File No. CA 006-11

H. Dianne Sutter	)	Thursday, the 31st day
Deputy Mining and Lands Commissioner	)	of July, 2014.

THE CONSERVATION AUTHORITIES ACT

IN THE MATTER OF

An appeal to the Minister under subsection 28(15) of the **Conservation Authorities Act** against the refusal to grant permission for development through the construction of a single family dwelling on the east part of Lot 22, Concession 1, Township of Amaranth, municipally known as 555106 Mono-Amaranth Townline (the "Proposed Building"), in the Town of Shelburne, County of Dufferin, Province of Ontario;

AND IN THE MATTER OF

Ontario Regulation 172/06.

B E T W E E N:

ALEX GILMOR AND TANIA GILMOR

Appellants

- and -

NOTTAWASAGA VALLEY CONSERVATION AUTHORITY

Respondent

- and -

THE TOWNSHIP OF AMARANTH

Party of the Third Part

O R D E R

WHEREAS THIS APPEAL to the Minister of Natural Resources was received by this tribunal on the 2nd day of September, 2011, having been assigned to the Mining and Lands Commissioner ("the tribunal") by virtue of Ontario Regulation 795/90;

AND WHEREAS a hearing was held in this matter on the 4th, 5th, 7th and 8th, days of March, 2013, in the courtroom of this tribunal, in the City of Toronto, Province of Ontario;

1. **IT IS ORDERED** that this appeal be and is hereby dismissed.

2. **IT IS FURTHER ORDER** that no costs shall be payable by any party to this appeal.

Reasons for this Order are attached.

DATED this 31st day of July, 2014.

Original signed by H. Dianne Sutter

H. Dianne Sutter
DEPUTY MINING AND LANDS COMMISSIONER

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Party of the Third Part

REASONS

Appearances:

Mr. Arkadi Bouchelev	Counsel, on behalf of the Appellants
Mr. Kenneth Hill	Counsel, on behalf of the Respondent
Mr. David N. Germain	Counsel, on behalf of the Party of the Third Part

Witnesses for the Appellant

Mr. Richard P. Hubbard	Vice-President, Savanta Incorp.
Mr. Edward Gazendam	President, Water's Edge – Environmental Solutions Team
Mr. Brian Plazek	Water Resources Engineer, URS Canada
Mr. James Spratley	Project Manager/Builder

Witnesses for the Respondent

Barbara Perreault	Senior Environmental Officer, Nottawasaga Valley Conservation Authority
Glenn Switzer	Director Of Engineering & Technical Services Nottawasaga Valley Conservation Authority
Mr. Chris Hibberd	Director Nottawasaga Valley Conservation Authority

The matter was heard in the courtroom of the Mining and Lands Commissioner, 700 Bay Street, 24th Floor, in the City of Toronto, in the Province of Ontario on March 4, 5, 7 and 8, 2013.

Deputy Commissioner H. Dianne Sutter noted that she had visited the site on Sunday, March 3, 2012, but was unable to access the internal portion. A second site visit was arranged and undertaken on Saturday, March 16, 2013.

INTRODUCTION

This appeal came before the Mining and Lands Commissioner pursuant to subsection 28(15) of the **Conservation Authorities Act**, R.S.O. 1990, c. C. 27, as amended, against the refusal by the Nottawasaga Valley Conservation Authority (NVCA) to grant permission for development of a single family house within a regulated area of the Nottawasaga River watershed.

Subsection 28(15) of the **Conservation Authorities Act** states that:

> *"A person who has been refused permission or who objects to conditions imposed on a permission may, within 30 days of receiving the reasons under subsection (14), appeal to the Minister who may (a) refuse the appeal or (b) grant the permission with or without conditions."*

It appears that the proper procedure was followed by the Gilmors in filing this appeal with the Minister of Natural Resources.

The Mining and Lands Commissioner and the Deputy Mining and Lands Commissioners have been assigned the authoritative powers and duties to hear this appeal pursuant to subsection 6(1) and clause 6(6)(b) of the Ministry of Natural Resources Act, R.S.O. 1990, c. M. 31, as amended, and Ontario Regulation 571/00. In addition, the principles outlined in the Statutory Powers Procedure Act apply to the hearing.

By virtue of subsection 6(7) of the Ministry of Natural Resources Act, these proceedings are governed by Part VI of the **Mining Act** with necessary modifications. Pursuant to section 113(a) of the **Mining Act**, these proceedings are considered to be a hearing *de novo*. The tribunal stressed this point at the commencement of the hearing and noted that the purpose of the proceedings was to hear all of the evidence in order to make a fair and independent judgment regarding the appeal.

PRELIMINARY MATTERS

The parties had discussed reaching an agreement on the issues that have the most significance and/or relevance to the hearing. An issues list was filed as Exhibit 15 and is, as follows:

"1. Can safe access to and egress from the site be provided?
2. Does the application conform to the relevant floodplain planning regulations?
3. Does the application conform to sound engineering practices generally?
4. What is the general practice of Ontario conservation authorities when it comes to applications for development in flood zone areas?
5. Does the Provincial Policy, as well as other pertinent policies, laws and regulations allow for development in a One Zone floodplain under certain circumstances? In making that determination, should the Commissioner take into account past precedents from the NVCA and other conservation authorities?
6. Can the proposed development proceed without adverse impacts on the control of flooding, in particular:
   a) is the use of a balanced cut and fill technique appropriate in the circumstances of this case?
   b) If so, have the Appellants shown that a balanced cut and fill can be achieved on their site?
7. Would the granting of the permission sought for this development be precedent-setting in respect of potential future developments on lands under NVCA jurisdiction and in Ontario generally? If so, is this a relevant consideration for the purposes of determining the outcome of the Gilmor appeal?
8. Should the Commissioner take into consideration the fact that road works conducted by the Township increased the amount of flooding on the Gilmor property? If so, what was the actual increase in the flood level?
9. Should the Commissioner determine whether the Township of Amaranth obtained proper permits in connection with road works conducted on the Mono-Amaranth Town Line? Provided this is a relevant consideration, was the paving of and any other work associated with the increase in flood levels to the Gilmor property carried out without a relevant permit from the NVCA?"

Counsel agreed that Issues 1 to 7 were considered relevant to this hearing. However, there was a dispute about the relevance of Issues 8 and 9. Both the Respondent and the Township of Amaranth indicated that Issues 8 and 9 should not be relevant to the proceeding and that it would be their intent to object to any questions dealing with these issues. A Ruling was requested.

Issue 8:

Counsel for the Township submitted that "whether or not safe access existed prior to the Township's road works is not relevant to this hearing." (Trans. - Day 1- p. 10) The requirements for safe access "are all questions that have to be answered in the context of what exists now." (p. 20) Mr. Germain argued (for the Township) that the Appellant's submission that the tribunal should look back at what existed when the application was submitted should not be the criteria used by the tribunal to reach a decision today.

Mr. Bouchelev argued that these facts are relevant in that the NVCA applied conditions on the Gilmor application that they did not apply to the Township, which in his view creates a precedent. In addition, he contended that opportunities for mitigation cannot be proposed or undertaken without a proper analysis of the changes in the floodplain as a result of the road works.

With regard to flood levels and other facts that are relevant to the appeal that is before the tribunal, the tribunal suggested that this information can be submitted if it is relevant to the conditions existing now - at the time of the application and appeal to the MLC. The tribunal accepted Mr. Germain's argument regarding the relevance of the past activity and reiterated the earlier statement that this was "a hearing *de novo*" (p. 21) and the intention was to look at the application and the facts surrounding it on the basis of the conditions that exist today. Due to this position, Issue 8, as written, is not considered relevant to the present hearing.

Issue 9:

The Appellant argued that this issue related to the impact that the road/culvert work had upon flood conditions for the Gilmor property. It was argued that there was an increase in flood flows which has negatively affected the property and over which, the Appellant had no control.

Beyond the fact that the Township had a permit from the NVCA to carry out any municipal work on the Town Line in the form of a replacement of a culvert, not a road pavement permit, the tribunal notes that permitted uses under the Ontario Policy Statement include municipal public works such as culverts, road construction and paving as well as bridge construction, and in this regard, it is noted that the municipality has a responsibility for the good of the community as a whole to maintain its infrastructure.

The relevant point, however, is again that this is a hearing *de novo* so the evidentiary facts should relate to what exists as of today, not to before any road works were carried out.

The tribunal ruled that Issue #9 should be dealt with in some other way than directly and any issues dealing with mitigation should relate to present day data and what would happen today.

BACKGROUND

Mr. Hill outlined the basic reason for this appeal. The Gilmor property is subject to the NVCA's Ontario Regulation 172/06 (Map sheets 10 and 11- Exhibit 16), with respect to being part of the floodplain and a provincially significant wetland ("PSW"). Some of the property is actually outside these regulation boundaries and is bounded by an unopened lot line or concession line. A residential unit has been constructed on the property, without any permits.

The NVCA is concerned about any new residential development in the floodplain. The issues applicable to this concern, deal with the first seven issues raised in Exhibit 15 such as safe access and egress, and the results of the NVCA staff's investigations relating to the application on the basis of its conformity to floodplain planning regulations as well as sound engineering practices. There are questions dealing with the application's conformity to the various Provincial policies, the **Conservation Authorities Act** and the various policies of the NVCA itself, such as the application of a one-zone concept (c.f. Regulation 172/06) to this portion of the watershed. Questions relating to the impact on flood control, including the use of the balanced cut and fill technique also are raised. The NVCA suggested that the tribunal examine past precedents and cumulative impact from the NVCA, as well as other conservation authorities. This last point was strongly supported by the Appellants.

EVIDENCE OF APPELLANTS

Richard P. Hubbard was sworn in as an expert witness. He is Vice-President of Savanta Incorp; an environmental consulting company which carries out environmental assessments. He has been involved in this work for 33 years.

Mr. Hubbard indicated that he had been asked by the Gilmor's project manager to provide an opinion as to the "appropriateness of the current building envelope…and also to provide an assessment as to whether there would be another potential building envelope….that might be a better choice to locate a house. **(**Trans. - Day 1 – p.45 (7-13)**)** Subsequently, discussions with the Gilmors and the NVCA led to the development of a work plan for an environmental impact study.

Description of Land and Environment

Mr. Hubbard discussed Savanta's report entitled *555106 Mono Amaranth Townline – Scoped Environmental Impact Study* and dated March, 2011. (Ex. 2b - Tab 2 – C) Copies of some correspondence from the NVCA had been provided to Savanta which identified the potential building lot at the rear of the property as well as a potential alignment for a driveway access to this area. Ontario **Regulation 172/06** titled *"Regulation for Development, Interference with Wetlands and Alterations to Shorelines and Watercourses"* was submitted as Exhibit 17. In addition, a map, entitled "Figure 2- Environmental Features" was submitted (Ex. 18) which outlined the area in the 2004 Township of Amaranth Official Plan designated as *Environmental Protection* indicating concerns regarding a potential for flooding as well as a concern for Natural Heritage such as fisheries or woodland areas.

The proposed building lot is located mid-center on the lot adjacent to the Town Line Road in an area described as woodland plantation. A blue line marks what is known as the Buttrey Drain, a watercourse feature used as a municipal drain located to the rear of the proposed development area.

The alternate building site as proposed by the NVCA is located at the very back of the Gilmor lands adjacent to an unopened lot line – an area also described as woodland plantation (white spruce). Distance from the Town line is approximately 300 metres.

The terms of the Study and the level of work to be undertaken was agreed to by the NVCA. The "scoping' took place in two seasons – late fall and just prior to the following growing

season. The site is gently rolling with fairly flat topography but includes some areas of depression. Beyond the Buttrey Drain, the property is comprised of wetland forms such as cattail mineral marsh and along the southerly boundary, there is a small "Dry-Moist Old Field Meadow".

Mr. Hubbard further indicated the location of what he understood was the NVCA's suggested access driveway from the Town Line to the rear upland site. This driveway has a convoluted route and ends crossing the wetland in order to access the white spruce upland area.

Mr. Hubbard indicated that the Savanta report was geared to determine "whether a potential building application may have direct or indirect impacts to the Natural Heritage features on the property". If so, are there mitigation techniques that can be used to address these impacts. (Trans. P.58) He outlined some specific issues/points with regard to both areas of potential development:

- The current house site is an area of lower function from a Natural Heritage perspective; The area has "very poor understory" from a diversity point of view with the area adjacent to the Buttrey Drain being a partially manicured lawn;
- The area west of the drain and extending to the white spruce plantation at the rear of the property is part of the Elba-Camilla Wetland Complex, an area considered by the Ministry of Natural Resources to be a Provincially Significant Wetland (PSW).
- Development (house construction, septic bed, driveway on the site) of either of the sites would have a similar impact. The rear parcel, however, is much larger and is contiguous with adjacent lands making it less preferred in the Savanta report in comparison to the front of the property;
- A critical issue with regard to developing the rear parcel as opposed to the Townline area is the access – Savanta really cannot find a way to traverse the wetland where the soil conditions are "competent" enough to create a reasonable and stable base for driveway construction. (Trans. – p. 62) In addition, this would basically need to be done from the townline to the rear plantation area;
- It was Mr. Hubbard's view that it will be difficult to secure access through the wetlands from the Ministry of Natural Resources (MNR) - as a commenting agency to conservation authorities. In his experience, MNR would *"take a very critical view of the fact that area would involve ..... removal of wetland that is not going to be replaced."* (Trans. p. 64);
- A substantial amount of fill would be required to create the driveway, along with the culverts that would be required to manage seasonal flooding.
- In comparison, the existing house site is east of the Buttrey Drain, by about 15 metres and about 30 metres from the wetland area; Although the PSW line is marked as being east of the Buttery Drain, Savanta believes this line, in actual fact, is west of the Buttrey Drain. In addition, the tile drain for the house is located towards the roadway, not the Buttrey Drain. There is no reason why a buffer cannot be restored or enhanced, parallel to the Buttrey Drain as part of a mitigation plan.

A second report was prepared by Savanta Inc., dated October 31, 2011, entitled *"Technical Opinion Letter"*. (Ex. 2b – Tab 2-I) This report was basically a summary of the work done by Savanta and was prepared to assist the Project Manager (James Spratley) in a presentation to the municipality. Of particular note were the following points:

1. The driveway proposal(s) to the rear of the Gilmor property creates substantial infringements on the protected area; the only non-negative driveway scenario is the existing driveway which is totally located outside the PSW feature.
2. Savanta determined that there are no mitigating measures that would eliminate or significantly reduce the impacts of crossing the wetlands. Heavy equipment would be required to construct the access, assisting in creating a large construction footprint.

Mr. Hubbard's conclusion in this second report summarizes the recommendation of Savanta Inc:

> *"Savanta has determined that the PSW encompasses the central portion of the property and the only way to reach the rear of the site is to traverse a major portion of the PSW. We conclude that the construction of such a driveway to the rear of the property would cause significant direct and indirect impacts on this natural area, and that the present house location is the only environmentally responsible option for the development of the Gilmor property." (Ex. 2b –Tab 2 –p.4)*

Edward Gazendam, P. Eng. was sworn as a qualified environmental consultant and a hydraulic engineer. His earlier employment was as a water resources engineer with the Grand River Conservation Authority. He is the President and founder of Water's Edge Environmental Solutions Team Limited.

The firm was employed by the Gilmor's Project Manager to assist in developing a floodline assessment report including an assessment of the width of the meander belt. Several reports were submitted regarding the Gilmor property and are found in Ex. 2b - Tab 2 beginning at Tab C. The first report provided a *"fluvial assessment of the North Branch of the Upper Nottawasaga River in order to determine an appropriate meander belt width in support of the overall riparian setback for the property"*. It is the Buttrey Drain (historically a ditch) that is at issue.

The objective is to allow the creek (drain) to meander naturally. Water's Edge was asked to determine what might be the limits of such a natural meander in order to determine whether a residence would be affected by the belt width on the front part of the property. Three different actual approaches were studied resulting in a determination *"that the belt width would not interfere with the location of the unit as shown"*. (Trans. – p. 92) The Drain flows northerly to the Townline culvert through the Gilmor lands.

The primary conclusion was that *"The current placement of the Gilmor residential unit would not be impacted by the meander belt width."* (Trans. – p. 93) – the maximum meander belt width being approximately 30 metres or 15 metres either side of the creek (Buttrey Drain).

A further report from Water's Edge - *"Flood Impact Assessment"* – dated March 11, 2011, addresses the extent and depth of potential flooding on the Gilmor property. The report responded to the NVCA's request for a floodline assessment. In order to prepare the report, the hydrology and the hydraulics were reviewed. The NVCA provided the hydraulic modeling and topographical information. Site surveying was carried out, using *"sub-centimetre accuracy GPS"*.

Mr. Gazendam indicated that the NVCA modelling appeared to be a draft as there was no townline culvert in the first model provided, only the road profile. As a result, it was necessary to *"introduce the culvert into that and as well, the road profile, the current road profile."* The road and the culvert were surveyed using GPS. A second model was secured from the Conservation Authority which included the culvert and the updated profile. It was this second model that was utilized in the Water's Edge's study and is described as Scenario One. Scenario Two added the cross-sections for the house location. Scenario Three and Four are variations on how safe access could be provided. Three shows a culvert through the driveway while Four suggests a piered driveway or an elevated road.

The hydrologic model indicated that the flow could be 22 cubic metres per second (cms) or 23 CMS[1]. The NVCA modelling suggested that the flow could be up to 26 CMS. The report utilized the NVCA's figure. The purpose of the modelling was to determine the actual flood lines and flood depths.

