flooding on the land. The Timmins Storm model is the one applied by the NVCA as the hypothetical extreme event, the worst case, and the Gilmors do not dispute the use of this measure. Given the topography and hydrology of the property, the type of flood envisaged is in the nature of a possible "backwater" or pooling flood of nearly stagnant or slow moving water, not a fast moving torrent. As the water that might flow would exceed the capacity of the culvert to carry it under the road, the water would back up and form a backwater or pond effect until it could drain downstream. Studies based on the storm model indicated that the depth of the

potential flood could reach as high as 80 cm at some points along the Gilmors' driveway leading from the embankment of the raised public road to the proposed house. The proposed house would be raised above the potential flood level.

[15] The NVCA considered how egress from the home would be affected in the event of a flood. The evidence was that while some types of passenger vehicles may not be high enough off the ground to cross water of 80cm in depth without stalling, the NVCA expert engineer acknowledged that under the Ministry of Natural Resources' provincial safety standards, which are used by the NVCA in its published guidelines, pedestrian access for children and adults is considered to be "low risk to life" at this depth and low velocity of water. In other words, the evidence was that in the event of the worst case flood, the Gilmors could walk out of their property to the high ground of the public road. Larger vehicles, including emergency vehicles, would have no problem moving through 80 cm of more or less still water.

[16] The driveway to the Gilmors' home is not elevated, but it is slightly built up. Flood depths either side of it would be slightly higher than 80cm, but still well within the same "low risk to life" category for pedestrian access under provincial standards. For most adults, the extreme limit of flood risk would thus involve traversing a short distance of still or slow moving water of a maximum depth somewhat above the knee.

[17] The adjacent public road is not at risk of flooding. It would remain high and dry in the event of the hypothetical storm.

[18] The Gilmors made the required application for permission to build with the NVCA in 2009. As noted above, they provided extensive expert evidence establishing the lack of any adverse impact of their proposed building on flood control. To be clear, the evidence established that the development would not affect flood control, as such, upstream or downstream of the proposed home. Detailed site studies using "under 1 cm" measurements were made to model the hydrology on this site to considerably greater detail than the NVCA had previously done. The methodology and quality of their expert evidence has not been challenged. Indeed, the NVCA utilized the data produced by the Gilmors' experts in preparing their own studies. The conflict between the experts who later testified before the Tribunal primarily centered on their divergent

opinions that as to what standard of safety ought to be applied and more general questions of "appropriateness".

[19] There was considerable dispute between the parties as to what constitutes "safe access" to the proposed development. The published guidelines of the NVCA indicate that absent detailed site analysis, it was not recommended that flood depths for access exceed .3m in low velocity water. However, where, as in the Gilmors' case, there was a detailed site analysis and low velocity water, the NVCA guidelines permit a maximum depth of .8m for safe access.

[20] As already noted above, this .8m standard conforms to and is derived from the safe access standards of the Ministry of Natural Resources (or "MNR"). The evidence before the Tribunal established that in accordance with this standard, the Gilmors' driveway would provide safe access in the event of the worst-case flood. Despite this, the NVCA expert said that contrary to its guidelines, the NVCA in fact applies the higher standard of .3m and apparently intends to alter its written guidelines to that effect in future. Based on the NVCA's position, the Tribunal later accepted the same higher standard, and it concluded that there were safety concerns associated with the Gilmors' development.

[21] At the request of NVCA staff, the Gilmors' experts performed a "cut and fill" analysis to demonstrate the means by which fill could be added to raise the driveway to meet the higher safe access standard suggested by NVCA staff while still having no net impact on flood control upstream or downstream. This means to redress the NVCA's postulated safety concerns would involve compensating for the increased fill in one area by cutting in another area, leaving the overall water retention capacity of the land unchanged. The engineers also proposed a "pier" structure (i.e. a (low) bridge) which would have no impact on water retention capacity.

[22] The Gilmors were, in truth, not planning to raise their driveway or to build a pier. Their position was that no alterations to the driveway were actually required, since having regard to provincial MNR standards and the NVCA's own written .8m standard, safe egress was already available. Nevertheless, they prepared the necessary cut and fill studies as requested for the event that the NVCA decided to require a raised driveway as a condition to approval. In other words, the "cut and fill" analysis was in the alternative, if and only, if the Gilmors were ordered

to adhere to the stricter 30cm depth standard for safe access instead of the 80cm standard that they believed applied, given the written policies of the MNR and the NVCA.

[23] The Gilmors' proposed solutions were found by the NVCA's engineer to be "close", but he had not fully completed his review. At the Tribunal hearing, he said that the NVCA did not favour cut and fill in this case, even if it did not dispute its effectiveness. He indicated that although the NVCA may exercise its discretion to approve this solution in some cases, the negative precedent that would be set weighed against it. He testified that others might get the idea that they too can build in floodplains by this means, and it might prove difficult to deny them permission. As for piers, he said that they are generally not a favoured solution because they require maintenance.

