

Righting the Apple Cart. Conservation Authorities

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Conservation Authorities (“CAs”) in Ontario are breathing a bit easier following the May 23rd 2017 decision of the Court of Appeal in *Gilmore v. Nottawasaga Valley Conservation Authority* reversing the Divisional Court and reinstating the decision of the Mining and Lands Commissioner not to permit development in a floodplain.

Some background.

CAs have the power to pass regulations prohibiting development in areas such as river valleys, wetlands and hazardous lands. All have done so. “Development” includes filling and building. Section 2 of these mostly identical regulations states that development is prohibited unless and until one gets a permission from the Authority under section 3 of the regulation. The applicant must demonstrate no effect on control of flooding, conservation of land and other matters.

In 2011 the Gilmores’ were trying to develop a lot they had bought parts of which were in a floodplain. (As determined by a specified storm condition known in this case as the Timmins Storm. Other parts of Ontario are governed by the Hurricane Hazel storm). Unfortunately the Gilmores’ driveway would be inundated by 80cm (2.5 feet) of water in the regulatory storm and there would be no safe ingress or egress to their home. Also there would be some reduction in the floodplain’s ability to hold and channel floodwater by some 230 cubic metres.

The provincial planning policy statement (the “PPS”) makes it clear that no development should be permitted in a floodway regardless of whether there are high points of land not flooded within it.

The Mining and Lands Commissioner after a full hearing *de novo* considered all this and refused the Gilmores’ their permission to develop.

The MLC decision was consistent with its previous positions and CA understanding. But suddenly, the apple cart of CA practice and law then swerved, hit a rock and overturned. Shocking the CA community, the Divisional Court disagreed with the MLC and concluded that, despite the clear prohibitive wording of section 2 of the regulation, “there is no statutory foundation for a presumed general prohibition on development”. The Divisional Court also concluded that safety was not a valid consideration when deciding whether to grant a permit and that the standard of review on appeal was “correctness” rather than “reasonableness”. They concluded the MLC was wrong and that the Gilmores’ could go ahead and build in the floodplain.

The apple cart’s crash caused an audible inward drawing of breath by CAs around the province.

The Court of Appeal

NVCA supported by Conservation Ontario and by the Ministry of Natural Resources and Forestry soldiered on to the Court of Appeal.

The Court of Appeal decided the Divisional Court was wrong on several grounds and established the following principles.

- The correct standard of review on appeal was “reasonableness” not “correctness” The MLC decision was reasonable in this case.
- The CA is required to act in a manner consistent with the PPS (ie safety issues and avoiding development in floodplains) and while this may overlap with planning authorities mandates under the Planning Act, there is no conflict. The PPS can be used to inform the Authority’s and the MLC’s decision.
- Section 2 of the regulation is a presumptive prohibition on development. This is part of the strategy of the province to direct development away from floodplains.
- The exercise of discretion to permit development under the regulation must be exercised “reasonably”.
- Control of flooding is understood as embracing a wide range of considerations including public safety.

- The MLC consideration of safety issues, which one might consider strict, was a reasonable approach in the context of the statute and the MLC mandate.

Going Forward

The Court of Appeal decision re-rights the apple cart and CAs are breathing a sigh of relief. Current CA regulations do presumptively prohibit development in specified areas. It is up to an applicant to convince the Authority, and the MLC on appeal, that such development will not affect the control of flooding, conservation of land, pollution, erosion, and dynamic beaches. These terms will be read broadly and courts will be loath to interfere in the reasonable interpretation of them by the MLC.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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