A further section of the report dealt with the method and results of the topographical survey that was undertaken to determine the channel's location as well as the road elevations and the presence of structures such as culverts. This work was carried out from about one lot south of the Gilmors' lot to about 375 metres north, where the road begins to rise again, beyond the Townline culvert. From this information, the Water's Edge report initially concluded that *"the elevation of the road was 475.41 and the floodline elevation at the house was 475.42 - that is under current conditions."* (Trans. – p 102 – line 9)

A further part of the study dealt with various driveway or access alternatives - culverts versus piered driveway. Since *"the entire area is essentially a backwater from the road culvert, there is really no difference in any of the scenarios on the site itself with respect to flood elevations".* (p. 103) It was also concluded that there is safe access to the site based on the existing road conditions for the Townline without either of Scenarios Three and Four being required.

1. Normal Vehicular access/egress – depth of 0.3 to 0.5 metres (small vehicle)
2. Emergency vehicles access/egress – depth of 0.9 to 1.2 metres (p.105)

As noted, the regulatory flood elevation is 475.41m *(475.42).* The lowest elevation along an old (existing) laneway to the Townline from the existing house location is 474.61m, a difference of 0.81 m (2.66 feet). The Flood Impact Assessment Report established that the Gilmor construction would have no impact on neighbouring property floodlines.

Referencing Ex. 20 – Regional Floodline, which indicates the post road-fill condition (existing) and describes the method of evacuating the 'proposed' house and property in the event of a flood, the driveway would lead towards the Townline, encountering at maximum, a depth of flooding of 0.8 m. This would meet the Technical Guidelines established by the Province for emergency vehicles

With reference to the Riparian Storage Assessment (Ex. 2b – Tab 2-e - p.5), it was estimated that the project would result in the minimal loss of 230 cubic metres of floodplain storage or approximately 0.6% of the total storage available. It was noted that recent road construction appears to have increased the riparianstorage significantly. One of the Gilmors' proposed measures

[1] Model based on the U.S. Corps of Engineers HEC RAS Model

for mitigation involving the removal of fill from the existing driveway and constructing a piered driveway could resilt in significant l overcoming the estimated storage loss. A further report dealt with a possible Cut and fill Balance (Tab 2-f) and indicated that other areas could be found to cut in order to allow the fill for the driveway, which would result in a balanced cut and fill and avoid any cumulative impact. Mr. Gazendam's opinion indicated that the Gilmor development would be considered a minor adjustment since it involves a minor amount of fill and is close to the edge of the floodplain. The details of a cut and fill process would be a matter for discussions with the NVCA. It was again noted that this report was prepared at the request by the NVCA.

It was noted that there were several reports requested by the NVCA regarding the cut and fill balance exercise, the last one being dated June 20, 2012. The request that the analysis was to be done on a 0.3 metre basis and the cut was to be outside the Provincially Significant Wetland was achieved by the Water's Edge final report. There was no response to this report and no further requests for additional studies. As a result, Water's Edge assumed that the NVCA staff accepted the report. However, no permit was forthcoming.

As a final note, Mr. Gazendam alluded to the result of the team discussion (Water's Edge) of the suggested residential development of the lands to the rear and in Mr. Gazendam's professional experience the conclusion reached was that it would not be practical to try to build the driveway to the rear lands. It would require excessive amounts of fill and many culverts for adequate flood flows. Safe access would be a great concern. (p. 109 and Ex. 2b - Tab 2-e) He further discussed this opinion in the cross examination by Mr. Hill stating: in comparison to the part of the lot adjacent to the townline:

> "I have to look at the alternative of having to cross what has been described as 300 metres of wetland through a PSW with a road that would create hundreds and hundreds of times the amount of fill and with significant costs in terms of hydraulics analysis and cost of construction versus a simple connection".
> (Trans. – pp. 224-225)

During cross examination by Mr. Hill, Mr. Gazendam indicated that the Gilmor's asked Water's Edge to provide support for an application for a residential unit, which is considered development under the **Provincial Policy Statement** (PPS)**.** He knew the designation at the rear of the property allowed for such development but he was looking at ways to make the development work at the front of the lot. He agreed that the floodway in this area is a One Zone Policy Area.

Mr. Hill referenced the **PPS**. (Ex. 12 – Tab 1-c) asking Mr. Gazendam how he would use the Natural Heritage section at 3.1.2. in his practice. Mr. Gazendam's view was that he was dealing with a lot of record despite the actual Official Plan and Zoning designations, which do not permit development in the area. Mr. Hill suggested that section 3.1.2. (d) does not permit development or site alteration in *"a floodway regardless of whether the area of inundation contains high points of land not subject to flooding*". Mr. Gazendam did not accept Mr. Hill's suggestion that the Policy statement actually described the Gilmor proposal since it was his understanding that the driveway/laneway had been in existence for sometime as an agricultural access to the wetlands and rear of the property, utilizing a culvert in the Buttrey Drain.

Mr. Gazendam confirmed that the Water's Edge assessment was based on *"existing conditions"* meaning that it included the new road profile. (c.f. March 11, 2011 - report – Ex.2b - Tab 2-e) He agreed that the existing conditions for the building and driveway were post construction.

Further debate ensued about what could or could not be discussed or what is considered existing or not existing or relevant. It had already been decided that the work done on the Townline was irrelevant in itself. However, as the Appellant pointed out, there had to have been some fill used to raise the driveway enough to provide proper access once that work was carried out and that this fill should be acknowledged as necessary and beyond the non-permitted construction. The tribunal agrees with this position. It appears that the elevation at the mid-point along the driveway is 474.95m resulting in just under a half metre of flooding (1.64 feet).

The question remained, however, as to what had been done to the lot since the house was built - the premise being that the house was not there now - so the existing condition around the building site must be appraised on the pre-construction conditions. Again, the tribunal accepts this position.

Mr. Gazendam explained that the ground elevation pre-construction was estimated to be 474.5m at the house site. In addition, it was estimated that 100 cubic metres (about 10 loads) of fill had been brought in to place around the foundation like an apron and it was this fill and other fill areas which would be removed to achieve a net zero balance in a cut and fill exercise. Removal of the driveway fill and the development of the piered driveway would contribute to the balance as well, except Mr. Gazendam stated that he understood that the NVCA did not want the culverted piered driveway, so this fill would remain and be cut elsewhere. All these details could be dealt with without *"sophisticated modelling".*

The lowest elevation of the driveway was 474.61m between the house site and the Townline. At the roadway edge of pavement today, the elevation is 475.43m while the elevation along the sides of the driveway is 474.91m, about 0.5m different (1.5 feet), the ditches near the road would be lower.

Mr. Hill stated that the NVCA used the 0.3m level of flooding over an access way as the appropriate standard and that this standard is applied by conservation authorities across the province. Mr. Gazendam, however, indicated that he was not aware of any authority that uses that standard but they do use the aforementioned Technical Guidelines.

In response to questions regarding the extent of the floodplain, Mr. Gazendam stated that the hydraulic modelling concluded that the floodplain was less than 400 metres wide. He further estimated that, of this amount, approximately 250 metres extended south of the townline culvert.

As far as the impact of any infringement by the proposal is concerned, based on the Water's Edge calculations and analysis:

> *"... that regardless of the amount of fill, but given the fact that it is a backwater area, regardless of the amount of fill that would occur, whether it has or not, it*

would make no difference in terms of floodline upstream or downstream of the site and it would have no impact on adjacent development or adjacent and neighbouring properties." (Trans. 1 - p. 225)

With regard to the floodproofing issue, Mr. Hazendam indicated that this is usually dealt with at the site plan stage with the Building Department as *". . . long as there is an agreement to provide flood-proofing or something to that effect within the conditions of permit approval".* (Trans. 1 - p. 229) In this case, it was being recommended and agreed to by the Gilmors, that the basement would be filled in (become non-habitable).

Mr. Brian R. Plazek was sworn as an expert witness as a Water Resources Engineer, in the employ of URS Canada, a company engaged in consulting regarding water related land development including stream restoration. They work for conservation authorities, municipalities as well as private clients/developers. In the '70s and '80s, Mr. Plazek actually carried out the original floodplain work for the NVCA.

Mr. Plazek was contacted by the Gilmor's Project Manager, James Sprateley, to provide assistance in dealing with the NVCA and securing the team needed to prepare the documentation required by the Authority. He was involved in the consultations with the Authority.

Mr. Plazek outlined the extent of the floodplain in the area, describing it as ". . . *a good estimate of where it extends to is actually where the limit of the wetland is".* (Trans. 2 – p. 256) There is spill over the roadway to the opposite side of the Townline. It was his view that there is a 13% infringement of the Gilmor property into the floodplain. The building area cannot be considered to be in the middle of the floodplain and, in fact, it is at the extreme edge of the floodplain.

Mr. Plazek referenced his summary report to the Gilmors, dated September 19, 2010 (Ex. 2c – Tab 3 – P). He indicated that the NVCA's preferred development at the rear of the Gilmor property did not make any sense to him, due to the impact of access through a Provincially Significant Wetland…such areas usually being considered untouchable. Such Wetlands are under the jurisdiction of the Ministry of Natural Resources, not the Conservation Authority and the history of ever getting MNR approval must be known to the NVCA staff.[2] As a result, it was his conclusion that [if development was to take place] building next to the Townline presented a more viable solution. The Studies carried out by Water's Edge confirmed this conclusion and actually quantified the exact limits of the wetlands.

Mr. Bouchelev referred Mr. Plazek to the *PPS*, subsection 3.1.2.(d) which Mr. Hill had discussed earlier - *"a floodway regardless of whether the area of inundation contains high points of land not subject to flooding*". Mr. Plazek agrees that the statement exists in this Policy document, but commented that conservation authorities, including the NVCA, have approved development under such circumstances. The Policy statement as well as the conservation authority's own adopted policies are used to make decisions. Flexibility is involved in these policies and therefore in the decisions as well.

[2] Mr. Hill verified that the Conservation Authorities now have the approval responsibility over PSWs as a result of their Ontario Regulations documents.

Mr. Plazek described some of the projects in which he had been involved where the NVCA and the Lake Simcoe Conservation Authority (LSCA) had allowed development in the floodplain. One of these was near the Gilmor lands in the Shelburne area. In this case, Mr. Plazek was responsible for all the water resources components, being storm water management and the channel design (Exhibits 21 - 23: Approved Shelburne Meadows Subdivision).

In this case, it appeared that a cut and fill exercise was suggested, approved by the NVCA and undertaken in what the Authority called a spill area.[3] (Ex. 14) The floodlines were revised. Part of the Bennington lands (Shelburne Meadows) had been in the floodplain. With the cut and fill work, that part was removed from the 20 m. buffer of the one zone floodplain with fill and six lots were created, all of which have now been developed. (Ex. 23) In this example, the NVCA was actually proactive in that the Bennington developers were approached to take part. The cut took place in the Beasley Drain - a natural feature.

The NVCA has indicated that this example does not apply to the Gilmor property since it was a spill zone, a point disputed by Mr. Plazek. He noted his opinion that the Gilmors are being treated in a more stringent manner than the subdivision developer.

The second example presented involved the LSCA in the Town of Newmarket. (Ex. 24) The Region of York was considering development in the area of the Western Creek, a regulated watercourse and Mr. Plazek was asked to determine how land which could be developed could be increased with a cut and fill procedure in the floodway. The same technology or methodology was used as for the Gilmor project – for every 0.3m of increment you fill, you cut somewhere else in the immediate area to maintain a balance and avoid any cumulative effect. In addition, an assessment of both upstream and downstream impacts was carried out. There was a 25% encroachment of the floodplain in the Newmarket example as opposed to the 15% (13% - Water's Edge) in the Gilmor proposal, creating a much larger impact.

Mr. Plazek indicated with the balance cut and fill proposed for the Gilmor property, that there would be no cumulative effect. In so far as becoming a precedent, in his view, if a balance cut and fill can be achieved, *"it doesn't make any difference because, at the end of the day, you are cutting exactly the same amount that you are filling. So everything is status quo."* (Trans: p. 290)

Mr. Plazek stated that the Gilmor site would have safe access according to the typical criteria accepted by MNR of 0.8m for personal accessibility. He commented that he also had never heard of 0.3m being used by a conservation authority.

He referenced a meeting with the CEO of the NVCA (Mr. Wayne Wilson) where he understood that the NVCA looked upon roadway fill in a different way than that associated with a building. This discussion dealt with Mr. Placek's concern about the amount of fill which would be needed through the wetland and floodway to develop the rear piece of the property as opposed to the Townline piece.

[3] Mr. Plazek disputes the definition and describes it as an area where water actually flowed around an island.

The Gilmors agreed to the undertaking of all the studies required by the NVCA. This would be the normal requirement for any development – large or small. In Mr. Plazek's view and experience there could have been more give and take or team-like discussions with the NVCA in so far as this is a single development issue. However, nothing was requested that was not improper.

During cross-examination, Mr. Hill rebutted some of Mr. Plazek's evidence:

- The PPS, specifically section 3.1.2.- Natural Hazards – in which are the words regarding "containing high points of land not subject to flooding". Mr. Hill suggested that, in fact, the Gilmor proposal was such an example. Mr. Plazek admitted it could be described that way, but an island with safe access. The proposal before the tribunal, however, has a driveway below flood level, thus definitely creating an island and in order to reach the island under flood conditions, a pedestrian would have to walk through 0.8m of water.
- Mr. Plazek had made assumptions based on his Shelburne experience, that the NVCA would give serious consideration to a residential proposal at the front of the lot, as they had done in the earlier 2000's for the Shelburne cut and fill example that created six lots, in so far as the Gilmor proposal had the new development surrounded by flood waters.

Mr. Hill referred to the *Nottawasaga Valley Conservation Authority Regulation 172/06* (Ex. 11 – Tab 2-b) and the Authority's policies and guidelines – documents which had been updated since the Shelburne project was approved and both were in effect at the time that Mr. Plazek began working with the Gilmors. Mr. Plazek admitted that he had used his recent experience and knowledge of the Shelburne project as his guideline.

- In addition, Mr. Hill again called attention to *Regulation 172/06*, (approved April, 2009) through which the NVCA became the responsible agency for wetlands under its jurisdiction. It was at this point that MNR off loaded that responsibility to local authorities.
- Reference was made to the distances the "proposed" house is from the edges of the floodline (new). The distance is extensive to the north, obviously beyond the Townline culvert towards the increasing edge of the floodplain. There was no estimate as to the distances either north or south, but Ex. 20 locates the proposal in the south east part of the floodplain (towards the edge) approximately 50m from some dry land. The Townline, both north and south of the access to the Gilmor property, is within the flooded area leaving only a small area at the end of the access at the roadway free of flood waters. In effect, the Gilmor property would be flooded during the regional storm
- Mr. Plazek again reiterated that he was not aware of any conservation authorities using the 0.3m figure as a standard for safe access/egress. Mr. Hill indicated that the NVCA's standard was 0.3m as were the standards used by the Credit Valley and the Lake Simcoe Region Conservation Authorities.
- Referencing the Authority's "*Guidelines to Support the Implementation of the Authority's Section 28 Regulation"* (Ex. 12 - Tab 1-d – pp. 38-39), Mr. Bouchelev, in re-cross, pointed out a section that deals with minor additions and re-development which states:

> *"In the absence of a site specific detailed analysis, it is recommended that the depths for safe access not exceed 0.3 metres and velocities not exceed 1.7 metres/second." (p. 39)*

Although this section referred to minor additions, not to new development which would describe the Gilmor proposal, it was noted that this was a standard used where specific analysis was not carried out- again, unlike the Gilmor proposal.

On page 38, "Safe Access' states that *"ingress/egress should be 'safe' pursuant to provincial flood proofing guidelines".* (MNR 2002) These guidelines have been outlined earlier in the evidence. Mr. Plazek reiterated that, in his opinion, the application would meet this technical standard.

In addition, Mr. Plazek's opinion was that no matter whether it was MNR or the Conservation Authority, it was very unlikely that a driveway with fill through a PSW would be approved due to the environmental impacts. Mr. Plazek also understood that MNR staff had been involved and visited the site in order to identify the limits of the wetlands.

Mr. Plazek indicated that he had not been advised that the NVCA would not accept a proposal with no dry access. The NVCA had suggested the development at the rear of the lot with an access of a much greater significance through the floodway – wetland. He also had no recollection of any discussions with regard to the suggested creation of an island, being the structure itself.

Mr. James Spratley was sworn as the final witness for the Appellant as an expert with regard to the facts of the proposal as well as general building issues within environmentally protected areas such as flood proofing. He became the Project Manager having reviewed the situation and concluded that there was *"a decent case"*. (Trans. Day 2 – p. 374 - line 25) Mr. Spratley undertook the following work in order to come to that conclusion:

- Met with the Town and Conservation Authority to determine situation;
- Determined that the lot was established in the 1960's as a ten acre lot - Parcel 8 block divided for development with clear access from side roads; (Ex. 2c - Tab 3-d). A lot of record was created at that time and is designated Rural 1-EP with a small rural residential area at the rear of the lot. (Ex. 2b - Tab1-d). This designation/zoning appears to prevent any further residential uses that had not existed prior to the approval of the By-law. (Note: A Zoning Amendment was required if a house was to be built)
- Mr. Spratley confirmed the presence of a culvert at the townline and the road way to the rear of the parcel, built for agricultural/gardening purposes by the previous owners (Cicis) to access the land and a garden shed. This information about the previous owners was purported to come from the Cicis' neighbour, although no witness statement was submitted. (Trans. – p 396 - 408).
- Reference was made to two reports (Ex 2c- Tabs – e and f) on MNR letterhead – one dealing with inspection of private property for the Forest Management on Private Lands Program (June 1980) and the second dealt with the Fish and Wildlife Branch Application for the Ontario Conservation Land Tax Incentive

Program (May, 2009). Mr. Spratley submitted that, in his view, both of these reports allude to the possible future development of a residential unit as well as forestry plantings. Mr. Spratley pointed to the fact that the report consigned 5 of the 10 acres as wetlands, from which he had assumed that the rest was available for residential purposes.