[24] The Gilmors' expert, who performed the detailed site-specific analysis, found no impact on flood control upon upstream or downstream properties from the construction of the house itself or from raising the driveway on piers were that to be required. In his opinion, there would be minimal impact were a raised driveway solution using fill required, but that could be eliminated through the cut and fill solution proposed. The NVCA's expert did not dispute this evidence with any specific technical objections, beyond the alleged inappropriate nature of the proposed development.

[25] As for the safety concerns raised by the NVCA, the Gilmors found themselves in a sort of Catch 22 situation. The only impact on flood control imputed to their proposed development would result from the raising of the driveway which the appellants had *not* proposed to do unless ordered. The NVCA, however, declined to grant approval with this condition because it viewed the development as inappropriate in the first place and it did not wish to create what it viewed as a precedent that would encourage more development. However, absent this change, they faced objections on grounds of safety due to an unannounced, stricter safety policy.

[26] The NVCA's expert admitted that the original designation of areas on the lot as being environmentally protected would have been done on a conservative basis without necessarily having detailed, site-specific analysis of the sort done by the appellants' experts in this case.

He also admitted that the NVCA does sometimes approve developments within a floodplain despite the contrary pronouncements in NVCA policies.

[27] (I note parenthetically and ironically, the NVCA staff reviewing the Gilmors' application indicated that they would not support the application to build at the proposed location, but they *would* consider supporting the construction of a much longer driveway over the existing drainage ditch to a new site at the back of the lot, which would be beyond the floodplain regulated by the NVCA. The proposed driveway would be approximately 600m long and proceed over the drainage ditch and across wetlands to the rear of the Gilmors' property to higher land. The Gilmors rejected that option, since it presented significant hazards in terms of winter access and emergency services access over such a long distance from the public road. Further, the fill necessary to build up the required road that distance would have a much more significant impact on the ability of the land to handle a flood and thus create still more regulatory approval challenges.)

[28] In the result, the NVCA supported the staff recommendation, and it turned down the Gilmors' application for permission to build their home by a Notice of Decision dated July 25, 2011.

[29] The Gilmors appealed. Their right of appeal lay to the Minister of Natural Resources by s. 28(15) of the CAA. The Minister has delegated that authority to the Tribunal by regulation (Ont. Reg. 795/90). The hearing was conducted by the Tribunal in March, 2013. A full re-hearing of the matter was conducted, including cross-examination of expert witnesses. The Tribunal reserved its ruling on the matter until July of the following year.

[30] On July 31, 2014, the Tribunal released detailed reasons and upheld the NVCA's decision, denying the Gilmors request for permission to build. The Tribunal summarized its conclusion as follows (at p. 57):

> "Based on the evidence and the reasons outlined, the tribunal does not find the application to be appropriate or justified especially from a safety point of view and also from the need to maintain the natural floodway. The application cannot be considered unique from an environmental standpoint. The tribunal finds that

> the PPS will take precedence along with the mandate of the Conservation Authorities Act and the subsequent regulation. Therefore, the tribunal will order that this appeal be dismissed".

[31] The Gilmors have exercised their right of appeal from the Tribunal's decision to this court under s. 133 of the *Mining Act*.

[32] The procedural background, evidence and position of the parties at the hearing are all exhaustively canvassed in the detailed reasons delivered by the Tribunal and need not be repeated further here. The record before us included the transcript of the four-day hearing before the Tribunal.

Issues on Appeal

[33] This appeal raises the following issues:

a. What is the applicable standard of review on a statutory appeal under s. 133 of the *Mining Act*?

b. Did the Tribunal err in finding that the CAA or the NVCA Regulation generally prohibit development on the floodplain?

c. Does the NVCA have stand-alone jurisdiction to regulate safety in floodplain areas?

d. Was there a reasonable apprehension of bias in this case?

e. If applicable, what is the appropriate remedy?

Analysis

(a) Applicable Standard of Review under s. 133 *Mining Act*

[34] This court's jurisdiction to hear this appeal arises from s. 133 of the *Mining Act*, which provides that "an appeal lies to the Divisional Court from any decision of the Commissioner". As such, this hearing is in the nature of an appeal and not purely a matter of judicial review.

