

Gilmor v. Nottawasaga Valley Conservation Authority: The pending appeal and what's at stake

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On December 20, 2016, the Ontario Court of Appeal will hear an appeal of an appeal overturning a refusal by a Conservation Authority to issue a permit for development of a house in rural central Ontario. Obscure and inconsequential as the case may at first sound, it is imperative that the Court of Appeal gets this one right.

First, some context. Throughout Ontario, there are 36 separate Conservation Authorities – all legislatively compelled under the *Conservation Authorities Act* (“CAA”) to “establish and undertake, in the area over which [they] have jurisdiction, a program designed to further the conservation, restoration, development and management of natural resources.” (s. 20(1)) Pursuant to these statutorily-defined objects, each authority is empowered to “make regulations applicable in the area under its jurisdiction,” including “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.” (s. 28(1)(c))

Like most conservation authorities, the Nottawasaga Valley Conservation Authority (“NVCA”) has exercised its statutorily-mandated regulatory powers to protect the natural resources in its area of jurisdiction. (NVCA: O. Reg 172/06) In particular, under section 2 of the Regulation, it is prohibited for any person to undertake development in the area within the jurisdiction of the Authority that are flood plains river or stream valleys, hazardous lands, wetlands, or other areas where development could interfere with hydrologic function. However, section 3 of the regulation also acknowledges that there may be exceptions to the rule: not every development next to every wetland will necessarily be detrimental to the conservation of land, and so the Conservation Authority must consider permitting applications that are made to it that show that the development will not be detrimental.

In the case of *Gilmor et al. v. Nottawasaga Valley Conservation Authority et al.*, 2015 ONSC 5327, the Gilmors had purchased some land that was subject to the jurisdiction of the NVCA. Nonetheless, the Gilmors began developing the land (building a house) prior to securing permission from the NVCA to develop it. Unfortunately for the Gilmors, they turned out to have counted some unhatched eggs: in its review of the Gilmor application, the NVCA was unable to conclude that the proposed development would not have an effect on the control of flooding in the area, and denied permission as a result. The Gilmors appealed to the Mining and Lands Commissioner and lost. But when they appealed again, this time to the Divisional Court, a reversal of their fortunes occurred: the Honourable Justice Dunphy directed that the order of the Mining and Lands Commissioner be set aside and the application of the Gilmors to develop should be approved.

I must here apologize: the reader may now wish to know more about the proposed development and other factual issues at play. And the **decision** is worth reading. However, the facts of the case, interesting as they are, are not what makes this case so important. Rather, it is the Court's particular interpretation of the statutory framework at play that is of greatest consequence and poses the greatest problem. In reaching his conclusions, Justice Dunphy curiously stated:

“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 [in the Regulation] 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.” (para 54)

However literal the Divisional Court's interpretation of this particular provision of the *Conservation Authorities Act* might be, it is difficult to understand how it can possibly be correct. This seems to imply that the developer himself should be entrusted with determining if he needs to comply and get a permit. For a Conservation Authority to be able to consider and decide whether or not a particular proposed development affects the control of flooding, let alone whether the proposed development affects the control of flooding in an intolerable way, developers clearly must be required to first apply to the Conservation Authority before developing. Conservation Authorities are not mind-readers, soothsayers or clairvoyant demi-gods and we cannot expect Jack and Jill Homeowner to self-regulate effectively. To ensure that proposed developments are evaluated at all, a compulsory permit application process must be in place. And for a compulsory permit application process to mean anything, development before a permit must be prohibited.

Just like good conservation, good legal interpretation requires an ability to see the forest for the trees. It is imperative to both that the Court of Appeal address this particular aspect of *Gilmor* this December.

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