- Mr. Spratley discussed various methods or techniques of flood proofing a house in a flood prone area - either in a "*backwater*" area or a "*river surge*" area (Trans - p.429) It is not necessary to place fill around a foundation – that is just one technique. He indicated that the detail would be at the time of the Building Permit, once the NVCA had been satisfied.
- An emailed list of the required actions and reports was emailed by Leslie Roach, Environmental Officer, NVCA. Mr. Spratley had been assured that this would be the complete list of requirements.

An Official Plan Amendment and a Zoning By-Law amendment would be a requirement of the Township and for the NVCA application:

1. A floodplain study *"demonstrating that the property in question is not subject to flooding in the location of rezoning and the access to that location".*
2. An erosion hazard study to determine that the area for development is outside the meander belts;
3. A geotechnical analysis examining the suitability of the soil, etc.; and
4. An Environmental Impact Statement to consider all potential building locations and focus on the PSW with late spring/early summer assessment being undertaken. Mitigation should be an important element.

It was in this email that it was noted that MNR had visited the site to re-survey the wetland boundary. The fact that the entire property was under the regulatory jurisdiction of the NVCA also was noted.

Mr. Spratley noted the following:

- Although not at the meeting of May 4, 2010 and not having a copy of the Minutes, he took a measure of confidence for a successful outcome from the Statement by Barbara Perrault:

  "that NVCA will approve building on a floodplain if certain criteria are met" adding that staff had been clear with the Gilmors from the beginning. The tribunal is unclear as to the meaning of "staff being clear with the Gilmors".

- In addition, he felt that the characteristics of the specific area as a backwater results in *"non-aggressive flooding"* (Trans. p. 443) as described by the initial engineering reports.

- Mr. Spratley further noted that Mr. Switzer, in his Witness Statement (Ex. 12- 1-section 19-c), declared that the NVCA did not support structural solutions such as the suggested piered driveway (Scenario 4). However, Mr. Spratley understood this technique was part of the *NVCA Planning and Regulation Guidelines* (p.88 under Flood proofing Standards -Glossary) where it is stated:

> *"Dry Passive flood proofing – includes the use of fill, columns or design modifications to elevate openings in the building or structure at or above the the level of the flood hazard."*

Mr. Spratley indicated that in his experience, the structural solution is used throughout Ontario and that it was a practical and reasonable solution for the Gilmor project. However, the team decided that there was enough ability to deal with the cut and fill technique, so did not pursue the matter of the piered driveway and the policy issue. (p. 464).

In cross-examination by Mr. Hill, Mr. Sprately acknowledged that he had not sought any planning advice at the time to determine the designated uses for the property. The two MNR documents dealt with "pre-planning for forestry" planting (1980) and was done before the PSW had been delineated. Mr. Hill noted that the application also did not deal with regulatory storm flooding and that there was nothing dealing with any potential for a housing unit. The documents, therefore, have no relevance to the case before the tribunal.

Referring back to the notes of the meeting held on May 4, 2010, (Ex 2-b, Tab 1-d), Mr. Spratley acknowledged that he had never checked with Barbara Perreault as to whether she had been correctly quoted. Reference was made to Ms. Perreault's own notes of the meeting (Ex. 12-Tab 4-d). However, the validity of these notes could not be verified by Mr. Spratley, since he was not at the meeting.

Mr. Germain requested comments from Mr. Spratley regarding his premise that the Gilmor lot was able to be developed residentially. Ex. 2b-1-a exhibited the Township of Amaranth Zoning By-law indicating that the majority of the parcel is designated Environmental Protection with only the lands at the rear of the lot allowing Rural Residential. Mr. Spratley had consulted a planner but determined a planner was not needed and would be too expensive for the Gilmors.

It was clarified by Mr. Germain that currently, there is an Official Plan and Zoning Amendment application before the Township Council. They have not been appealed or pursued and are being held in abeyance pending the Conservation Authority proceeding.

EVIDENCE OF THE RESPONDENT

Barbara A. Perreault has been the Senior Environmental Officer for the NVCA since September, 2000.

Ms. Perreault indicated that she was present at the meeting held on May 4, 2010, (Ex 2b - Tab 1-d) but indicated that the recording of the Minutes were not accurate with regard to her comments. In addition, she referred to her own notes taken at and following that meeting (Ex. 12 - Tab 4-d) in which she noted:

> *"NVCA staff informed him that if the proposed building was shown to be outside of the flood meander belt hazard, we may support the application. Must be outside the hazard and a floodplain study would be required for the rezoning application."*

Ms. Perreault met with the Gilmors in August, 2009, just before their permit was submitted in September. She indicated that the Gilmors were told that the proposed site was not supportable by the NVCA as it was in the flooplain and was not zoned correctly. In cross-examination, Ms. Perreault indicated she had spoken by phone to Mike Giles, the Chief Building Officer for Dufferin County (and seemingly chair of the meeting on May 4) shortly after receiving a copy of the Minutes in email form indicating her concern about the Minutes. No amended Minutes were circulated and she acknowledged that she did not contact the Gilmors to indicate the error made regarding her comments.

Glenn T. Switzer, P. Eng. became Director of Engineering at the NVCA in 2002, having worked in both the private and public (conservation authorities) sectors for thirty-one years. Mr. Switzer was qualified as an expert witness in water resources engineering.

Mr. Switzer outlined the purpose of the Regulation Maps for the NVCA **(**Ex. 16 and 17). The floodlines are not precise but conservatively considered "approximate". It is these regulation maps that tell the public that a permit would be required if any building was contemplated. Ex. 25, entitled "Gilmor Property Limits of Water's Edge Studies and Adjusted Inundation Area", was prepared by the Authority staff by utilizing the Water's Edge hydrology data to create a visual representation of the flood limits on the Gilmor property and to explain how the hydraulics work.

Mr. Switzer referred to the data in the Water's Edge report (Ex. 2c – Tab 3-s) which had accepted the NVCA flow rate of 26.46 cubic metres per second for the Gilmor lands (p. 2 of 8). It was noted that 475.43 metres had been accepted as the modelled flood elevation. The exhibit also differentiates the flood depths within the floodplain.

The north branch of the river (Buttrey Drain) carries most of the flow to the confluence with the West tributary and the River itself. Based on the view that the existing *"house is essentially a box that is sitting on the original ground elevation of approximately 474.4".* This would, therefore, indicate a flooding depth of about one (1) metre at the spot where the house is now located and the depth would vary in the surrounding area but certainly average out at one metre flood depth. The driveway is higher (474.61m - 474.72m to 474.95m near the townline).

The Ministry of Natural Resources Technical Guide – Policies and Performance Standards (Ex.12 - Tab 1-b) would describe the Gilmor property as a one zone floodplain/floodway. Section 2.8 of this document outlines the One Zone concept as follows:

> *"Generally, the floodplain will consist of one zone, defined by the selected flood standard (see Figure B-1). New development in the floodplain is to be prohibited or restricted. Where the one zone concept is applied:*
>
> *i) Municipalities and planning boards should include policies in their official plans that explain the intent of the one zone concept;*

ii) The floodplain should be appropriately zoned in conformity with the official plan designation to reflect its probative or restrictive use; and

iii) The entire floodplain should be treated as the floodway."

Mr. Switzer reviewed all the information available to him and Ex. 20 (elevations) and Ex. 25. It was his opinion that the prebuilding area/lot, including the driveway, is fully in the regulatory floodplain or floodway, with a flood depth of approximately 1 metre during the maximum storm. (Timmins) With regard to the water velocity at the building site, it is considered to be fairly low at approximately .1 cubic metres per second. This is due to a back-up from the road at the culvert creating what Mr. Switzer called a reservoir or pool effect on the Gilmor building site. (also referred to as a backwater area)

During his review of the project, Mr. Switzer referenced the *Provincial Policy Statement*, dated 2005 (Ex. 12 - Tab 1-c). Section 3.1 deals with Natural Hazards. The relevant sections for Mr. Switzer were:

"3.1.1. Development shall generally be directed to areas outside of:

(b) hazardous lands adjacent to river, stream and small inland lake systems which are impacted by flooding hazards and/or erosion hazards; and

- Hazardous Sites

3.1.2. Development and site alteration shall not be permitted within:

(c) areas that would be rendered inaccessible to people and vehicles during times of flooding hazards, erosion hazards and/or dynamic beach hazards, unless it has been demonstrated that the site has safe access appropriate for the nature of the development and the natural hazard;

(d) a floodway regardless of whether the area of inundation contains highpoints of land not subject to flooding."

Mr. Switzer pointed out that the word 'generally' has been removed from Section 3.1.2**.,** which provides more specificity to the clause. He also stated that it was clear to him that the property is located in the floodplain or floodway and that development and or site alteration is not permitted.

The second document was the *Nottawasaga Valley Conservation Authority Development Review Guidelines* (Ex. 12-tab1-e) dated April, 2006. This was mentioned in order to clarify that the NVCA had accepted the hydrology and hydraulics data provided by Water's Edge as being technically in conformance with the guidelines.

The *Nottawasaga Valley Conservation Authority Planning and Regulation Guidelines*, dated August 20, 2009, provided the direction for the actual review of the proposal. (Ex. 12-Tab 1-d, p. 78) (along with the Ministry of Natural Resources Hazard Manual). The section relating to Flood-Proofing Standards states:

"However, the following general flood-proofing and safe access standards will apply to development permitted in flood-prone areas within the NVCA watershed:

- *To ensure safe access, in the absence of a site specific detailed analysis, it is recommended that the depths not exceed 0.3m and velocities not exceed 1.7m/s.*
- *When evaluating detailed analysis for safe access looking at the combination of depth and velocity, the NVCA uses the 2X2 rule with a value of 0.4m^2/s, providing the depth does not exceed 0.8m and the velocity does not exceed 1.7 m/s.*
- *All new structures shall be dry flood-proofed using passive flood-proofing measures with the minimum opening elevation being located at least 0.3 metres above the regulatory elevation."*

Moving to the MNR document – Appendix 6, the guidelines discuss private vehicle and pedestrian issues regarding a flood event. Evacuation by private vehicle and some emergency vehicles, other than fire trucks, would become a problem beyond the range of 0.3m – 0.4m (1 – 1.5 feet) depth of flooding. The NVCA's policy (first bullet above) reflects the MNR document. The MNR document provides a great deal of data or technical information, without suggesting a firm depth and velocity number. This has become a type of risk analysis process for the conservation authorities – decisions are made locally as to how much risk the authority is willing to take. The MNR report does say:

"As a result, it is likely that the simple rule of 3x3 product represents the upper limit for adult male occupants in a floodplain and that it would be reasonable to consider something lower as being more representative of a safe upper limit for most flood-plain occupants" (p 28 – Appendix 6)

Mr. Switzer went on to quote from the MNR document on page 27 (fourth paragraph):

"...a reasonable approximation of low risk area can be made with a product rule that contains some constraints on the domain of depth and velocity. For example, a product depth and velocity less than or equal to 0.4m^2/s (4 ft^2/s)defines the low risk area providing that depth does not exceed 0.8m (2.6 ft) and that velocity does not exceed 1.7 m/s (5.5 ft.)

Mr. Switzer stated that the NVCA had adopted the 2 x 2 rule (less than 3 x 3) at the suggestion of the MNR report, as well as the not to exceed 0.8 m in depth and 1.7 m velocity constraint. Although the NVCA staff are using these rules in practice, he noted, however, that this intent is not reflected in their Planning and Regulation Guidelines which allows for an increase if specific detailed analysis is done as opposed to the 0.3m depth/1.7 m/s velocity required where the analysis is absent. This needs to be corrected in the NVCA's Guidelines and he indicated that discussions are underway to modify the existing words that are part of the Authority approved policy. The existing words are incorrect. The first bullet refers to vehicle access and the second is for risk to life or pedestrian access.

With regard to the Gilmor lands, Mr. Switzer concluded that the property is at risk for both pedestrian and vehicle access. In addition, flood proofing standards would be required. There are other sections of the Guideline that need to be referenced: (pages 46 and 48)

"4.3.4.5. Development Within One Zone Regulatory Floodplain of River or Stream Valley

1) In general, development within the Regulatory floodplain shall not be permitted;

2) In general, flood hazard protection and bank stabilization works to allow for future/proposed development or an increase in development envelope or area within the Regulatory floodplain shall not be permitted;

5) In general, development within the Regulatory floodplain on vacant lots of Record shall not be permitted.

6) In general, basements within the Regulatory floodplain shall not be permitted;

and....

14) Notwithstanding Section 4.3.4.5.1, development associated with the construction of a driveway or access way through the Regulatory floodplain in order to provide access to lands outside of the Regulatory floodplain may be permitted subject to the provision of safe access and if it has been demonstrated to the satisfaction of the conservation authority that there is no viable alternative outside of the regulated area and that the control of flooding, erosion, pollution or the conservation of land will not be affected;

With regard to part 14, Mr. Switzer stated that this could work for the Gilmors for the parcel at the rear of the property which is outside the floodplain, **if** the access could pass the tests. (ie. conservation of land)

Mr. Switzer also noted that the NVCA uses the *Ministry of Natural Resources – Technical Guide* methodology approach to calculate the regulatory floodplain as well as carrying out any necessary hydraulic analysis.

In summary, Mr. Switzer described the Gilmor proposal as an island in a floodplain and outlined the NVCA's position as follows:

1. The proposal does not comply with the *Provincial Policy Statement*, the NVCA's Guidelines or the Ministry of Natural Resources Guide. Flood proofing studies have not been submitted and safe access has not been demonstrated.

2. The balance cut and fill concept is used primarily to regularize the floodplain edges where new development is proposed. It is not used to allow development to take place anywhere in the floodplain. It is not part of the MNR Technical Guide nor the NVCA's guidelines but is used at the discretion of the Authority's engineers to provide some flexibility to development, but it is not utilized very often.

3. The Shelburne example presented by Mr. Plazek predated the implementation of the new NVCA guidelines. The Authority classified the area as a SPILL, not as a floodplain, where development could occur under certain conditions such as flood proofing. The houses were raised so that they were not in the floodplain. He indicated that, in the end, no cut and fill was done in the Shelburne example to permit the houses to be developed. (Ex. 21 dated August 1, 2003)

4. In reference to the potential for residential development at the rear part of the 'lot', it was his opinion that it provides a better location since it is outside of the Regulatory Floodplain. The access and egress hazard is not eliminated but the risk is less. It is not known at this time whether such a driveway access is feasible and appropriate studies would be required to determine the impact.

Mr. Switzer concluded his evidence with the following statement:

"If development is allowed to proceed as an island here in the floodplain and safe access and egress is developed, if a balance cut and fill is provided, which there's an indication that that could be possible, the impacts of the loss of storage downstream would be mitigated. So there would be no impacts due to the loss of storage downstream." (Transcript p.620)

If the proposal was approved, however, Mr. Switzer expressed a strong concern, from an engineering point of view, about the use of cut and fill at the engineer's discretion as a precedent. It could lead to the opening up of development on floodplains anywhere in the watershed. It would not matter what the PPS or the Guidelines said. They are guidelines but, the main goal for the NVCA *"is to try to minimize risk and not put development in harm's way in a floodplain".* (Transcript p.621)

Referencing Ex. 25, Mr. Bouchelev, during cross-examination, asked Mr. Switzer to estimate the distance from the site of the existing house. His response indicated that the floodplain extends approximately 425 metres westerly and about 50 metres to the east. This information presumably was requested to show that the house is not actually in the middle of the flood plain.

Mr. Switzer also acknowledged that development is sometimes allowed in a floodplain as an exception to the PPS and agreed that Ontario Regulation 172/06 is a binding legal document as opposed to the PPS.

With regard to the issue of reports requested from the Appellant (i.e. cut and fill) by the NVCA staff, Mr. Switzer indicated that the problem that staff have by reviewing and commenting on consultant's reports, is that it gives the impression of approval despite the fact that they "had been clear all the way through the process, that staff were not in support of the application". Mr.Switzer stated that it had always been made very clear to everybody that just because some of the requirements were or could be satisfied, that did not mean that staff supported the application.

It was pointed out that the cut and fill concept does not appear in the NVCA's Guidelines, in effect it is silent on the matter. Mr. Bouchelev suggested that, as a result, the

Guidelines did not prohibit this concept. Mr. Switzer agreed but only in so far as it is not used normally, but it is the practise of the NVCA to use the concept only at the discretion and approval of the Authority engineer.

Further questions related to the issue of the depth of flooding at the site of the constructed house. Mr. Switzer's Witness Statement (Ex. 12 - Tab 1 para. 15) indicated that the NVCA staff had estimated the flooding depth to be 0.8 metres. He indicated that this was the view at the time the Statement was prepared. However, his opinion had changed and the Water's Edge opinion of 1 metre was now accepted, since this figure was based on the Appellant's more accurate calculations.