[35] While on a judicial review application, the reasonableness standard is normally applied to questions of law involving a board or tribunal's "home statute", the correctness standard will be applied where the interpretation issue falls into one of the categories of exceptions that the Supreme Court of Canada has recognized, including: (i) constitutional questions; (ii) questions of law that are both of central importance to the legal system and outside of the adjudicator's expertise; (iii) questions regarding the jurisdictional lines between two or more competing specialized tribunals; and (iv) true questions of jurisdiction or vires: see *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 30. The Gilmors submit that the second and third exceptions apply in this appeal to the Divisional Court.

[36] Relying on *3437400 Canada Inc. v. Niagara Peninsula Conservation Authority*, *supra*, the Gilmors argue that the application of MNR safe access guidelines and provincial land use policy statements are beyond the Tribunal's "home statute" expertise. The NVCA counters that historically the Tribunal has been sitting on appeals from the various conservations authorities established under the CAA and over the years has decided numerous applications for permission to develop. Many of its decisions are published, and it has developed a body of jurisprudence. Thus, it submits that the CAA and NVCA Regulation are substantially equivalent to its "home" jurisdiction. The NVCA distinguishes *3437400 Canada Inc. v. Niagara Peninsula Conservation Authority*, *supra* on the basis that the Tribunal in that case treated the relevant policy of the conservation authority as binding, whereas the Tribunal in the immediate case placed such policies in the correct place in the hierarchy.

[37] In *3437400 Canada Inc. v. Niagara Peninsula Conservation Authority*, *supra*, this court granted an appeal from a decision of a different Deputy Commissioner of the Tribunal in almost identical circumstances. In that case, the Niagara Peninsula Conservation Authority had enacted a regulation materially identical to the NVCA Regulation in the immediate case. The Niagara Peninsula Conservation Authority had published a policy which prohibited development and the Tribunal found the policy to be appropriate and applicable having regard to the context of the statute and regulation. In its decision, *3437400 Canada Inc. v Niagara Peninsula Conservation Authority* (released May 11, 2010, File No. CA 004-09) the Tribunal stated:

> "Stepping back from the issues before this tribunal and only looking at the tone of these two regulations, it is apparent that the legislators' primary intention was to clearly state that development was prohibited in certain areas. But, an authority might grant permission if it could form an opinion that certain important interests would not be affected by proposed development" (at p. 20).

However, on the appeal, this court held that the Tribunal had demonstrated a fundamental error of law on a matter of general importance and extending beyond the Tribunal's area of expertise. At para. 32 of its Reasons for Decision, the court held that the Tribunal "erred in finding that the legislator's primary intention was clearly to prohibit development in certain areas and that the applicable policy was consistent with this." The correctness standard was thus applied. In my opinion, *3437400* cannot be distinguished from the immediate case and the same standard (correctness) should apply.

[38] The Gilmors also submitted that the correctness standard ought to be applicable in the circumstances of this case due to the existence of overlapping regulatory jurisdictions The planning authorities have yet to process applications for zoning variances or to obtain building permits, both of which procedures will subject the Gilmors to the jurisdiction of overlapping authorities, which also have mandates to consider such things as safety. For example, in the case of the building permit process, the Gilmors will be required to address the conformity of their proposed home to safety standards in the *Building Code* applicable to buildings in a potential floodplain. The *Building Code* (Ont. Reg. 332/12 made under the *Building Code Act, 1992*, S.O. 1992, c.23) has provisions specifically applicable to building in floodplains, including requirements that buildings "incorporate floodproofing measures that will preserve the integrity of exits and means of egress during times of flooding": s. 3.1.1.3(1) of the *Building Code*.

[39] The NVCA doubted how deeply the Chief Building Official under the *Building Code* process would examine the driveway access issue beyond the features of the actual building in question. It submitted that both it and the Tribunal were correct and reasonable in examining the Gilmors' development in the context of safety risks in the event of a serious flood.

[40] In my opinion, the jurisdictional overlap issue in relation to "safety jurisdiction" also warrants application of the correctness standard to interpretations of law made by the Tribunal in

relation to the relevance of safety and safe access. The high degree of reliance placed by the Tribunal on safety considerations in rejecting the appellants' application amounted to a positive assertion of jurisdiction to scrutinize applications on the basis of safety. This scrutiny overlaps at least in part the jurisdiction of the County in administering the *Building Code* and possibly as well with the *Planning Act* (under the aegis of which a *Provincial Policy Statement* was published).

[41] I do not find it necessary to consider whether the interpretation of the NVCA Regulations applied by the Tribunal also raises a "true" jurisdictional issue as discussed by the Supreme Court in *Alberta (Information and Privacy Commissioner, supra*.

