



Gilmor Briefing Memo - Confidential

Date: August 16, 2016

Re: NVCA ats Gilmor - Appeal

Key Messages:

- The province of Ontario has delegated the lead responsibility for the protection of property from flooding to Conservation Authorities.
- In relation to the Gilmor property, its susceptibility to flooding was discussed prior to the property purchase. Despite this, building was commenced without a municipal building permit and Section 28 permit from the Nottawasaga Valley Conservation Authority.
- Through due process the matter is now before the Ontario Court of Appeal. The Court of Appeal will determine whether protection of property and safe access to and from flood prone properties will rest with Conservation Authorities or will become a responsibility of municipalities.

Background:

- In 2009, the Gilmor's submitted a permit application for the construction of a single family dwelling within a flood prone area in the Township of Amaranth.
- Due to flooding concerns, NVCA staff was not in a position to recommend approval of the application and the application was heard by the NVCA Board of Directors and refused due to concerns for flooding, cumulative impacts and precedent.
- The matter was appealed by the landowner to the Mining and Lands Commissioner (MLC) where the appeal was dismissed. In other words, the MLC supported the position of the NVCA Board.
- The applicant appealed the decision to the Divisional Court who reviewed the MLC's decision and rendered a decision September 9, 2015 overturning it and allowing for the proposal.
- The NVCA then moved forward with the request for an appeal (Request for Leave to Appeal the Divisional Court Decision to the Ontario Court of Appeal) based on what the NVCA believes were five errors made by Divisional Court:
 1. That the Court applied the wrong standard of review – it applied the test of correctness and not one of reasonableness;
 2. That the Court narrowly interpreted the Authority's power "control of flooding" and failed to apply the broad interpretation of the *Conservation Authorities Act* and of Regulation 172/06;
 3. That the Court wrongly confined the Authority's jurisdiction and failed to appreciate that safety considerations fell under the phrase 'control of flooding'

- and that a Conservation Authority does indeed have the power to deny a permit on the basis of safety to a land owner who seeks to develop in the flood plain;
4. That the Court erred in concluding that the MLC Commissioner misinterpreted sections 2 and 3 of Ontario Regulation 172/06;
 5. That the Court misapprehended the testimony and wrongly substituted its view rather than allowing the Commissioner, a specialized tribunal with expertise in the subject matter, to make the decision.
- In addition to the above, the applicant had commenced construction without appropriate permits. As a result, the County of Dufferin issued a Stop Work order in 2010. The NVCA understands that the house construction did continue past the Stop Work order date and that the County proceeded to court to seek an injunction to make the Gilmor's cease work on the property, however, the NVCA cannot comment on this matter as it is a matter before the County of Dufferin.

Court Of Appeal

- In October 2015 the NVCA Board directed staff and legal counsel to proceed with the request for Leave to Appeal.
- The NVCA through its solicitor John Olah of Beard Winter LLP submitted the request of leave factum in November 2015.
- On February 19, 2016 NVCA received the Court of Appeal's endorsement of the Motion for Leave to Appeal.
- The Ministry of the Attorney General notified the parties March 14, 2016 that the Ministry of Natural Resources and Forestry intended to seek leave to intervene in this matter based on the following reasons:
 - "The standard of Review;
 - The interpretation of the *Mining Act* R.S.O. 1990, c.M.14, the *Ministry of Natural Resources Act*, RSO 1990, c.M.31 and regulations thereto, including O.Reg. 571/00 and, the *Conservation Authorities Act*, R.S.O., c.C.27 and regulation thereto 172/06; and
 - The respective scopes of discretion available to Conservation Authorities and to the Mining and Lands Commissioner and her duties, including the interpretation and reliance on provincial and conservation authority policies."
- Due to the nature of this appeal, Conservation Ontario also sought to obtain intervenor status.
- The Ontario Landowners Association sought intervenor status as the outcome of the appeal will have a direct impact on landowner property rights.
- On July 14, 2016 the Ontario Court of Appeal granted intervenor status to Conservation Ontario and the Ministry of Natural Resources and Forestry. The Ontario Landowners Association was not granted intervenor status.

Next steps:

- The interveners have 60 days to file their factums and the Gilmor have 90 days. The NVCA already provided a factum on June 30, 2016

Contact Person: D. Gayle Wood, Chief Administrative Officer, gwood@nvca.on.ca