Discussion moved to the depth of flooding which the NVCA had calculated as 0.75 to 0.8 metres along the driveway, which would not meet the NVCA's requirements for vehicles or emergency vehicles of 0.3 to 0.4 metres for maximum flood depth. There was a good chance, however, that it would meet the pedestrian requirement, especially since the velocity is low at 0.1 metres per second.

With regard to the proposed driveway, Mr. Switzer clarified that the alignment shown on Ex. 19 was just one suggestion. The example shown on Ex. 19 was estimated to be approximately 600 metres from the rear development area to the townline if there is a flood event, whereas if the house was at the front of the lot, the distance would be about 50 metres. Mr. Switzer reiterated his view that the risk is greater at the front since it was still in the floodplain. The rear development would have a greater impact for emergency vehicles, other than a fire truck, but for evacuation from the residence, it would have less risk since it was *"high and dry"*. Their goal is to place the house and the car entirely outside the hazard area based on the purpose of the Provincial Flood Policy as reiterated in the NVCA's policy document.

Mr. Switzer continued to indicate, that despite the disparity in distance (50 metres compared to 600 metres) that the rear property was still safer. He agreed the distance at the road was shorter, but stated that the point was, what happens once there is a flood event at the site:

> *"I'm not so sure emergency vehicles working right in the middle of the floodway where the velocities are the highest, the depths are the highest, and you have a very narrow limited area [the driveway] that's just in the floodplain, and you have to get out of your vehicle, you go into the houses, maybe help someone in a wheelchair...take them through the water [surrounding the house] and get them back in the vehicle, get the vehicle turned around, and come out." (Trans. – p. 701)*

Mr.Bouchalev suggested that emergency vehicles and cars also could not get to the rear property since the vehicles had to travel the long driveway through the flood area. Mr. Switzer responded on the basis that either driveway would have to be at or less than 0.3 metres (.98 feet) if development was to be considered for approval. Considerable discussion took place as to the advantages and disadvantages of the front versus the rear development suggestions. Mr. Switzer indicated that he was speaking only from an engineering point of view.

However, Mr. Switzer made further statements with regard to the potential for a cut and fill balance and the NVCA's practice in this regard. At one point he stated that Savanta Consultants have indicated that considerable fill material was available on the property where a cut and fill balance could be done to cross the environmentally sensitive area.

Because of other hazards/issues connected with the front parcel, he still preferred the rear property where the zoning allowed development and the cut and fill concept was a possible tool to allow that to happen.

Mr. Switzer acknowledged that there was an area at the town line and the existing driveway where the depth of flooding was very low if not flood free. Exhibit 25 indicates this area is either at or below 0.4 metres and this situation continues to the south to flood free land (appears to be 150-175 metres south of driveway) while almost 400 metres to the north. However, it is noted that the land on either side of the road (ditches presumably) would be 0.4 to 0.8 metres of modelled water depth, as it heads towards the town line culvert.

Mr. Switzer agreed that emergency vehicles in the form of fire trucks could access the house area through 0.8 metres of water but stated that this still would not meet the NVCA's access/egress standard of 0.3 metres of depth for the other matters. The personnel would be trying to get people out which would be difficult as noted above. Mr. Switzer did not believe that kind of access would be acceptable to either the municipality or the Conservation Authority. This later risk is not there on the back property.

He also agreed that two water courses needed to be crossed to get to the rear property, while none needed to be crossed if the front area was selected. However, he said the distance is longer to get to the rear but a great deal of the distance is not in the floodplain at all - only a portion crossing the designated wetland is flooded to a depth of 0.4 to 0.8 metres (Ex. 25) The greatest depth to cross is at the front part of the lot where it ranges from 0.8 to 2.03 metres of depth (Fig. 25).

With regard to:

1. the raising of the driveway on the front area, Mr. Switzer indicated that there was a good chance of it being done using balance cut and fill, but an evaluation must be properly done.
2. flood proofing the house, Mr. Switzer indicated that one of the preferred methods was placing fill around the house. However, he indicated that was not necessarily a preferred method for the Gilmor proposal because of the need for a cut and fill balance. The more fill that goes around the house would reduce the amount available for the cut process.
3. the driveway, it was again noted that Mr. Switzer does not support a piered access driveway/structure to provide access to this site in accordance with the NVCA's practice. Again this practice is used at the recommendation of the engineer as a response to the many problems that could arise from a structural solution. It is not in the NVCA's policy document. However, in the Appendix to the MNR Guidelines (Appendix 6 Ex. 12 – Tab 1-i) which are guidelines followed by the Authority, page 26 presents a section entitled "Elevated Structures" which allows for raised structures on piers in flooded areas. In addition, Mr. Bouchelev referenced parts of the NVCA's Policy guidelines which show that piered structures are allowed or can be allowed (pages 39 and 88).

Mr. Bouchelev drew attention to a letter dated June 20, 2012, from Water's Edge, through the Gilmors to Mr. Switzer. This letter discussed the cut and fill and an assessment of the balance. This is the letter about which Mr. Gazendam indicated he had not received a reply and assumed the information and submission was acceptable to the NVCA. Mr. Switzer indicated that he was not aware of responding to the letter and indicated that the staff accepted the principles for a cut and fill outlined in this letter – the technique, the evaluation and the data that were used by Water's Edge were appropriate. However, he stated that if the Authority's approval was to be met, further flood proofing and safe access/egress and the fill that might be required in either or both cases would have to be done. Mr. Switzer indicated he was definitely looking for a zero balance.

Mr. Switzer acknowledged that the NVCA attempts to avoid conditional permits under the Regulations, but that they have been given in the past. He also accepted that flood proofing could be one of those conditions.

Mr. Bouchelev referred again to the Shelburne subdivision plan, in particular a map from December, 2000, produced by R. J. Burnside & Associates Ltd. concerning - the question of floodplain versus spill area. (Ex. 22) Mr. Plazek, who was not on staff at the time, had testified that the area in question was floodplain, according to Ex. 22. Mr. Switzer suggested that if that were so, a cut and fill exercise would have been required. However, Mr. Switzer explained that he had become involved with the NVCA in this project when the report (partially) produced in Ex. 12 – Tab 6-g and dated December, 2003, was issued. This report indicates that a balanced cut and fill was not required *"given that the site in question is within a spill area".* Mr. Bouchelev cited another report, dated January, 2002 (Ex. 14) both reports preceded the final design. It appears that work had progressed on solving the engineering issues between 2000 and 2003 and the Authority had identified what they considered spill area beyond the floodplain so that the matter of storage became redundant and was replaced by an enlargement of the actual channel to allow for normal flow. It appears that the Authority and the consultants have a different definition of what constitutes a spill area.

Mr. Bouchelev argued that the full report should have been presented, his point being that cut and fill balance might have been used at this site in what he believes is floodplain, then this could work similarly on the Gilmor lands through an adjustment of the floodplain edges.

Mr. Switzer concluded by indicating that based on the Water's Edge evidence, there was a chance to do a cut and fill balance, but the staff has not yet done an analysis so they do not know whether it is going to work until the final design is done. However, even if they can do a balance cut and fill to raise the driveway to less than 0.3 metres of flooding, Mr. Switzer still did not believe the development was appropriate.

Christopher T. Hibberd is the Director of Planning for the Nottawasaga Valley Conservation Authority. He has twenty years of experience working in environmental planning including with the Credit Valley Conservation Authority and the Toronto and Region Conservation Authority. He was sworn in as an expert witness in land use planning.

Mr. Hibberd reviewed the use of the NVCA's guidelines when commenting on circulated planning applications. The staff ensure consistency with the *Provincial Policy Statement,* in particular section 3.1 Natural Hazards. They do review the local municipal Official Plans and Zoning By-laws as guidelines.

Reference was made to NVCA's *Planning and Regulations Guidelines* (Ex. 12 – Tab 1-d – p.25) as to how they assist staff in their review of permit applications *"by providing a comprehensive outline of the Authority's technical standards and requirements".*

Of particular note was a paragraph (#6 – p. 25) dealing with the coordination between planning applications and those under the permitting program of the Authority's Regulations.

> *"The Authority will ensure that its position on Planning Act applications is the same as the position on a permit application for the same property, except where a planning policy supported by the Provincial Policy Statement and Provincial Plans, or the Authority's Board of Directors may be more restrictive.*
>
> *The principle of development is determinative to the review process under the Planning Act."*

Mr. Hibberd also referred to Policy 3.1.1. and 3.1.2. of the *PPP - Natural Hazards* which were discussed earlier by Mr. Switzer. The Authority follows the definition of the word "Development" as outlined in the PPS. (p. 30):

> *"Development means the creation of a new lot, change in land use, or the construction of buildings and structures requiring approval under the Planning Act."*

In addition, the **Conservation Authorities Act** provides the following definition of development in Section 28, subsection 25 and provides more specific details:

> *"(25) In this section,*
>
> > *"development" means,*
> > *(a) the construction, reconstruction, erection or placing of a building or structure of any kind,*
> > *(b) any change to a building or structure that would have the effect of altering the use, or potential use of a building or structure or increasing the size of the building or structure, increasing the number of dwelling units in the building or structure,*
> > *(c) site grading,*
> > *(d) temporary or permanent placing, dumping or removal of any material originating from the site or elsewhere."*

With regard to the Gilmor proposal, it is designated *"environmental protection and rural"* in the Official Plan and the 2009 Township's Zoning By-Law implements the Official Plan by zoning the land *environmental protection and rural residential*. The proposed house would require Official Plan and Zoning By-Law Amendments to go forward, since it is located within the environmental protection zone. An application is before the Township of Amaranth and the NVCA staff's comments were provided to the Township on December 14, 2010.

In March 2011, the NVCA received technical documentation, from the Gilmors, which has been reviewed from a planning standpoint as well as a technical standpoint. A letter was provided to the municipality by the NVCA, dated April 18, 2011 (Ex. 2b - Tab 1–k) outlining the position of the Authority. The major position was stated as follows:

> *"As mentioned in previous correspondence, the natural hazard studies needed to demonstrate the area to be rezoned is not within the natural hazard area.*
>
> *Please be advised policy 3.1.1. (b) of the Provincial Policy Statement states that the development shall generally be directed to areas outside of hazardous lands adjacent to river and stream systems, which are impacted by flooding hazards.*
>
> *Furthermore, Section 3.1.2.(d) states that development and site alterations shall not be permitted within the floodway, regardless of whether the area of inundation contains high points of land not subject to flooding.*
>
> *We advise that under the one-zone concept of floodplain management applicable to this area, the entire floodplain is considered the floodway.*
>
> *Based on these policies, it is our opinion that the application does not conform to the above-noted floodplain policies established under the Provincial Policy Statement".* (Ex.2b – tab 1 – k)

Mr. Hibberd continues to accept the opinion expressed in this letter to the municipality despite the submissions made by the appellant's consultants. There is an overlap at times between the Authority's role as a commenting agency in Planning Act matters and the role of the Authority as a regulatory body. Planning matters often end in the need of a permit from the Authority. The review of such applications are usually co-ordinated and the Authority staff prefer to see the planning issues being clarified first in order to avoid a lot of studies being done by the applicant that might not be necessary.

Reference was made to *Ontario Regulation 172/06,* (Ex. 12 – Tab 2-B) which is the NVCA's Regulation dealing with *development, interference with wetlands and alterations to shoreline and watercourses.* Section 3 deals with "*Permission to Develop*". Mr. Hibberd identified the control of flooding and the conservation of land as the two major tests that could not be met by the Gilmor proposal. He stated:

> *"Based on the technical materials provided, the review of that material, and the review of the policies at hand, the house being located within the floodway, the placement of the fill within the stream corridor, and in close proximity to the wetland, that's the reason why those two tests, we felt, weren't being met."* (Day 3 - p.781)

Mr. Hill referred to the Policy documents of the two other Authorities that Mr. Plazek had referenced earlier (Order, p. 11, para. 7) and in which he purported that the 0.3 m standard was not used. Exhibit 26 provided excerpts from the Credit Valley Conservation Authority's 2010 policy document which outlined that the CVCA "Safe Access" standards. (Ex. 26

– p. 63-c-ii) as being *"for depths greater than 0.2 and less than or equal to the 0.3 metres, the velocity must be less than or equal to 1.3 metres per second."* Mr. Hibberd indicated that this policy was very similar and possibly even more rigid than the NVCA's policy.

With regard to the Lake Simcoe Region Conservation Authority's Policy, the vehicular access is not greater than 0.3m and pedestrian access is not greater than 0.8m (Exhibit 27). This evidence contradicted Mr. Plazek's contention that the standard used by the NVCA was unusual. The impact of other Authority policies were seen by the tribunal as examples only. It is the NVCA's policy document that is of importance in this hearing.

With regard to the NVCA's policy document, (Ex. 12 - Tab 1–d - p.78) Mr. Hibberd stated that the goal is to make sure that people living in a house can get in and out during a flood event and that vehicular access, especially for emergency vehicles, would be available right to the building itself.

In that regard, however, Mr. Bouchelev pointed to the discrepancy between what the staff of the NVCA use and what is written in the Policy document. Mr. Hibberd reiterated that staff use 0.3 metres of depth to a maximum velocity of 1.7 (as stated earlier by Mr. Switzer). The actual policy, however, varies from this position. It states that the 0.3 m/1.7 velocity is the standard where there is *no site-specific detailed analysis.* Where an analysis has been done, the policy is the 2 X 2 rule with a value of 0.4 metres squared per second, providing the depth does not exceed 0.8 metres and the velocity does not exceed 1.7 m/s. However, Mr. Hibberd stated that this was not correct or at least that was not what was meant and he did not believe that staff have changed the figures (0.8 to 0.3) but only clarified them. This policy was adopted by the Conservation Authority Board on August 28, 2009 (source- NVCA Web Site).

In addition, it was noted that the Authority is a commenting agency for Official Plan and Zoning By-Law Amendments, while the ultimate decision maker is the municipality.

Mr. Bouchelev stressed that the Provincial Policy Statement is a policy and is not legally binding. Mr. Hibberd, however, indicated that the NVCA's comments or advice should be *"consistent with that document".* (Trans. - p. 818) He also stated the opinion that the policy is clear that development in a floodplain is not allowed. (PPS –Sections 3.1.1. and 3.1.2.)

Reference was again made to *Ontario Regulation 172/06 - Nottawasaga Valley Conservation Authority; Regulation of Development, Interference with Wetlands and Alterations to Shorelines and Watercourses.* (Ex. 12 - Tab 2-B) It was noted that similar Regulations were approved by the Province for all 36 Conservation Authorities. Mr. Bouchelev referred Mr. Hibberd to Section 2 (1) which states:

> "*Subject to Section 3, no persons shall undertake development in or on the areas within the jurisdiction of the Authority that are…"*
> *(c) hazardous lands;*
> *(d) wetlands; or*
> *(e) other areas where development could interfere with the hydrologic function of a wetland, including areas within 120 metres of all provincially significant wetlands and wetlands greater than 2 hectares in size , and areas*

within 30 metres of wetlands less than 2 hectares in size, but not including those where development has been approved pursuant to an application made under the Planning Act or other public planning or regulatory process."

Mr. Bouchelev continued by referencing *Section 3 - Permission to Develop*. Subsection 3(1) states that an Authority may grant permission for development in the above described area:

"*if in its opinion the control of flooding, erosion, dynamic beach, pollution or the conservation of land will not be affected by the development."*

Mr. Bouchelev attempted to show that that the Regulation, passed in 2006 supercedes the PPS, which was updated in 2005. It was noted that the PPS is reviewed and possibly revised every five years. The tribunal understands that a Policy is a Policy that provides guidelines and differs from anything approved under an Act, such as the Authority Regulation.

Mr. Hibberd's Witness statement (Ex. 12 - Tab 2), indicated that the NVCA typically prefers that Planning Act approvals be in place before considering a permit application. He stated that a co-ordinated effort between the municipality and the Authority was the usual process followed. Mr. Bouchelev referred Mr. Hibberd to the surrounding lands (or rural lots), on which many have structures (residential) built. He called this a developed neighbourhood, while Mr. Hibberd referred to the area as a rural area in which structures have been built (legally). Ex. 2b- Tab 1-A was referenced apparently to indicate the number of lots that have been developed in the area. No information as to where these structures were built was given but Mr. Hibberd did not believe they were illegal.

The respondent recalled several of their witnesses to give reply evidence.

First, Mr. Brian Plazek was referred to Ex. 22 - the Shelburne Meadows Floodplain Map. The map is dated October 2000, but Mr. Plazek indicated that the information had been updated through a report authored by him and dated December 2003, (Ex. 12- Tab 6-G) which outlined three recommendations to make sure that URS was proceeding in the correct manner as approved previously by the NVCA to the R.J. Burnside & Associates Ltd preliminary storm water management and floodline analysis, completed in January 2000. The Appellant believes this matter is relevant in that the Shelburne Meadows development gives the suggestion that the NVCA has an "implied" policy of allowing development in the floodplain.

Secondly, Mr. Edward Gazendam was recalled to respond to the issue of Right of Way initially discussed with Mr. Hibberd. He stated that:

"A right of way would be described as access over someone else's property to get out to your own property. And a driveway is just something that exists on your own property." [4] (Transcript - p. 855)

[4] The Canadian Law Dictionary states that a Right of Way is "the right to pass over another's land and can be created by dedication and acceptance or by Statute.

In the case of the Gilmor lands, there is no "private right-of-way" granted to anyone else. It is therefore a private driveway or laneway.