[42] The NVCA, however, takes the view that appeals under s. 133 of the *Mining Act* are always subject to the reasonableness standard of appellate review. The Court of Appeal has applied the "reasonableness" judicial review standard to an appeal under s. 133 of the *Mining Act* in the past: *Ontario (Minister of Transportation) v. 1520658 Ontario Inc*., 2010 ONCA 32. However, in that case the Court was considering an appeal from a decision involving a contest between two potentially competing uses of Crown land: mining claims or the Ministry of Transportation's desire to expand a road. Writing for the majority of the Court in that case, Jurianz J.A. found that the relevant provisions of the *Mining Act* considered by the Tribunal were "intended to provide for the administration of mining resources *owned by the province* under the general direction of appointees of the Ontario government and to give the Commission the exclusive jurisdiction over any matter involving the interpretation of the provisions thereof" (emphasis added).

[43] In the present case, there is no general "privative clause" similar to s. 105 of the *Mining Act*, and the interests involved are a conflict between the private interests of the appellants on lands owned by them with the public interest as administered by the NVCA rather than administration of Crown lands. Further, the *Mining Act* contains provisions enabling claims involving private property to be removed to Superior Court, further supporting the view that the appellate standard of correctness on questions of law ought to apply to s. 133 appeals in such cases. I do not find it necessary to decide that narrow issue today.

[44] For the foregoing reasons, I am satisfied that the correctness standard should be applied to assessing the interpretation of the CAA and the NVCA Regulation applied by the Tribunal in this case.

[45] I note that it actually matters little whether the standard applied is "reasonableness" or "correctness". As shall be seen in the discussion below, in my opinion, the Tribunal's decision was also outside the range of reasonableness.

[46] As I shall explain further below, the NVCA's right to review, grant or withhold permission to develop under s. 2 of the NVCA Regulation only arises in cases where a proposed development is first found to have an effect on flood control or one of the other listed criteria in s. 3 of the NVCA Regulation. In my opinion, creating a "heavy onus" against approval of developments *before* finding any adverse impact on flood control and then erecting barriers to discretionary approval based on criteria not listed in the statute or regulation, such as general concepts of "appropriateness", and relying on unpublished and newly-raised strict standards of safety or a general fear of adverse precedents was both an error of law and also unreasonable.

(b) Did the Tribunal err in finding that the CAA and NVCA Regulation generally prohibit development on the floodplain?

[47] The Gilmors argue that instead of considering whether the proposed development would have any impact on "control of flooding" - the precise question which s. 3(1) of Ont. Reg. 172/06 directed the NVCA and the Tribunal to consider - the Tribunal started from the proposition that any development on floodplains is generally prohibited. Provincial and NVCA policy statements (which do not have force of law) which appeared to agree with this general prohibition were thus given great weight. In so proceeding, the Tribunal repeated precisely the same error that this Court reversed in the *3437400 Canada Inc*. case, *supra*.

[48] Examples of the erroneous approach employed by the Tribunal from its Reasons include:

> "[b]oth the approved Regulations and the detailed Provincial and Authority Policy documents begin by first recommending that development not be allowed in the valley where flooding occurs" (at p. 42);

> "the tribunal has considered and finds that it will adopt the general practice of Ontario Conservation Authorities to prevent incursion of development into floodplains and floodways. The provincial and NVCA's policies all accept this goal as a priority. This also applies to wetlands. As Mr. Hill stated, it takes a strong case to overcome the application of this practice" (at p. 44);
>
> "it should be remembered that it is the responsibility of Appellant to convince the Authority and now the tribunal that the development should be allowed, *since the guiding legislation and policies, both of the Province of Ontario and the NVCA, prohibit development within the floodway*" (at p. 45)(emphasis added); and
>
> "The Regulation generally opposes development within any hazard area" (at p. 46).

[49] In my view, the foregoing quotations from the Tribunal's reasons indicate that it did indeed proceed from an unreasonable and fundamentally erroneous interpretation of the governing NVCA Regulation. Neither the CAA nor the NVCA Regulation enacted thereunder can reasonably be construed as presumptively prohibiting development.

[50] Section 20 of the CAA establishes the objects of conservation authorities, including the NVCA:

> The objects of an authority are to establish and undertake, in the area over which it has jurisdiction, a program designed to further the conservation, restoration development and management of natural resources other than gas, oil, coal and minerals.

[51] Subsection 21(j) of the CAA confers upon conservation authorities (including the NVCA) specific jurisdiction in respect of flood control, permitting an authority "to control the flow of surface waters in order to prevent floods or pollution or to reduce the adverse effects thereof". If the concept of "control of flooding" needed elaboration, s. 21(j) provides useful context. Flood control is controlling the flow of surface waters. The *reason* it is considered useful to do so is to prevent floods or pollution or to reduce the adverse effects thereof.