Mr. Gazendam was referred to both Exhibits 20 and 25 – the later being a map prepared by the NVCA and the former by Waters Edge – and asked what the flood depth would be at the Mono-Amaranth Townline in front of the Gilmor lands. Exhibit 25 shows a range from 0.4 to 0.8 metres of flood depth (1.3 feet to 2.6 feet). Based on the survey work done by Water's Edge, there is an elevation at the road of 475.38m suggesting 4 centimetres (or 1.57 inches) of flooding – a very limited amount of water depth along the edge of pavement. Mr. Gazendam indicated that there was a mid-crown in the road but basically the road is quite flat.

In response to Mr. Switzer's testimony that safe access requirements cannot be met, Mr. Gazendam refuted this with comments that the provincial standard of 0.8 for the driveway is met. In addition, the NVCA's Guidelines state that 0.8m or less would be considered safe access. In Mr. Ggazendam's experience, the guidelines have been 0.8m depth for pedestrian access in a residential development.

He did agree with the respondent that the Conservation Authority has a responsibility to consider safety, risk of property damage, loss or risk to life. Part of dealing with these issues would involve safe access for people and vehicles. He believes the piered driveway proposal can deal with these issues.

Mr. Spratley also was recalled and indicated that the NVCA staff was not supportive of the piered driveway system as they do not support structural solutions which they submit would deteriorate over time and they could not be assured that proper maintenance would be undertaken. Mr. Spratley indicated that, in his view, a piered driveway (or a bridge) can provide safe access for the residence, literally to a level of zero flooding. (Trans – pp. 869-870) and last longer than a house.

SUMMATIONS

Mr. Bouchelev for the Appellant

The first reference was to *Junker v. Grand River Conservation Authority – CA 83/91*

> *"Land use restrictions are a subtle form of expropriation. That they are useful and, often, essential is not questioned. However, since they take away property rights, they must be exercised with caution and, most certainly, within proper statutory authority. However desirable it may be that people be prohibited, for their own safety, from building a home, there has to be legislative authority to do so."*

Mr. Bouchelev acknowledges the *Junker* decision stands for the proposition that:

- Regulations are legally binding;
- Policy statements are not – guidelines, not law;

A further statement from *Junker* expands upon this argument

> *"I am aware that conservation authorities adopt provincial floodplain 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."*

Mr.Bouchelev submited that where a conflict between a Regulation and a Provincial Policy arises, it must be the Regulation that is binding. This is the case in the Gilmor application. (Transcript - p. 875) *Regulation 172/06* provides for a specific exception allowing development in one-zone floodplains, provided certain conditions are satisfied. Section 2.1 of the regulation was referenced as to development restrictions:

> *"Subject to Section 3, no person shall undertake development or permit another person to undertake development, in or on the areas within the jurisdiction of the Authority that are,……*
> *(c) hazardous lands;*
> *(d) wetlands; or*
> *(e) other areas where development could interfere with the hydrologic function of a wetland, including areas within 120 metres of all provincially significant wetlands and wetlands greater than 2 hectares in size, and areas within 30 metres of wetlands less than 2 hectares in size, but not including those where development has been approved pursuant to an application made under the Planning Act or other public planning or regulatory process*

The specific exception is found under *Permission to develop* – part 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."*

Mr. Bouchelev submitted that the only issue before the tribunal is whether or not the application presents *"challenges in terms of control of flooding for the Conservation Authority".* (Tr. P 877) This issue was discussed in relationship to safe access, use of balanced cut and fill and the use of structures in the form of piers.

Mr. Bouchelev referred again to *Junker* wherein Deputy Commissioner Yurkow indicated that an Authority exceeds its jurisdiction when dealing with concern for life. Yurkow stated:

> *"The perspective of conservation authorities is set out in the Act. The Act is quite clear: concern for life is not one of the statutory objectives of conservation authorities. Anyway one reads the Act, the concern of conservation authorities is the conservation, restoration, development and management of natural resources.*

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.

However desirable it may be that people be prohibited, for their own safety, from building a home, there has to be legislative authority to do so."

Mr. Bouchelev indicated that if this was not enough for the tribunal, it has been shown that the 'proposed' building does have safe access, despite the controversy regarding what is the depth of flooding that the NVCA allows which would provide safe access. The NVCA's *Planning and Regulation Guidelines*. (p. 78)

"However, the following general flood-proofing and safe access standards will apply to development permitted in flood-prone areas within the NVCA watershed:

To ensure safe access, in the absence of a site specific detailed analysis, it is recommended that the depths not exceed 0.3 m and velocities not exceed 0.7m/s. When evaluating detailed analysis for safe access looking at the combination of depth and velocity, the NVCA uses the 2 X 2 rule with a value of 0.4 m^2/s, providing the depth does not exceed 0.8 m and the velocity does not exceed 1.7 m/s."

Mr. Bouchelev stated that detailed analysis *had been* made available to the NVCA. According to the Policy document, the 0.3m figure being used by staff applies to situations where no detailed study has been done. 0.8 m depth is in the approved policy for situations where the studies have been done and the velocity has a value of 0.4.m2/s. He pointed out that Mr. Switzer had indicated that the velocity was actually 0.1 metre/s because of the site being a backwater area. The driveway is less than the required 0.8 m. In the appellant's view, safe access could be achieved.

Mr. Bouchelev pointed out that Mr. Switzer had indicated that the above statement was in error and that the Policy document needs to be amended. Mr. Bouchelev, however, submitted that staff were not following their own approved *Regulation Guidelines* – the document available to the public. He indicated that if the guidelines were wrong, then they should be amended through the proper process of full approval by the Conservation Authority Board of Directors.

In addition, the cut and fill proposal can be undertaken to provide a net balance, something the Authority would want. Mr. Switzer indicated that the reports were "very close" (to being complete - June 20, 2012), that the methodology was sound and the resubmitted increment study was correct. Two proposals were submitted by Waters Edge regarding the driveway – piered which would provide dry access to the building or not piered, the latter being flooded during the regional storm but still within the safe access limit.

Mr. Switzer stated that the NVCA does not allow the use of structures such as the piered driveway due to possible deterioration over time. However, the MNR Guidelines do contemplate the use of piers or columns. In addition, the NVCA *Planning and Regulation Guidelines* also contemplate the use of structures under the section on Flood proofing standards. (p. 88) c.f. Waters Edge flood impact assessment study). Mr. Bouchelev submitted that the tribunal has the right to recommend one of the options or to provide conditional approval, requiring the parties to work towards a safe solution.

Mr. Bouchelev also submitted that the tribunal should consider background and historical factors in making a decision. He enumerated these points:

1. Gilmor property is a lot of record from the 1960's;
2. The property was used for gardening with a driveway and shed;
3. The lot is located in a mature neighbourhood;
4. Residential dwellings are located on the surrounding lands;
5. There are only two or three empty lots;
6. It receives municipal services;
7. No development of the lot is contrary to the NVCA's mandate to promote efficient land use;
8. There is no purpose in an empty lot in the middle of a developed neighbourhood; and
9. The Gilmor proposal to build the house adjacent to the townline is the least obstructive approach without interfering with the Provincially Significant Wetland.

With regard to the issue of precedent, Mr. Bouchelev referred to *Hogan v. Nottawasaga Conservation Authority* – a decision by Commissioner Ferguson, dated December 24, 1976. Mr. Ferguson noted that the lot was fully serviced, it was the last lot available for building within a plan of subdivision and was located at the edge of the floodplain as his reasons for dismissing any concern about the issue of precedent. Mr. Bouchelev submitted that the same situation applies to the Gilmor application. He indicated that similar cases were very rare.

A further issue was that of fairness to the Gilmors in terms of *"what they were led to believe when they were – when they made an application with the NVCA".* (Tr. – p. 886) The Minutes of the meeting of May 4, 2010, clearly *"demonstrated that Barb Perreault stated that the NVCA would allow development under certain circumstances".* Those Minutes specify the reports that would be needed in order to obtain permission. Although Ms. Perreault stated she was misquoted in these Minutes and that the Chair had been notified, there is no evidence that the mistake was explained to the Appellants. As a result, the Gilmors proceeded to secure the studies that the NVCA had requested, with the expectation that if they could meet the requirements, they would be allowed to build. However, the NVCA's response indicated that no development would be allowed based on the *Provincial Policy Statement*, despite the fact that Regulation 172/06 allows development under certain circumstances.

Mr. Bouchelev also referred to *Bauer v. Lake Simcoe Region Conservation Authority* - October 4, 1989 (unreported) wherein the appeal was granted on the basis of "implied policy". He paraphrased this decision:

> *"when a party makes an application, the application should be fair. If a certain policy states that development should not be allowed, yet certain developers are allowed to develop, then everyone else should be allowed, who is in the same circumstances, should be allowed to develop. The Conservation Authority should not be making arbitrary decisions. They should apply their policies uniformly."* (Trans. p. 907)

Mr. Kenneth Hill, Counsel for the Respondent

The test that needs to be applied in the *Gilmor* case is outlined in Section 3 of Regulation 172/06 – can the appellant satisfy the tribunal that they ought to be given permission to construct where they are asking to construct. The tribunal must consider whether the control of flooding, pollution and the conservation of land will be affected. There is no question that the Regulation prohibits the granting of this permission unless, the tribunal can be satisfied that those three criteria can be dealt with, in which case, the Regulation "*may grant permission for development".*

Reference was made to this tribunal's decision in *Ontario Khalsa Darbar Inc. v. Toronto and Region Conservation Authority,* December 20, 2012 (unreported) in which *Hope v. Rideau Valley Conservation Authority,* January 18, 2006 (unreported) and *Nagy v. Metropolitan Toronto and Region Conservation Authority,* March 19, 1979 (unreported), were cited with regard to the significance of Commissioner Ferguson's comments in *Nagy:*

> *"The significant consideration is not the prevention of flooding, but the broader concept, an interference with the control of flooding. It is this broader concept that issues of precedent become significant. While the individual case may not cause significant flooding, the consideration of the application must relate to the broader concept of control of flooding, and whether the granting of permission would create a precedent that could not be distinguished on its permits in subsequent applications*." (Trans. p. 912)

The tribunal is in the position of having to deal with the pre-development situation with regard to the application, despite the existing conditions. With this being the situation, then the fact is that the site can flood to about a metre during a regional storm. The Respondent's evidence disagrees with the Appellant's contention that the site is on the edge or fringe of the one-zone floodplain or floodway, and actually is located close to the middle of the north-south portion of the floodway, close to the Buttrey drain itself and close to the confluence of the two watercourses. The NVCA describes the proposed building site as *"an island that would be isolated and surrounded by floodwaters during the regulatory storm. It would create a high point of land".* (Trans. p. 914) Based on Section 3.1.2. of the PPS, development would not be permitted.

Mr. Hill also noted the stance of the witnesses for the Respondent regarding the standards for access by people and by vehicles and he noted the anomaly with regard to the wording in the NVCA Guidelines. He concluded this point by the statement:

> *"..at the end of the day, you have to decide what's appropriate. And based on the evidence you've heard, I think it's open to you to find, for this kind of development, 0.3 metres maximum flooding over driveways would be the only sensible thing."* (trans. p. 918)

The tribunal was again reminded of the decision in *Hope v. the Rideau Valley Conservation Authority* in which the importance and relevance of Policy and Guideline documents are discussed. In support of that decision, Mr. Hill quoted extensively from p. 26:

"The tribunal views this statement as clearly indicating that the RVCA has "had regard to" the Provincial Policy Statement and that they have adopted the Implementation Guidelines as part of their policies.

The remaining part of this discussion is the question asked in Issue 1 concerning the need for the tribunal to also have regard to the Provincial Policy Statement. In the conclusion section of Avery v. Lake Simcoe Conservation Authority - (tribunal file CA 005-96, March 29, 1999, unreported, p. 46) the tribunal stated:

"The Provincial Policy Statement on Floodplain Policy provides some insight into what might be expected of the Mining and Lands Commissioner with regard to the hearing of appeals in these matters. While not legally bound by the Provincial Policy Statement"....but "By the same token, the Mining and Lands Commissioner, in hearing appeals and Ontario Municipal Board appeals affecting floodplains, should also "have regard" to the Policy Statement in their deliberations. Obviously, it is anticipated that tribunals such as the Mining and Lands Commissioner, would give major significance to an approved Policy Statement and any deviations would therefore have to be very well substantiated and justified.

As in previous decisions, the tribunal finds that it must take responsibility to assist in the implementation of the Provincial Policy Statement by having regard to the Province's stated goals, objectives and policies. Since the RVCA has adopted policies in order to uphold the provincial policies, the tribunal further finds that it must adopt the application of or have "regard to" these policies."

Mr. Hill indicated that the decision must be made on more than the technical considerations of the Regulations. In order to answer the question of the appropriateness of the development, the tribunal needs to consider the other guiding documents that have been submitted such as the *Provincial Policy Statement*, and the *Policies and Guidelines of the Conservation Authority* (and of the Ministry of Natural Resources). This does not mean that development cannot occur, but *"it is a high, high bar for an appellant to satisfy all of the concerns that are raised by building in those flood prone areas".* (Trans. p. 921)

Mr. Hill conceded that the Appellant's studies have shown the potential for the control of flooding from the technical engineering perspective. The Appellant may be able to flood proof and provide proper access, but there are still implications to the technical issues that have not been dealt with. The cut and fill balance becomes a major concern with whatever method the Appellant might use and further studies would then be required in order to determine the impact. Beyond that the safety for whomever might occupy the house is a major concern as would be access for fire fighters and other emergency responders.

Further submissions were made regarding the issue of precedent. Both parties have brought this issue forward with the Appellant providing examples of where permission has been granted. Mr. Hill commented that *"we have to be careful in applying those, to be sure that we're comparing apples to apples".* (Trans. p. 923) Every case has to be assessed on its own merits, including the policies of the different Authorities used as examples. They are not necessarily consistent across the province depending on the characteristics of the watershed and the issues facing that watershed.

Mr. Hill submitted that the examples used by the Appellant with regard to precedent do not support their proposal. Neither does a single lot in the floodplain which is not designated or zoned for residential development. In all cases, the planning was not an issue, only how to implement the plan of subdivision to protect the control of flooding, possibly with a cut and fill technique. Mr. Switzer also indicated concern with regard to precedent and the issue of the impact on the control of flooding by cut and fill operations. The example in *Shelburne* actually did not use the technique. The *Kawartha* example was not a permit case and was not new development, but was redevelopment which gets settled by a different set of policies. The Grand River (*Junker)* example is quite old and was also dealing with the last lot in what appeared to be an approved subdivision and was serviced with water and sewer. So the examples were not the same as the issue with the Gilmor lands and therefore, difficult to use as comparisons.

Mr. Hill stated that *"The balance cut and fill approach is a technique that has its uses, but not to create development sites in a floodplain".* Engineering is not the only answer, nor is it the test. The onus is on the Appellants to show that a deviation from the *Provincial Policy Statement* is *"well- substantiated and justified".* (Trans. p.25 and 26)

Mr. Hill also dealt with the decision by Deputy Commissioner Yurkow in *Junker* wherein he stated that he did not think that conservation authorities had any jurisdiction to deal with safety issues. Since that decision was made, there have been many more decisions where safety has been recognized as a concern. It was noted that the Legislation itself and the Regulations all refer to hazards as does the *Provincial Policy Statement*. Mr. Germain also had stated that *"when you're dealing with a hazardous situation, safety is the flip side of that".* (Trans. p. 928)

Mr. Yurkow also referred to restrictions as a "*subtle form of expropriation'.* Mr. Hill did agree that it is necessary when implementing regulations and policies to be fair and proper. The NVCA follows the guidelines set down by both the Province and the Board of the Conservation Authority. As noted, the Regulations deal with hazards and those hazards involve a concern for safety as outlined in those policies and guidelines.

Mr. Hill countered Mr. Bouchelev's list of reasons why approval should be granted with the fact that the 10 acre lot has been in existence for 40 years and not built on until now. Also, this kind of land development is not allowed today. The Gilmor proposal is a rural residential use, not a plan of subdivision or a neighbourhood like the *Junker* appeal.

With regard to the 'proposal to build on the rear of the lot', Mr. Hill submitted that this was a way of saying 'we don't support your proposal' by the town line. That NVCA staff were not saying that building on the rear and the impact to access that site was a good idea, but they were attempting to point out that the policies do not permit development where they wanted to build. He referenced the examples in the correspondence in which the Gilmors were asked to show that the proposed site was outside the flood hazard area. All the studies, however, showed that it was inside and that mitigating measures were proposed.

With regard to the notes of the meeting attended by Ms. Perreault that Mr. Spratley relied on, Ms. Perreault was the only one that provided evidence on this matter. She indicated that the Gilmor's were told what the Authority's concerns were…many times. Mr. Hill made the following statement that is fully reproduced here:

> "*And it is difficult when you tell people, we can't support your application unless you do A, B, C and D. Because people hear that as saying, oh, okay. If I do A, B, C, and D, then I'm going to get my permit. So then they do the studies and the studies show that they can't get one and they get very upset. "You told me that I could get a permit." That's the way they remember it. It's human nature, it happens all the time. And, unfortunately, that's what I think may have happened here."* (Trans. p. 932)

Mr. Hill made a final summation with regard to the fact that just because the Zoning By-law might allow development on a site does not mean that the Regulation test does not need to be met. He noted that while planning approvals cannot be used in support of an NVCA application. The tribunal might take into account the zoning prohibition in weighing the facts in this case. Mr. Hill does not believe a tribunal has ever done this, but he believes it is relevant in this appeal.

Mr. Germain, Counsel for the Township of Amaranth

The Township did not take any position with regard to the substance or merits of this appeal.

However, Mr. Germain pointed out that the suggestions raised by Mr. Bouchelev with regard to the inefficiency of leaving the lot vacant with regard to the Township's tax base as well as a few other points, were not considerations for this tribunal. Those are land use issues. In addition, Mr. Sprately's opinion that it might be possible to massage the environmental protection zoning to allow a residence were beyond his qualifications. There is no doubt that amendments would be required as outlined by Mr. Hibberd, a qualified land use planner.

No evidence was led concerning a number of the alleged facts (or allegations) and Mr. Germain noted that no finding should be made with regard to these. They were:

1. The suggestion that the Township planner pointed out three acceptable building locations; and
2. The suggestion that the Township was opposed to building at the back of the property.

Mr. Germain also made a submission regarding, costs but the tribunal finds that this submission was premature and would be dealt with later on in the proceedings.

Mr. Bouchelev, Counsel for the Appellant – Reply

The Respondent indicated that the PPS should be given broad consideration. He made the point that the PPS was amended and published in 2005 and a few months later, the new Regulations for the NVCA came into being (2006) which carved out an exception to the PPS. The same situation occurred in *Hope v. Rideau Valley Conservation Authority*.

Mr. Bouchelev did not agree that the development could be called an island. Since the decision must be made on the basis that no building presently exists, therefore *"there are no high points of land"*. (Trans. p. 958) He described an island as a high point of land in a floodplain, not a building. Mr. Bouchelev submitted that the definition by the respondent in the Gilmor case was not what is described in the PPS.

With regard to flood proofing a residential building, Mr. Bouchelev stated that this proposal can be flood proofed without adding any fill and would not require any changes to the existing cut and fill balance. He submitted that the tribunal could *"make an order conditional on such flood-proofing".* (Trans. p. 959)

Mr. Bouchelev also dealt with the issue of whether any decision of the tribunal would be precedent setting. He acknowledged that it was important for the tribunal to make sure that decisions would not be precedent setting. In this regard, however, he stated "it cuts both ways". (p. 961) The tribunal cannot make a decision to refuse an application simply because it might be precedent setting. There would be no purpose for any appeal in the first place if this was the case. The question should be "*would it be reasonable to permit development under the circumstances?"* (p. 962) As noted, both parties referenced *Hope v. Rideau Valley Conservation Authority*. He also again referenced *Junker*, where Deputy Commissioner Yurkow stated:

> *"I am discounting this as a reason to refuse permission in this case. There was no evidence to show that there are other lots for which this would serve as a precedent."*

Mr. Bouchelev submitted that the Respondent did not submit any evidence of any other lots in the area that he felt would serve as a precedent. He did acknowledge that he had mentioned some two or three empty lots, but he did not consider them to be precedents. He stated that there was no evidence that development might take place or was wanted on these lots and that there would or would not be any approval. Each proposal should be judged on its merits. In the case of the Gilmor lot, a significant portion is Environmental Protection with the potential for development at the rear, but this is not practical from many points of view. He did note that this was an option suggested by the NVCA which was repeatedly put to the Gilmors as viable. Mr. Bouchelev believes that precedent is where similar circumstances exist elsewhere. The Gilmor proposal is a very specific situation.

In his final point, Mr. Bouchelev submitted that the notes of the Township's meeting should be taken as the important evidence as written. As a result of this submission, a debate developed between the parties which the tribunal allowed to continue in order to clear up the point before the hearing ended.

Mr. Hill had submitted that Ms. Perreault had appeared as a witness and given evidence under oath with regard to her notes and the 'official' notes of the meeting regarding the Gilmor proposal, which Mr. Hill classified as 'hearsay'. Mr. Bouchelev submitted that Ms. Perreault's position wavered from 'no development' to 'we'll allow building on the floodplain if certain conditions are met." A list of steps were included in the Minutes as to what the Gilmor's would have to do if they decided to continue with the project. This is the crux of the debate. In Mr. Bouchelev's submission, the NVCA *"certainly left a window of opportunity for building in the floodplain."* (p. 976)

ISSUES

1. What is the value, relevance and relationship of the 2005 approved Provincial Policy Statement with the NVCA Regulations and any approved Policies and Programs within the context of the **Conservation Authorities Act**?

2. In the provincial context, what is the general practice of Ontario Conservation Authorities with regard to development in the floodplain, in particular in One Zone floodplains and Provincially Significant Wetlands, and the relevance of these matters to the Gilmor application?

3. Are the Policies and Guidelines reasonable, appropriate and accepted by the tribunal?

4. By reviewing these Policies and Guidelines, is the site appropriate for development for human habitation from the perspective of:

   - the location of the site within the floodplain and the effect on the Natural Heritage System;
   - conformity to floodplain planning;
   - safe access and egress;
   - utilizing balanced cut and fill technique to achieve acceptable flood proofing and safety;

5. Should cumulative effect and precedent be considered by the tribunal in deciding this matter?
6. Was the appellant treated fairly?

FINDINGS

It was a complicated hearing for everyone in that the existence of a partially built residential unit had to basically be ignored. It was necessary and agreed to by all parties that the tribunal would look at the appeal as the land/property existed prior to any construction taking place. This issue intruded many times into the hearing and in the tribunal's view, lengthened the time required for the submission of evidence and for cross-examination.

The hearing was *de novo*, but the tribunal must comment that it is of the opinion that the Appellant and his construction crew and supervisor must have known a building permit was required. Such a permit would not have been issued by the Township of Amaranth without the process including a reference to the NVCA. What happened created another "after the fact" application. Appeals to the Minister and by delegated authority to the Mining and Lands Commissioner invariably result from such actions, leading to what can be a difficult hearing process, one in which fairness must be measured against the evidence.

The parties had provided the tribunal with a list of nine issues, seven of which had been agreed upon. The last two issues in the list (reference p. 3) were ruled as inadmissible for various reasons. The tribunal has reviewed this list as well as the final submissions by all parties and will deal with the issues raised within the context of the six issues as outlined previously.

ISSUE 1: What is the value, relevance and relationship of the approved Provincial Policy Statement, the Nottawasaga Valley Conservation Authority's Regulation and any approved Policies and Programs within the context of the Conservation Authorities Act?

Appellants constantly raise the issue of the relevance of policy documents as opposed to legislation and inevitably the same answer is given to them. It is the **Conservation Authorities Act** that is the chief document referenced by the tribunal and it is this **Act** that establishes and guides the activities of Conservation Authorities. Of the forty subsections that form the **Conservation Authorities Act**, the first twenty deal with the establishment and administrative matters of an Authority. The second twenty deal with the objects and powers or responsibilities of an Authority with regard to the natural environment within their respective valley systems. It is the second twenty subsections which affect this appeal.

Through this **Act,** an Authority may carry out such activities that further the purposes for its existence or plainly, the furtherance of its objects. A review of subsection 20(1) of the **Act** provides this information:

> *"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."*

Subsection 28(1) of the **Act** deals with the approval by an Authority and subsequently by the Minister of Natural Resources, for making of regulations in the areas under their jurisdiction. These Regulations include:

> *"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."*
> **(**Clause 28 (1)(b)**)**

It is the **Act** itself, along with the approved *Regulation* that provides the legislative base for the actions of a Conservation Authority. In the case of the NVCA, the relevant and approved Regulation is *Ontario Regulation 172/06*. This document will be referenced in later Issues by the tribunal.

The next step in the process, however, must be to describe what is meant by the words in these documents. A further description of the "powers" of an Authority are found in clause 21(1)(a) of the **Act**:

> *"For the purposes of accomplishing its objects, an authority has power,*
>
> *(a) to study and investigate the watershed and to determine a program whereby the natural resources of the watershed may be conserved, restored, developed and managed; and*
> *(p) to cause research to be done;"*

This tribunal has previously stated that, as a result of the directions outlined in this clause, a Conservation Authority can and should develop, as a program, guidelines for its operation in the form of a *policy document* which would provide to both the Authority staff and the public at large, in a consistent manner, operational guidelines or information as to what is required by an Authority with regard to possible development within the valley systems. It should be noted that

Conservation Ontario has produced a generic policy document to assist in providing consistency across the province's Conservation Authorities. Individual policy differences between the Authorities do occur, allowing different reactions to differing issues that might occur in each watershed basin.

The NVCA has carried out this process and has produced two policy documents that are considered important and relevant to the tribunal's decision. Reference has been made to both of these documents in making the decision in this matter. These are:

1. The *NVCA Planning and Regulation Guidelines*, approved by the NVCA in August 2009, (Ex 12 – Section 1 - Part D)
2. The *NVCA Development Review Guidelines*, approved by the Authority in April 2006 (Ex. 12- Section 1 - Part E)

In addition, two provincial documents must be considered by the tribunal as well, both providing guidelines and technical and researched data to Conservation Authorities, as well as other governmental bodies in the province, the first document being very significant:

1. The *Provincial Policy Statement*, and
2. The Ministry of Natural Resources *"Technical Guide" – River and Stream Systems*: *Flooding Hazard Limit and Policies and Performance Standards.* (Ex. 12- Section 1: Parts C and F)

The tribunal finds that all of these documents are relevant to the final decision regarding this appeal. As will be seen from the specific findings, the tribunal has considered these policy documents and has applied certain portions from each which it has considered and adopted in reaching its final decision.

With regard to the PPS, the tribunal accepts, again, the responsibility imposed by the Province of Ontario that directs a Commissioner, such as the Mining and Lands Commissioner, as well as the Ontario Municipal Board, Municipal Councils and Conservation Authorities, to have regard for the PPS. The tribunal has accepted this responsibility in so far as it provides the decision maker with a level of consistency within the framework of the provincial jurisdiction. The public has a right to expect such consistency.

The Provincial Policy document is broadly reviewed every ten years and relevant amendments are made, (if required) in order to be current with the issues in the province. In the Gilmor case, the 2005/2006 document is the relevant Statement and although its' validity was questioned by the Appellant due to the fact that it is under review at this time, the tribunal accepts this document as the reference for this hearing. Until an updated PPS is approved, the 2005 document is the relevant policy document.

With regard to the Ministry of Natural Resources *"Technical Guide"*, it provides information for the tribunal that is based on research and provides consistent technical data for the NVCA and the tribunal. In the Gilmor case, it is particularly relevant to the safety issue regarding ingress and egress to a site that is located in the floodplain.

The tribunal recognizes the process that results - Legislation to Regulation to Policies and Guidelines - as a legitimate process to follow in the implementation of the basic law itself. The weight placed on each of these issues by those who drafted these documents becomes stronger as it moves to the detail of the Policy or Guideline stage, but it remains the law in the **Act** itself that sets the basis for everything that follows, including the legal Regulatory document. It must and does relate back to the reasons the **Act** was promulgated in the first place. It is in this context that this tribunal will review and decide this matter.

ISSUE 2: In the provincial context, what is the general practice of Ontario Conservation Authorities with regard to development in the floodplain, in particular in One Zone floodplains and Provincially Significant Wetlands, and the relevance of these matters to the Gilmor application.

This issue is derived directly from the 'agreed upon list' of issues submitted by the three parties to the hearing. It is advisable to place this matter in the context of subsection 28(1) of the **Conservation Authorities Act.** The first three parts of Section 28 clearly state the parameter's of an Authority's mandate:

> *" Subject to the approval of the Minister, an authority may make regulations applicable in the area under its jurisdiction,*
>
> *(a) restricting and regulating the use of water in or from rivers, streams, inland lakes, ponds, wetlands and natural or artificially constructed depressions in rivers or streams;*
>
> *(b) prohibiting, regulating or requiring the permission of the authority for straightening, changing, diverting or interfering in any way with the existing channel of a river, creek, stream or watercourse, or for changing or interfering in any way with a wetland;*
>
> *(c) 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;*"

In the case of the Gilmor application, clause (c) and the issue of permission to develop a residential unit are the main concerns. Permission was denied on the basis of, and in summary:

- the development would be located in the floodway,
- the development does not comply with Ontario Regulation 172/06 and the 2006 Planning and Regulation Guidelines;
- the development sets a negative precedent due to its location and due to existing Policies; and
- the development would have an unacceptable negative impact.

Authority staff members, across the province, use the same or similar words when dealing with 'development' applications located in floodplains. The provincially approved *Regulations* basically provide generic direction as to the general practices of all Conservation

Authorities. In effect, it does not matter whether it is a One or Two Zone Floodplain. The issue is the potential of life threatening floods that would have an impact on development that might be allowed in floodplains.

Both the approved Regulations and the detailed Provincial and Authority Policy documents begin by first recommending that development not be allowed in the valley systems where flooding occurs. The impact is analyzed. If the impact is found to be at an acceptable level as far as the risk to, in particular, human life, is concerned, then conditional approval for development is possible. The above noted documents all allow for some flexibility in the implementation process. Again, the majority of the conditions would relate to either a One Zone or Two Zone valley system.

The Gilmor property is located within a One Zone Valley. Since such a valley is not as well defined as the Two Zone valley system, edges become questionable. Flooding can extend into areas which might not be inundated under every flood event. There can be backups or ponding due to vegetation accumulating in the floodplain or at culverts and bridges that can impede the flow for a time, causing backups onto land that might not flood during every event. In the case of culverts and bridges, this must be and is considered in determining flood levels. Changes in such structures can change the flood levels over time, but each Authority has the information which provides the guidelines and the levels included in the guidelines for allowing or denying development in the valley area. This information is available to developers and consultants as well as individual land owners.

Ontario Regulation 172/06 provides a description for One Zone Valley systems as where "the river or stream valley is not apparent". (Ex. 12c – Tab 2–b) It also provides directions as to how to measure such a valley. Whether the boundaries outlined on Exhibit 25, based on Water's Edge mapping using the NVCA data, provide the boundary of what might be considered the One Zone floodplain in this area is correct or not, it is the boundary that was accepted and used by the parties during the hearing and that boundary is accepted by the tribunal, as being reasonable in the circumstances.

In addition, *Regulation 172/06* also speaks to wetlands:

*"**Development prohibited***

***2.** (1) Subject to section 3, no person shall undertake development or permit another person to undertake development in or on the areas within the jurisdiction of the Authority that are,*

(d) wetlands; or

(e) other areas where development could interfere with the hydrologic function of a wetland, including areas within 120 metres of all provincially significant wetlands and wetlands greater than 2 hectares in size, and areas within 30 metres of wetlands less than 2 hectares in size. (O. Reg. 172/06, s. 2 (1); O. Reg. 74/13, s. 1 (1, 2)".

The Regulation does provide for development permission through Section 3 and the word "IF" is very significant with regard to wetlands in this section.

> ***"Permission to develop***
>
> ***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. O. Reg. 172/06, ss. 3(1)."*

However, with regard to PSW designations, again, the PPS and Conservation Authority Regulations and Policies preclude development. The boundary of this wetland is detailed on Exhibit 25. The Conservation Authorities have been given the regulatory jurisdiction over wetlands, hence it is accepted that direct Provincial approval is not required and that the decision would be made by the NVCA.

Wetlands are a combination of land and water, sometimes very wet and sometimes dry. They provide a significant environmental habitat for nature as well as a natural breathing space for humans. Moreover, they provide significant hydrological function within a watershed, providing areas for retention and discharge of water according to the needs of the overall ecosystem at that location. Unfortunately, these lands are constantly under attack for development purposes, so it is important for the tribunal to acknowledge the importance of the designation that has been placed on part of the Gilmor property, initially by the Province of Ontario and now regulated by the Authority

The NVCA staff has suggested that the request for a residential unit might be approved if such development occurred on the lands at the rear of the Gilmor property beyond the one zone floodplain and the wetlands. It is appropriate to deal with this matter at this time, since it keeps clouding the issue of development near the Townline.

The tribunal heard, with interest, the suggestions by the NVCA staff as to how to access this rear site with as little impact as possible. However, the arguments were not convincing. Mr. Hill stated that the NVCA staff only suggested the alternative site since it was outside the Regulatory floodplain and would present less risk to life. **(**Ex.12a – section 5(c)**)** However, the tribunal finds the latter to be a questionable conclusion.

It is apparent to the tribunal, that access to the rear of the property (at this time) would be circuitous and certainly not in the best interests of either the valley or the wetlands in that valley. It would seem more appropriate for the NVCA to protect these wetlands from any encroachment due to their importance in the environmental system. In fact, Section 5.2. of the *NVCA Planning and Regulation Guidelines* states the general policy of the Authority:

> *"In general, staff will recommend that no new lots be created that would require a new crossing of a wetland or hazardous land limit to access a building envelope."* (p. 82)

The tribunal understands that there is not a 'new' lot involved, but it does note the philosophy behind the Policy. In the present application, the point is the *"crossing of hazardous lands"* to secure access.

Mr. Gazendam's statement reinforces the tribunal's view:

> *"I have to look at the alternative of having to cross what has been described as 300 metres of wetland through a PSW with a road that would create hundreds and hundreds of times the amount of fill and with significant costs in terms of hydraulics analysis and cost of construction versus a simple connection*". (Trans.– pp. 224-225)

Although, this suggestion could be part of an Order by the tribunal, this tribunal does not accept the obvious impact the construction of an access road through the valley and the wetlands, (even if on the edge) would have and as such, at the present time, does not accept the construction of a residential unit at the rear of the property as an alternative solution to the issue, despite the zoning designation. Circumstances may change in the future as development moves beyond the existing Shelburne boundary, allowing the development of the unopened road allowance, which would provide direct access to the rear of the property, without creating an impact on an environmentally significant area.