[52] The NVCA was enabled pursuant to s. 28(1)(c) of the CAA to make regulations "prohibiting, regulating or requiring the permission of the authority for development if, in the opinion of the authority, *the control of flooding*, erosion, dynamic beaches or pollution or the

conservation of land *may be affected by the development*" (emphasis added). The NVCA admitted that only the "control of flooding" criterion listed was a factor in this case.

[53] The NVCA Regulation was enacted pursuant to s. 28(1)(c) of the CAA. It provides in section 2(1) that "*Subject to section 3*, no person shall undertake development…." (emphasis added). Section 3 of the regulation in turn provides for the NVCA to grant permission for development in language which closely tracks the original language of s. 28(1)(c) of the CAA pursuant to which it was enacted:

> "s.3(1) The Authority may grant permission for development in or on the areas described in subsection 2(1) if, in its opinion, the control of flooding, erosion, dynamic beaches, pollution or the conservation of land will not be affected by the development".

[54] Placing the NVCA Regulation in the context of the CAA demonstrates that there is no statutory foundation for a presumed general prohibition on development. The other listed criteria not being relevant here, it is *only* developments that affect the control of flooding that may be prohibited, regulated or subject to a requirement for prior permission. A general prohibition on developments without consideration of the impact, if any, of such developments on flood control in the particular circumstances of each case, would have been beyond the jurisdiction of the NVCA to enact pursuant to s. 28(1)(c) and it cannot acquire such jurisdiction by misinterpreting its own regulation.

[55] Viewed in this context, section 3 of the NVCA Regulation is not an exception to a general prohibition on development contained in s.2. Rather, it is a condition precedent to that prohibition.

[56] Section 28(1)(c) of the CAA and s. 2(1) and s. 3 of the NVCA Regulation are intended to strike an important balance. Land use restrictions of the sort imposed by s. 2 of the NVCA Regulation can impair or even sterilize land from most uses. The Tribunal itself has on a different occasion characterized this as a "subtle form of expropriation": *Junker v. Grand River Conservation Authority*, CA 83/91. Such restrictions may be necessary in the broader public

interest in some cases, but there is reason to be vigilant that such a significant impairment of property rights is carefully exercised within the bounds of proper statutory authority.

[57] In the present case, the public interest which the NVCA was authorized to supervise was that of flood control – this limited but important jurisdiction was not intended to be wielded to assert wider jurisdictional authority than the Legislator has conferred and it certainly does not provide a general prohibition against development.

[58] In *3437400 Canada Inc. v. Niagara Peninsula Conservation Authority* (*supra*), this court considered the substantially identically-worded regulation of the Niagara Peninsula Conservation Authority and concluded (at para. 32) that "[d]evelopment is not prohibited *unless* the permission made possible by s. 3 is not granted having regard to the criteria set out there". It follows that where the permission made possible by s. 3 is refused *without regard to the criteria set out therein or based on entirely different ones*, development was never intended to be prohibited by the CAA or the NVCA Regulation.

[59] The misapplication of s.3 of the NVCA Regulation went to the core of the decision of the Tribunal in the immediate case and caused it to arrive at a conclusion that was both contrary to the governing law and unreasonable. Put shortly, the Tribunal's decision was tainted by legal error and it was also unreasonable in the particular facts of this case where the development would have no effect on flood control as such and where the proposed development posed no meaningful threat to safety and where safety concerns, if any, could be addressed without affecting flood control.

(c) Does the NVCA have stand-alone jurisdiction to regulate safety in floodplain areas?

[60] Since the NVCA, and as it turns out the Tribunal, regard safety as a matter of "flood control", there was considerable discussion and evidence at the hearing before Tribunal as well as the appeal before this Court regarding the issue of safe exit from the house to the public road. The parties debated whether it is safe enough if a pedestrian can safely traverse the short distance from the (dry) house through still or slow moving water reaching a depth of 80cm in some places or must the driveway also be passable by *any* family automobile in all conditions? Is risk to life

the criterion or some lower standard of inconvenience? And most critically, were the NVCA and the Tribunal correct or reasonable in relying on safety concerns as the reason for denying development approval to the Gilmors?

[61] The Gilmors strongly urged that the Tribunal committed a jurisdictional error in claiming the right to withhold approval based on its views on the alleged safety of access to the proposed development.

[62] Neither s. 20 of the CAA nor s. 28(1)(c) mention safety. In conferring jurisdiction to assess developments, the NVCA Regulation makes no mention of safety either. The Gilmors cite a decision of a Deputy Commissioner Yurkow in *Junker v. Grant River Conservation Authority, supra*, where he wrote at p. 4:

> I am aware that conservation authorities adopt provincial flood plain planning policy statements. These policies refer to 'preventing loss of life'. Government policies are not, however, law. By adopting these policies, an authority cannot acquire a jurisdiction greater than it is given by statute. Nor can an authority use the policy statements to expand on its objectives as they are set out in legislation ...
> Authorities have been taking risk to life into account in refusing permission to build. This is beyond their authority. That all authorities seem, without challenge to use concern for risk to life as a reason for refusing permission is amazing. They, clearly, do so without authority.

[63] The NVCA supports the Tribunal's finding and its own practice, arguing that safety is the very raison d'être of the NVCA's jurisdiction in relation to flood control. It submitted that in exercising its discretion, the NVCA or the Tribunal to whom the appeal was taken must necessarily consider safety.

[64] In our view, while it would be incorrect to assert that the NVCA and Tribunal were not entitled to *consider* safety issues at all, safety cannot be elevated to a stand-alone head of jurisdiction granted to the NVCA in regulating flood control. By performing its mandate and gaining greater knowledge of floods and the means of controlling or mitigating them, the NVCA is certainly enhancing public safety. Floods are a *potential* hazard and their control necessarily enhances safety. The NVCA, however, cannot create jurisdiction over a proposed development

by reason of safety issues alone where flood control is not impacted any more than it can use flood control as a pretext to assert jurisdiction it does not otherwise possess. The condition precedent to the NVCA's authority to grant or withhold its permission to develop is an effect on flood control and not the subjective assessment of the NVCA or the Tribunal of the appropriateness of the development from a safety perspective.

[65] In this case, it appears to me that safety was used as a pretext for applying a policy preference that would seek to impose a blanket ban on development in areas within a floodplain without regard to the particular characteristics of the actual land or of the proposed development. In my opinion, safety was elevated out of all proportion to a reasonable assessment of it in order to provide a basis to apply a general policy that is itself without statutory mandate. The complete elimination of all risk in all endeavours is neither possible nor desirable. The Tribunal's approach to safety as a factor in flood control was unreasonable. The NVCA admitted that access would not pose a threat to life for pedestrians nor impede at least larger emergency vehicles in the rare event of an extreme flood. It would not even be "unsafe" for passenger vehicles since the postulated risk was of stalling, not of being swept away in a torrent.

[66] The proposal of the NVCA to consider a 600m raised driveway to the back of the lot through even more wetlands would be hard to reconcile with the idea that safety was the true basis for rejection of this development. There would simply be no reasonable comparison between the relative safety of that proposal – including in winter storm conditions – compared to a 50m driveway a short walk to an open public road. The 100 week snow storm risk would pose a much larger and more certain threat to safety in that scenario than any 100 year flood model ever could.

[67] The Tribunal raised the issue of subsequent purchasers in its reasons as an added reason for its position in regards to safety. I am not persuaded. Subsequent purchasers will not fail to note the title history, which will alert them to the existence of some risk of flooding. They will have every opportunity to conduct as much due diligence as they think fit. The decisions of the Tribunal and the NVCA are on the public record. If subsequent purchasers were the concern of the Tribunal, a simple condition that notice be placed on title would have been easily resolved.

Approving this development sets no trap. The risk of a dangerous flood that genuinely posed a safety risk did not exist.

(d) The "Cumulative Impact" Grounds for Refusing Approval of the Gilmors' Development

[68] The NVCA argued that "cumulative impact" of a proposed development with other possible developments can also form a basis to reject a proposed development under s. 3 of the NVCA Regulation, citing the case of *611428 Ontario Ltd. v. Metropolitan Toronto & Region Conservation Authority*, (1996) 90 O.A.C. 230 (Div. Ct). It submits that the assessment of the evidence in respect of this criterion by the Tribunal is subject to deference.

[69] I disagree that the 611428 case assists the NVCA. The case involved a fill application – the appellant sought permission to fill in a small valley. The role of the valley in terms of, among other things, flood storage and flow of water was firmly demonstrated on the evidence before the Tribunal. The Tribunal held, and this court agreed, that the applicant in that case had an onus to discharge that its development would not have an impact downstream and that the Tribunal did not err in rejecting the applicant's evidence and finding that the cumulative effect of the proposed development with possible future developments could also be considered. It would not take many such developments to have a large impact.

[70] The present case is very different. In the immediate case, unlike the *611428* case, the Tribunal found that "the potential for cumulative effect from any development on the site would not have much impact" and noted that there are very few empty lots of this nature left in the area.

[71] Cumulative impact of development may in some circumstances be an appropriate criterion to examine, as in *611428, supra*, but not when used as a catch-all objection without having first established a reasonable foundation for such conclusion. There was no such evidence in this case, whereas there was a wealth of evidence to ground such an objection in the *611428* case. In the immediate case, the Gilmors' expert evidence was that there was no impact of the development upstream or downstream. This evidence was not contradicted with more than speculation from the NVCA, whose disapproval of the project was very clearly premised on entirely different grounds.