The tribunal has considered and finds that it will adopt the general practices of Ontario Conservation Authorities to prevent the 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. The area where the Gilmor's want to undertake development is wholly within a floodway and the tribunal finds that the application must meet all the tests imposed under the Act, in order to secure approval.

ISSUE 3. Are the Policies and Guidelines reasonable and appropriate and accepted by the tribunal?

As a result of this last statement, there is a need at this point, to determine the policy guidelines that the tribunal will accept in reviewing the Gilmor application. Obviously the **Conservation Authorities Act** and *Regulation 172/06* provide the law and regulation relating to this conservation authority matter, but the tribunal finds that the policies and guidelines for their implementation are important to any decision on the Gilmor matter. The *Provincial Policy Statement* has been reviewed as to its direction for the tribunal. The other relevant documents are:

1. Provincial Policies and Standards/Guidelines:

(a) Ontario Ministry of Natural Resources - The Technical Guide – River and Stream Systems - Flooding Hazard Limits - Policies and Performance Standards (Ex. 12c – Tab 1- B);

(b) Ontario Ministry of Natural Resources - The Technical Guide –River and Stream Systems - Erosion Hazard Limit- Application of Provincial Policy (Ex. 12c – Tab 1-F); and

(c) Ontario Ministry of Natural Resources – Appendix 6 – Floodproofing – (Ex. 12c -Tab 1-I).

2. NVCA Policies and Guidelines:

(a) Nottawasaga Valley Conservation Authority – Development Review Guidelines - April 2006 – (Ex. 12c – Tab 1 – E); and
(b) Nottawasaga Valley Conservation Authority - Planning and Regulation Guidelines (Ex. 12c – Tab 1- D) August 2009.

The Authority Policies will be reviewed first, followed by a review of the way in which the Provincial Policies have had an impact on the Authority's documents.

The *Development Review Guidelines* (2006) were *"developed to provide a fair, reasonable and uniform basis for development approval decisions within the Nottawasaga Valley Conservation Authority jurisdiction."* The document makes reference to a goal of *"protecting watershed communities from natural hazards"*.

The reports provided to the NVCA were, initially, part of the 'consultation' undertaken in order for the staff of the NVCA to comment to the Municipal Planning Department regarding the 'proposed' residential development on the Gilmor site. Subsequently, an application was submitted to the NVCA for development within the floodway and discussions took place regarding the technical information that would be required. It should be remembered that it is the responsibility of the 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.

The Guidelines provide the technical approaches required in order for any consultant to prepare these reports. The boundary of the floodway and the effects of the Timmins level storm on the proposed development are some of the issues which would be raised during pre-consultation as well as during the review of submitted documents. Although only minor references to this document were made during the hearing, it is assumed, by the tribunal, that the Gilmor's consulting group utilized this document in preparing their reports. The tribunal has thoroughly reviewed this document and finds that it will adopt it as an appropriate technical basis for reviewing development proposals and further finds that it provides a reference for understanding the proposal.

The *Planning and Regulation Guidelines* were approved by the full Authority in August, 2009 and were developed, *"to provide the technical details and direction to help ensure a consistent approach in implementing the Planning and Regulation programs".* (p. 5) They rely on the water management guidelines developed by the Ministry of Natural Resources (and Forestry as of June 24, 2014) to provide detailed research with regard to "Natural Hazards" issues as outlined in the *Provincial Policy Statement.* In addition, the conservation authorities consulted with Conservation Ontario to develop generic or consistent guidelines which could be applied across the province, with very few exceptions. The Ministry of Natural Resources delegated responsibility to Conservation Authorities for natural hazard issues (as outlined in the PPS) as early as mid-1995, while responsibility regarding wetlands was added at a later date. Basically, the Authority's represent the "provincial interest" when the Province is not involved.

The appellant submitted the decision of former Deputy Commissioner Yurkow matters on the basis of concern for the loss of life. His view was that the **Act** did not include this issue as one of the "statutory objectives" of conservation authorities. *(Junker v. Grand River Conservation Authority* – CA 83/91*).* This tribunal takes a different view of this issue.

The 'management of natural resources' is one of the objects of the **Act.** The question becomes what does manage or management mean? The Oxford Dictionary states that it is to 'organize or regulate'. The NVCA works with Regulation 172/06 which is approved under the **Conservation Authorities Act.** This regulation states that subject to section 3, *"no person shall undertake or permit another person to undertake development in or on the areas within the jurisdiction of the Authority"*. The area of jurisdiction is outlined in the Regulation and can be

described as "hazard lands". Why would development be opposed in these areas? They are obviously areas where flooding and potential erosion could occur. Such flooding or erosion would have an impact on the land and any persons who resided on that land, resulting in property damage and potential loss of life.

The Regulation generally opposes development within any hazard area. The reasons why development is not supported, such as the potential danger to anyone living there, are not outlined as such in the Regulation. However, the fact that development may be allowed if it can be shown, "*in the opinion of the Authority"*, that it will not affect the control of flooding, etc. indicates concern regarding any development in the floodway which might damage people and property. If there were not potential problems, there would be no need for the Regulation.

Ontario has experienced a number of floods where the loss of both people's lives and their property has occurred, all of which has cost the citizens of the Province. Some of the policies and the subsequent programs that Conservation Authorities have developed have been to prevent these dangerous situations from happening now and in the future and to reduce the costs of restoration. The lessons from Hurricane Hazel in 1954 seem to be fading in the public's mind.

It is with this philosophy or concern that the NVCA included the following statement in this policy document:

> *"A principal mandate of the Authority is to prevent the loss of life and property due to flooding and erosion and to conserve and enhance natural resources. This regulation is a key tool in fulfilling this mandate because it prevents or restricts development in areas where the control of flooding, erosion, dynamic beaches, pollution or the conservation of lands may be affected by development."* (p. 27)

Subsequent to the issuance of Deputy Commissioner Yurkow's *Junker* decision, tribunals have taken a different view and have accepted the responsibility of deciding issues dealing with safe access and potential loss of life. This tribunal has dealt with the issue in previous decisions. Sufficient evidence exists - such as the development of Flood Warning Systems, the purchase of floodplain lands as one of the Ontario Conservation Authorities permitted activities, the management of floodplains and waterways and projects to control both flooding and erosion – that support the responsibility to prevent the loss of life and property in river and stream valleys in Ontario. Therefore, the tribunal will address the flood issue in the context of safety to humans. The question is which guidelines will the tribunal adopt in making a decision on the Gilmor application.

The NVCA's Planning and Regulation Guidelines discuss the Technical Standards for Flooding Hazards in various parts of the Policy. On page 38 (bottom), the goal of the Authority is stated quite clearly and is one that the tribunal will adopt.

> *"Ingress and egress should be "safe" pursuant to provincial floodproofing guidelines (MNR 2002a). Depths and velocities should be such that pedestrian and vehicular emergency evacuations are possible."*

and further….

> *"In the context of new development (Gilmor), the risks should be controlled by prohibiting development in dangerous or inaccessible portions of the regulated feature."*

A review of Section 4.3.4.5 – Development Within One-Zone Regulatory Floodplain of River or Stream Valley – supports the premise that new residential development is not generally accepted in the Regulatory floodway.[5] However, in reviewing the 'Notwithstanding' sections, the tribunal discovered that they refer to everything but 'new development' such as a residential unit, each section referring to specific development. This is superceded by Regulation 172/06**.** The meaning attached to the word 'development' follows the definition found in the **Conservation Authorities Act**. The tribunal, therefore, agrees that development, generally, including residential development, is prohibited, but the Authority may grant permission under certain circumstances.

In dealing with the discrepancy that was seen in the Policy document dealing with ingress/egress safety, the tribunal noted a relevant paragraph in section 1.2. of the NVCA's document:

> *"The guidelines will also be a valuable source of information for the Authority's Board of Directors, municipal staff, development industry and the public."*

The tribunal understands this to mean that all the persons listed should be able to rely on the words in the guidelines. It has been established, however, that with regard to the issue of safe passage, the NVCA staff gave evidence that what is written in their policy document is not what they meant and that it is confusing. Staff are not following the words as written. Instead, they are following the guidelines as outlined in the *Ontario Ministry of Natural Resources - The Technical Guide – River and Stream Systems - Flooding Hazard Limits - Policies and Performance Standards.*

The NVCA Guidelines themselves, (Section 4.8 - p. 78) in the paragraph entitled Flood-Proofing Standards, provide the words approved by the full Authority and referenced above.

> *"The following general flood-proofing and safe access standards will apply to development permitted in flood-prone areas within the NVCA watershed:*
>
> - *To ensure safe access, in the absence of a site specific detailed analysis, it is recommended that the depths not exceed 0.3 m and velocities not exceed 1.7 m/s.*
> - *When evaluating detailed analysis for safe access looking at the combination of depth and velocity, the NVCA uses the 2x2 rule with a value of 0.4m/s, providing the depth does not exceed 0.8m and the velocity does not exceed 1.7 m/s.*
> - *All new structures shall be dry flood-proofed using passive flood-proofing measures with the minimum opening elevation being located at least 0.3 metres above the regulatory flood elevation."*

[5] The fact that the property is a lot of record has no bearing on the issue before the tribunal.

Mr. Switzer indicated that the Guidelines being used by the NVCA staff to review the safety issue with regard to floodway applications (such as the Gilmor proposal) are stated incorrectly concerning site specific studies being provided or not provided. He stated:

> *"we're trying to define a standard for our Conservation Authority to use, out of the MNR Guidelines. It's stated incorrectly there. But the statement there, one is done with studies and one done without studies, is incorrect. One is put there to address vehicle access* (Bullet 1 above) *and the other is put there to address risk to life*."(Bullet 2)

Mr. Switzer provided a further explanation (page 19 Evidence) of how and why the NVCA has come to rely on MNR's Technical Guide in these matters. It allows each Authority to decide on the level of risk it is willing to take. The Authority has adopted the 2 x 2 rule, which is less than the 3 x 3 rule, as it seems more "*representative of a safe upper limit for most floodplain occupants"*. (MNR Appendix 6)

The tribunal notes that the NVCA referred to their use of the MNR Technical Guide in their Planning and Regulation Guidelines. Despite the inaccurate wording in their own Policy, the Authority included the following statement in their document:

> *"The variety of flood proofing options and safe access requirements are too detailed and extensive to include in these guideline. For more detailed information, please consult Appendix 6: "Flood proofing" of the "Technical Guide – River and Stream Systems: Flooding Hazard limit" (MNR, 2002a)."*

This sentence clearly indicates the use of the Technical Guide in making their decision. Direction is also clearly given to the reader that it is important that *Appendix 6 – Flood proofing*, which is attached to the MNR's *Technical Guide – River and Stream Systems - Flooding Hazard Limits - Policies and Performance Standards,* should be consulted in order to secure detailed information and direction.

Before proceeding further, the tribunal recommends that Section 4.8 of the NVCA Policy should be corrected by the Authority, as it pertains to safe access standards as soon as possible. It is quite surprising to the tribunal that the Policy was adopted in 2009 and that almost five years has passed since that date and this amendment has not been made. It certainly led to a matter of confusion for the tribunal and may have also caused some confusion for the Appellant. The written policies adopted by the full Authority should be the Policies that the staff follow to evaluate an application. The public has the chance, if they take advantage of it, to review and understand what is required in order to submit and possibly secure a permit. This allows for consistency for the public.

The *Nottawasaga Valley Conservation Authority – Development Review Guidelines - April 2006* – (Ex. 12c – Tab 1 – E) were only briefly referenced. Mr. Switzer indicated that it is a, *"set of guidelines that we prepared for consulting engineers making submission to the Conservation Authority giving some technical advice as to some of the methods used to calculate hydrology and hydraulics."* These guidelines do not provide the tribunal with information that furthers the decision making process.

There are, however, some other Policies which the tribunal reviewed as they relate directly to the Gilmor application. The following summarizes those policy references:

- Vehicle Access Standards: Section (6) Vehicle Access of Appendix 6 - MNR *Technical Guide* provides a discussion of the safety for vehicle passage in a floodplain/floodway. Based on this discussion and the earlier assertion that the tribunal accepts the guidance of this document, the tribunal notes that the flood depth and the velocity of the water is again the basis for deciding on safe access. The tribunal will accept the guidelines in the *Technical Guide* as the basis for the decision on the issue of the proposed driveway as follows:

"most family automobiles, something in the range of about 0.3m – 0.4m (1 ft to 1.5 feet) would be the maximum depth of flooding before potential egress problems would result."(p. 29)

and further:

"*Most police vehicles and ambulances would be limited by exhaust considerations… Diesel fire vehicles with top exhausts appear best suited to flood conditions. Their road clearance is high and it is suggested that 0.9m-1.2m (3-4 feet) of flood depth would not present a problem….Operations at velocities in excess of 4.5.m (15 ft/s) would probably not pose a problem when these vehicles are moving over a good/non eroding base."*

- Dry Flood Proofing: The tribunal accepts the NVCA's statement that "all new structures shall be dry flood-proofed using passive flood-proofing measures with the minimum opening elevation being located at least 0.3 metres above the regulatory flood elevation."

- Development within 30 metres of a wetland: In this case, it is a Provincially Significant Wetland. (Policy 4.7.4.2.1, p.74) This Policy states that, in general, development is not permitted within 30 metres of the wetland boundary. However, the Notwithstanding Clause allows such development on vacant lots of record if the Authority deems any hydrologic interference is acceptable. The policy would require an Environmental Impact study **(**Section 4.7.4.2.1 (5))

The tribunal notes that this policy, as it relates to *Gilmor*, does not appear to cause the NVCA a problem, at least with regard to the townline lands. It seemed obvious, however, at least to the tribunal, that such interference to the wetlands would naturally occur if the Gilmors proceeded with the NVCA's suggestion to build a residence on the high land at the rear of the property.

These bulleted issues and guidelines provide the basis by which the tribunal will review and decide on the engineering merits of the Gilmor application. It seems prudent to the tribunal to make sure that the application can meet these standards. Safety is a very important issue when a false step can cause immense cost to public bodies as well as to the appellants themselves. Weather patterns are changing and flash and localized flooding is becoming more common. This tribunal is of the opinion that extreme care must be taken in protecting the public and private sectors of society.

ISSUE 4. Based on the accepted guidelines, is the site suitable for development for human habitation from the perspective of:

- location of site within the floodplain and the effect on the Natural Heritage System;
- conformity to floodplain planning;
- safe access and egress; and
- utilizing the balanced cut and fill technique to achieve acceptable flood proofing.

1. Location of site within floodplain and the effect on the Natural Heritage System:

There is no dispute that the proposed location for the residential unit is within a One Zone floodplain or floodway. The discussion dealt with the location of the site within the floodplain – in the middle or on the edge. The Appellant's consultants argued that the proposed house site is at the edge of the floodplain while the Respondent described it as an island located in the middle of the floodplain. The tribunal, therefore, has adopted this as a sub-issue with an impact on the final decision, especially with regard to access and egress.

Both parties described the flooding that occurs in the area where the Gilmor's want their house located, as having an approximate flood depth of 1 (one) metre during the regulatory (Timmins) storm, the figure which is supported by the Water's Edge data. The velocity was described as having a fairly low ratio of approximately 0.1 cubic metres per second.

The Appellant further described the area as a "back water" while the Respondent described it as having a "reservoir or pool effect". The tribunal accepts these descriptions as basically being the same. It is clear that the configuration of the waterways themselves, as well as the potential for back up due to debris collection at the confluence of the Buttrey Drain and the watercourse, would contribute to the backwater effect that results in the lowering of the velocity in the area where the house is 'proposed'.

The use of the word island by the Respondent was also noted. Mr. Hibberd referenced subsection 3.1.2.(d) of the PPS which addresses *"high points of land not subject to flooding"*. It was not clear what the Authority staff meant by using the word 'island', other than as a reference to any constructed home being the island. The tribunal does not find these words to have great relevance to the decision.

In reviewing Exhibits 18, 19 and 25, the tribunal notes that the building footprint is located adjacent to the Townline Road within the Environmental Protection Area but outside the Provincially Significant Wetland. The lands immediately on the east side of the road appear to be outside both of these designations. The tribunal can further describe the site as being at the edge of the floodway at a point where the West Nottawasaga River sharply changes course northwards to then become the Upper Nottawasaga River. It is also at this bend that the man-made North Branch of the Buttrey Drain joins the river. Figure 25, which outlines the modeled flood depths, presents the floodway west of the Townline as "T" shaped. Despite being close to the confluence of the three

parts of the water system, the tribunal finds, that viewed from this perspective, the building footprint is located on the edge of the Regulated floodway and accepts that the building site is within a backwater. As a result, the tribunal finds that this part of the issue would not be one to negate approval from the engineering perspective.

Although Exhibits 18/19 place the site outside the Elba-Camilla Wetland complex (listed as a Provincially Significant Wetland by the Ministry of Natural Resources), the PPS guides development away from such areas, as does Regulation 172/06. However as noted, Section 2 – (b),(d) and (e) state that *"no person shall undertake development….* (e) *within 120 metres of all provincially significant wetlands"* where development could interfere with the hydrologic function of a wetland. As the Appellant pointed out, Section 3 of the Regulation does provide for development under certain circumstances, but the tribunal must stress the use of the word 'may'. The Regulation states clearly that "the Authority may grant permission" and in this hearing, it is the tribunal who may grant permission.