[72] To the extent there was *any* discussion by either the Tribunal in its reasons or by the NVCA's expert in his evidence on the matter of cumulative impact, this was focused primarily upon the possible cumulative impact of the fill required to raise the driveway or upon the question of whether the present case would set a bad precedent for future developments in flood plains generally. This is a far cry from studying the actual impact of this actual development in the precise area where it is situate (with few remaining lots). The only expert who actually did site-specific measurements was the Gilmors' and his evidence was not contradicted with any other positive evidence on the matter.

[73] Had there been a *bona fide* concern about cumulative impact, the engineering solution offered by the Gilmors (a small amount of cut and fill to balance it) would have been simple enough to arrange. The NVCA did not pursue the matter.

[74] I am not persuaded that this minor theoretical impact can be elevated to the level of satisfying the threshold criterion of actual impact on flood control required by s. 3 of the NVCA Regulation. By restricting developments with an impact on control of flooding, neither s. 3 of the NVCA Regulation nor s. 28(1)(c) of the CAA can reasonably be construed as subjecting developments to control with only the most trivial or hypothetical of impacts. The inquiry is not akin to studying the impact of fluttering butterfly wings in Mongolia on flooding in Amaranth Township. Flood control impacts, if they were to be found, require evidence and a foundation that satisfies standards of reasonableness and materiality. I do not read the reasons of the Tribunal as suggesting any findings reaching that level of concern over "cumulative impact" nor would the evidentiary record before it reasonably permit such a finding.

(e) Reasonable Apprehension of Bias

[75] The appellants cite two grounds for alleging a reasonable apprehension of bias on the part of the Tribunal: (i) the reference in negative terms to the partial construction of the proposed home without the requisite permits; and (ii) the history of this particular Deputy Commissioner in refusing all appeals of this sort.

[76] The first point requires additional facts. The appellants had grown very frustrated with the length and delay of the process. They commenced building without the required permits in 2010. They now acknowledge that this was wrong, and they do not seek to excuse it. Needless to say, that step did not increase the goodwill of the various agencies with whom they were seeking to deal, including the NVCA. Construction was halted after a court proceeding. We are advised that the future of that proceeding awaits the outcome of this process.

[77] Clearly I am not to be taken in any way as sanctioning that sort of self-help remedy. The consequences of that action are, however, the subject-matter of a different court proceeding and do not arise to be determined or considered here.

[78] The Gilmors allege that the Tribunal drew unwarranted negative inferences from these facts, relying upon two passages in the written reasons released. In my view, the passages cited by the appellants do not indicate bias. The Tribunal found it necessary to recite the background to the application before it, and the partially-built house was one aspect of that. I see no basis to suggest that the Tribunal made any improper use of that information. There is nothing here to support a reasonable apprehension of bias.

[79] The appellants also provided copies of a number of decisions of the Tribunal issued by this particular Deputy Commissioner purporting to show a mathematical predisposition to rule against appeals from refusals of conservation authorities to approve developments under regulations similar to s. 3 of the NVCA Regulation (and its counterparts enacted by other conservation authorities). In my opinion, this sort of statistical analysis is not a means to demonstrate apprehension of bias. A detailed examination is required to determine what the reasons said about the rejection of the application. In the immediate case under appeal, the Tribunal made a fundamental error of law that caused it to start from the wrong premise. Surely either the merits of the cases before the Tribunal in those other instances or the possible repetition of the error of law corrected in this case are explanations of the mathematical anomaly alleged by the appellants that provide a more satisfactory explanation than that of bias. The threshold for establishing reasonable apprehension of bias is a high one and the evidence in this case is a long way from meeting it.

(f) Appropriate Remedy

[80] I have found that the Tribunal erred in interpreting the regulatory framework under which it was operating. I have found the decisions both incorrect *and* unreasonable. I therefore would grant the appeal.

[81] The appellants ask in addition that the court grant the permission requested under s. 3 of the NVCA Regulation, with or without conditions. In order to grant that request, the court must be satisfied that it has jurisdiction to grant the approval in an appeal under s. 133 of the *Mining Act* and that this is an appropriate case to do so.

[82] The Gilmors were entitled to have their application dealt with objectively and with regard to the criteria established by the statute and regulation which in this case was flood control. This did not happen and I have decided to allow their appeal. This leaves open the question of whether this particular proposed development in fact affects flood control, the question raised by s. 3 of the NVCA Regulation. In this regard, the Gilmors' expert did the detailed site analysis of the actual area of the development and concluded that there would be no impact on flood control from the development itself. Neither the methods nor the conclusion of the expert were challenged by NVCA. To the contrary, it actually agreed that aspects of the proposed development improved the water retention capacity of the land (tree planting and landscaping).

[83] The Gilmors' expert opined that there was a very small amount of fill around the foundations of the proposed house that would have no impact on flooding upstream or downstream. Once again, the NVCA's expert did not challenge that finding with positive evidence. Not yet being satisfied is not the same as positively concluding that there *was* an impact. The fact that the NVCA did not take the Gilmors' expert up on the offer to arrange for "cut and fill" to balance the small fill effect is suggests that the NVCA was not genuinely concerned about flood control impact.

[84] The just, most expeditious and least expensive determination of this issue will not be secured be sending the Gilmors back to the Tribunal for a third hearing on the merits in six years.

[85] The Tribunal, in hearing the Gilmors' appeal from the Notice of Decision of the NVCA, was empowered by s. 28(15) of the CAA to grant the requested permission with or without conditions. In my view, this court has the same jurisdiction in hearing this appeal of the Tribunal's decision under s. 133 of the *Mining Act* to cause grant the appeal and to cause to be issued the permission requested.

[86] The Gilmors have yet to obtain the necessary zoning and building permit approvals required in order to complete their project. The proposed building will have to meet *Building Code* requirements for buildings in floodplains. If there are *legitimate* reasons for other authorities to pursue the matter of safe access beyond the MNR standards having regard to their own different regulatory mandates, it is possible that the respondent may need to finish its review of the flood control impact of those engineering solutions as and when they are actually needed. Those will be different issues for a different day.

Disposition

[87] The appeal should be allowed and the order of the Tribunal dated July 31, 2014 should be set aside.

[88] I direct the entry of an order approving the application of the appellants for approval of the proposed development pursuant to s. 3(1) and (2) of Ont. Reg. 172/06.

[89] Neither party sought to recover costs from the Third Party Township of Amaranth nor did the Third Party seek costs from any party. The Third Party's intervention on this appeal was confined to a very narrow issue. In the circumstances, I would not make any order as to costs in respect of the Third Party.

[90] The appellants and respondent agreed that costs should follow the event and that partial indemnity costs are the appropriate scale. I agree. The parties provided outlines of costs as requested. While the appellants had the higher burden of disbursements (producing the transcripts and appeal books), the appellants' claimed fee amount ($27,457.50) was also very significantly higher than the corresponding claim of the respondent. After carefully considering the factors in Rule 57.01 of the *Rules of Civil Procedure*, and in particular, Rule 57.01(1)(0.b), I

would allow the appellants' costs in the amount of $20,000 plus $2,600 HST for fees plus claimed disbursements of $10,575.71 for a total of $33,175.71.

[91] The appellants have been successful on this appeal which represented a very important issue for them. However, given the nature of the appeal (which was not a hearing *de novo*) and the issues raised, I am satisfied that this amount is at the high end of the range of what an unsuccessful party would reasonably expect to pay as costs of the matter. I do not think it fruitful to attempt a line-by-line critique of time spent or to dissect which issues might have received more or less attention. The exercise of assessing costs is more than a mere mathematical exercise of counting hours and multiplying by hourly rates derived from a grid even if that is a useful and even necessary starting point. I am of the view that the amounts suggested by the mathematical exercise need to be subjected to the "reality check" of Rule 57.01(1)(0.b). In this case, I view the fees of $20,000 (plus HST) as being in the high end of the range that I think would be allowable for a case of this nature and complexity.

[92] Finally, the parties were in disagreement as to how to treat costs of the hearing *de novo* before the Tribunal. The respondent was successful in that hearing. The Tribunal nevertheless chose not to award costs to the successful party. While I acknowledge that this court has jurisdiction, if it chooses, to alter that outcome on appeal, I would decline to do so here. The Tribunal balanced the interests of the parties in light of its own practices in this and prior hearings in coming to its decision. The appellants were the beneficiaries of that discretion in their hearing before the Tribunal to that degree at least. I would not interfere with the Tribunal's exercise of its discretion on costs and restrict this court's award of costs in this case to the hearing before it.

S. F. Dunphy, J.

E. R. Kruzick, J.

P.M. Perell, J.

Released: September 9, 2015

CITATION: Gilmor et al. v. Nottawasaga Valley and The Township of Amaranth, 2015 ONSC 5327
DIVISIONAL COURT FILE NO.: 14/404
DATE: 20150909

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Kruzick, Perell and Dunphy JJ.

BETWEEN:

Alex Gilmor and Tania Gilmor

Appellants

– and –

Nottawasaga Valley Conservation Authority

Respondent

– and –

The Township of Amaranth

Third Party

REASONS FOR DECISION

Sean F. Dunphy, J.

Released: September 9, 2015