It has already been noted that the tribunal cannot adopt the suggestion to develop at the rear of the property due to the impact the access/egress would have on the wetland complex. The construction of a driveway through the wetland would "interfere with the hydrologic function" of the wetland, despite the implication that the NVCA could accept such a driveway. It is the tribunal's opinion that this proposal does not meet the criteria of the Policy as a *'feasible alternative'*. (4.3.4.5. - 12 – (a) p. 47)

With regard to the Townline site, however, the tribunal accepts that the impact on the Wetlands would be limited to pedestrian uses. Despite being within the 120 metre limitation outlined in Regulation 172/06, the tribunal can accept that the issue of proximity to the wetlands would also not be one to negate approval, as long as any development would provide protection against incursion into the wetland area.

2. Conformity to Floodplain planning

The Nottawasaga Valley Conservation Authority made the decision to refuse the Gilmor application on the basis of the following issues:

1. Location within the floodway;
2. Does not conform/comply with the NVCA's Planning and Regulation guidelines;
3. Contrary to Natural Hazard policies of the *Provincial Policy Statement* and the associated *Technical Guide - River and Stream Systems*;
4. Sets a negative precedent; and
5. Cumulative effect regarding the filling of the floodplain.

Obviously, it is because of Item 1 that this appeal is before the Mining and Lands Commissioner. Every document that has been or will be discussed begins by opposing any development in a floodplain or a floodway due to the concern over the damage that flooding can cause to property and people and the resulting costs for society as a whole and for individual persons. Extensive research has been done to determine the levels of flooding that can be absorbed by society and this research has been documented in Regulations and Policy Guidelines to allow

society to attempt to prevent the loss of property and of life itself. Items 2 and 3 outlined in the Authority's refusal letter (Ex. 2b) are of importance to the tribunal with regard to Sub-issue 2.

1. Location within the Floodway: The tribunal has stated its opinion that the development site is on the edge of the floodway and that as a result, this issue of the actual location is not one that would cause a refusal to grant the application.

2. Does not conform with the NVCA's *Planning and Regulation Guidelines*: The guiding Regulation 172/06 is very clear in Part 2, that development shall not take place in the 'Regulated Limit' of the river or stream valleys and wetlands *"in or on the areas within the jurisdiction of the Authority".* The Regulation describes how that limit is determined for the NVCA valley system. In the case of the Gilmor lands, the valley edges basically are not apparent and hence the floodway designation.

The Regulation also allows for approval under certain circumstances, which are outlined in Section 4.3.4.5. The tribunal finds that, in summary, the following points are relevant in determining whether the application can meet the criteria to overcome the development prohibition.

(a) no new hazard is created/ no aggravation by flooding/no negative hydraulic impacts;
- development protected with flood proofing and other techniques;
- access for emergency works, maintenance and evacuation;
- safe access can be provided through a driveway or access way

It appears to the tribunal that the Gilmor's consultants referenced the Regulation to determine the edge of the floodway, as well as the predicted meander belt under the designated Timmins Storm in producing their submissions to the Authority. These submissions, all of which confirmed that the property next to the Townline is located in the floodway, were accepted by the NVCA staff as appropriate, as far as they went. The tribunal also accepts the validity and appropriateness of the submissions with regard to the data provided, but did note that the Appellant's consultant's made few references to the NVCA's Policy documents as back up to their argument for approval. References were made to policies of other Conservation Authorities, most of which were shown as being erroneous conclusions, at least with regard to the NVCA, since the policy documents of the Ontario Conservation Authorities are all broadly based on the guideline document developed through Conservation Ontario.

Referring to those issues that the Appellant must solve if approval is to be obtained, the tribunal finds that the proposal would not aggravate the flooding conditions to any great degree **(**(a) above**)** and due to the acceptance by the tribunal that the site is located in a backwater area, hydraulic impacts would probably be minimized. This opinion is reinforced by the data that indicates a low water velocity on the actual development site. However without mitigation, the tribunal finds that any new residential construction could increase the hazard in the area.

3. Safe Access and Egress

The final two issues concerning safe access to the property and any possible residence, is of great concern to the tribunal. These issues require the tribunal to make a judgment

referencing the policies and guidelines that have been adopted by it. (Issue 3) Water's Edge provided the following historical data, surveyed elevations at the proposed house site, as well as the estimates of the flood depths along the access road: (Ex. 2b – 2g. / Ex. 20)

1. The elevation of the Timmins floodline is 475.42m. (sometimes 475.43 is used)
2. The floodline elevation at the house site is 475.42m.
3. The floodline elevation at the Townline road is 475.41m.
4. The velocity on the house site – 0.1 cubic metre per second.
5. The lowest elevation at the corners of existing house is 475.66m.
6. The lowest elevation along an old "driveway" or laneway is 474.61m (0.81 m. depth/2.65 ft.).
7. The lowest elevation between the old driveway and the house site is 474.31m (1.1 m/3.64 ft.).
8. The maximum depth of flooding of 0.8 metres (2.62 ft.) would occur along the driveway access.

Appellant's Position: The following guidelines, which they described as the 'Technical Guidelines', were used by the Consultants to determine safe access through flood waters,

1. Normal vehicular access/egress–depth of 0.3-0.5 metres for small vehicles; (0.98 ft.-1.64 ft.)
2. Emergency vehicles access/egress – depth of 0.9 to 1.2 metres; (2.95 ft.- 3.93 ft.)
3. Human /pedestrian access/egress – depth of 0.8 metres; (2.62 feet) – adults standing)

Using these figures, Water's Edge determined that safe access can be provided to the property without excessive amounts of fill. A pedestrian exiting the site along the laneway would only encounter a maximum 0.8m depth of flood waters. (2.62 feet)

The tribunal, in its review of Exhibit 20, found the following information regarding elevations of significance.

1. Elevation of 575.43 at the Townline Road resulting in '0' flooding;
2. Elevation of 474.95 just west of the Townline, resulting in 0.47 metres (1.54 feet) of flood depth;
3. Elevation of 474.61 in the middle of the driveway opposite the house site, resulting in 0.81 metres (2.65 feet) of flood depth;
4. Elevation of 474.31 on the land between the laneway and proposed house site, resulting in 1.11 metres (3.64 feet) of flood depth;
5. Elevation of 474.78 at the west side of house site, resulting in 0.64 metres (2.09 feet) of flood depth.
6. Elevation of 474.4 at the original ground (pre house) resulting in 1.02 metres (3.346 feet) of flood depth;

The tribunal has adopted the flooding depth figures suggested by the Ontario Ministry of Natural Resources - Technical Guide. It has been determined that the NVCA staff also are using these guidelines. **In summary, therefore, the following guidelines, based on the 2 x 2 rules, are being used by the tribunal, based on a relatively low velocity of 0.1 cubic metre per second.** (Water's Edge report) It should be noted that these figures reference persons standing still. Stability is reduced once a person begins to move. It should also be noted that there is a fallacy in accepting guidelines without thought since they are designated as averages. Age, stature and the physical conditions of the water due to weather are factors that take you above or below the averages. The guideline for adults and older children all are in reference to persons 'standing'. The water velocity impact would increase as a person maneuvers through the flood waters.

1. Normal Vehicle access/egress – maximum depth of 0.3 metres – 0.4 metres (1 ft.- 1.5 feet)
2. Emergency Vehicles access/egress with top exhausts – 0.9 -1.2. metres (3-4 feet) of flood depth;
3. Human/pedestrian access/egress when standing:

- most people would float at 0.9 – 1.2/1.37 metres (3.93 – 4.49 feet) of flood depth with low velocity and 1.37 metres (4.5 feet) when standing;
- average 6-10 year old would float at 1.1 metre (3.5 feet) of flood depth;
- younger children would float at 0.98 metres (3.2 feet) of flood depth;

Mr. Spitzer gave his opinion that the Gilmor application was "at risk for both pedestrian and vehicle access". In analyzing the data and the mapping provided, the tribunal has determined the following conclusions with regard to the potential depth of flood waters during a Timmins event.

1. the suggested driveway exceeds the 0.3-0.4 guideline for safe 'family' vehicle by 0.51 - 0.4metres (or 1.67 -1.345 feet) and therefore, would meet the standard;
2. the suggested driveway would meet the guideline for emergency vehicles with high exhausts;
3. the suggested driveway at the flood depth of 0.81, would meet or be less than the maximum depth of 0.9 -1.2 m for adult pedestrians, while standing and would also meet the standard for younger children;
4. the land between the driveway and the house would just meet the standard for adult pedestrian access, but would not meet the standard for younger children;
5. the land at the original ground (pre house) would meet the standard for adult pedestrians and 6-10 year olds but not the younger children category.

Based on this analysis, the tribunal finds that the proposal which is an 'empty' area under this application, can meet safe access and egress standards only in some of the required areas. The data shows that the actual situation clearly fails to meet one of the most important guidelines, that of access for a family vehicle. This vehicle would be the first thing a family would try to use to get away from the property. Stalling the vehicle while in the flood waters would produce a dangerous situation, especially if young children were involved. It does not matter whether the Gilmors have or don't have young children, the fact remains that they could sell the property to a family who might have this problem, a family who may not be aware of the risks involved.

In addition, the area between the proposed house and the driveway would present a barrier for moving pedestrians as it just barely meets the safe standard for a standing adult and youth. Floating would occur at 0.9 metres while this section would be flooded to a depth of 1.11 metres or 3.64 feet. It must be remembered that it is this area through which emergency workers would need to pass on foot in order to get to any persons requiring their assistance during a flood event.

The question comes to mind as to why anyone would knowingly take on that kind of risk to their lives. Additionally, beyond the risk to emergency workers, if such a situation arises, it is the public that will face the costs, at least under the present system. The Conservation Authority clearly also asks this question and have decided that this application is in their 'at risk' category, a decision shared by the tribunal.

4. Use of Balanced Cut and Fill

Mr. Switzer indicated that there is a potential for a cut and fill balance to occur on the property which might mitigate the situation to meet the criteria. It was noted, however, that there was no agreement that a cut and fill balance could be accomplished and in fact, the NVCA expressed concern that this might not be the proper route to take. Unless this matter can be resolved by a cut and fill balance, the issue of increased hazard remains a concern to the tribunal.

As it stands, the tribunal also is not convinced that this is the solution. The impact would be to create a raised driveway, either on piers or with fill, and for a raised walkway to be constructed to gain pedestrian access to the house itself. This would occur in an area with flood waters surrounding the created development of the house, road and walkway and in the tribunal's opinion, could lead to hazardous situations.

The tribunal understands that the cut and fill exercise is not included in the NVCA's Policy document, nor is it part of the Ministry's *Technical Guidelines*. It is used only at the discretion of the Authority's engineering staff and "*is used primarily to regularize the floodplain edges"* where a new residential development is proposed. (Switzer testimony) Mr. Switzer indicated that this method is not used very often and its purpose certainly is not to provide opportunities for single development anywhere in a floodplain. The tribunal finds that the use of this method to allow development in the floodway should be used sparingly as it could lead to an untold number of applications for development in a floodplain or floodway.

The prime concern of the NVCA is to keep development out of the floodplain and avoid the potential risks that would follow, a concern shared by the tribunal. Throughout the REASONS portion of this decision, to this point, there have been five technical issues which could be dealt with through a conditional approval and as even noted by the Respondent, may have the potential to be solved. However, the tribunal finds that there are too many variables, including the safety risks, that indicate that the development is questionable. Regardless of whether the technical issues can be solved, the question remains ….is the development appropriate?

Deliberately establishing a residence in a floodplain or floodway and then trying to prove it should be approved is not the route that should be followed. If contact had been made with the Authority prior to the actions undertaken by the Appellant, even before the purchase of the property, and certainly prior to any construction being undertaken, and possibly with the help of a professional planner, this appeal probably would not exist.

The tribunal finds that the appellant has not satisfied its concerns over technical matters, especially concerning safety issues. In addition, the tribunal is of the opinion that the application shows little concern for the issues surrounding natural hazards and the natural heritage which are outlined in both the NVCA's Regulations and the guidelines provided by the PPS, especially from a safety point of view.

ISSUE 5. Should the tribunal consider cumulative effect and precedence within the Authority area of jurisdiction in deciding this matter?

The tribunal normally takes both of these issues into consideration in reaching a decision and finds that they are relevant issues in most appeals. In this case, it appears that a cut and fill option might work to mitigate any cumulative effect on flood conditions. However, this kind of action is not viewed as appropriate for the site, in that a precedent could be set which might encourage others to propose residential development or any other kind of development in the NVCA's designated floodplains or floodways, as well as within those of other Conservation Authorities. The effect of precedent is pervasive in that the Appellants attempt comparisons to show that another application is similar and therefore, a precedent has been set. The tribunal is of the opinion that the decisions referenced by the Appellant are a case in point in that the similarity was very difficult to determine.

In this case, the tribunal finds that the potential for cumulative effect from any development on the site would not have much impact. However, the tribunal does find that the issue of precedent does have an impact on the decision. There are very few empty lots of this nature left in the area. The question must be asked as to why this is so, over the lengthy period of time since the ten acre lots were created. The answer seems simple. They are in a floodway and there is a risk involved in introducing development at this time. The future may hold a different story, if an alternative access can be developed directly onto the rear portion of the lot.

ISSUE 6. Was the Appellant treated fairly?

This matter seems to have developed from the preliminary hearing to secure party status for the Township of Amaranth. In reviewing that decision, it appears that the Gilmors may have caused some concern with Town Officials by inappropriate actions and words. This evidence was not before this tribunal and other than a few misdirected remarks by almost all parties, this tribunal did not see any such behavior, nor was it allowed to develop. As a result, it is a matter that will not be referenced further as it is history and as noted, this is a hearing *de novo*.

The only matter of concern basically deals with an Authority's inability to say no without the applicant having some opportunity to present their case. It is a difficult situation. This can be done in any meaningful way only through the preparation of various technical reports. The tribunal believes that the Authority maintained their negative position regarding the application and notified the Township of that view through a report in response to the Gilmor's Zoning amendment application. Applicants tend to hear what they want to hear and in this case, it appears that a planner was not engaged to help them through the process, before they proceeded with the technical studies. Engineering reports abound, but the impact on the conservation of land, the impact of the very questionable ability for safe access, as well as the concern for the natural environment appear to have been viewed as minor nuisances.

The Gilmors were provided with a full hearing of their issues and concerns, and although sympathy for their situation might be felt, it remains that they wish to build a house where they should not build a house for the reasons discussed. A risk to themselves exists and the tribunal agrees with the NVCA that the risk is too great. It cannot be recommended that the risk be accepted.

Conclusions

The tribunal has reviewed the reasons why this appeal was filed. The Nottawasaga Valley Conservation Authority Board denied the application outlining their reasons that the development would be located in the floodway and would not comply with Ontario Regulation 172/06 as well as the Guidelines that assist with the implementation of the Regulations. The matter of precedent and the unacceptable negative impact were also noted. (Ex. 12c – Tab 4-e)

Although the tribunal's decision results from a hearing *de novo,* it remains that the reports of the various staff were, for the most part, those that had been reviewed by the Executive Committee of the Conservation Authority. Certainly there was a great deal of discussion as to why the staff recommendations were made and many points were challenged. The tribunal, however, noted that at least four to five issues require further study or at least in depth discussions between the parties, all of which relate to technical issues. There are questions the tribunal cannot answer due to lack of clear evidence and as a result, any decision with regard to them would be questionable. Whether the NVCA is prepared to renew discussions of the issues, will be left to them to decide. As was noted, it is not just technical issues that should sway the tribunal. The floodway has a purpose in the 'conservation of land' category and needs to be maintained to do its job.

In the final analysis, the tribunal has decided that the development in the floodway is inappropriate at this time. The risk to the homeowner, both from a standpoint of safety and property damage, as well as the subsequent cost to the taxpayer if the Timmins situation or any other flood occurs, must be acknowledged and is found to be unacceptable.

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 will be dismissed.

Costs

With regard to the issue of costs, Mr. Germain submitted that because Deputy Commissioner Orr had basically dealt with the relevance of the road work by the Township of Amaranth for any future hearing, then the submission by the Appellant's which included "extensive allegations of fact relating to the Township Roadworks" was unnecessary. This allegation was continued, despite the Township's concern about its inclusion, right up to Day 1 of this hearing.

The tribunal notes that the Township received party status on June 5, 2012, nine months before the hearing commenced in March, 2013. Exhibit 13 (the Township's Document Brief) was not helpful in establishing when the reports within it were received, although the Brief itself is dated September 27, 2012.

However, it was not until the beginning of the hearing when the tribunal actually received and ruled on the list of nine issues, presumably previously agreed to, and found that Issues 8 and 9, which referenced the Township issues were declared to be either irrelevant or acknowledged that the parties would deal with the points in a different manner.

The tribunal ruled that any references to such matters were basically an "after the fact" situation since this tribunal was dealing in a *de novo* manner with the application as if at the pre-construction stage of the house. As a result of this, the Township's issues were ruled as inadmissible. As stated, they bubbled over a few times but testimony was halted before advancing further.

As a result, this tribunal has difficulty accepting Mr. Germain's "vexatious" argument as the Township's wishes were accepted at the beginning of this hearing, and upheld through the hearing as well as in this decision. The Township had the choice to seek party status. This seems to have been based on innuendo as far as was submitted by the Township's evidence.

The comments by Mr. Germain on page 942 of the transcript reference a previous decision (*Cooper v. Lake Simcoe Region Conservation Authority*) as follows:

> *"Vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than legitimate".*

Mr. Germain maintains that the Township would not have been involved if these allegations had not been made and had been withdrawn at the time of the hearing on Party Status. This tribunal notes that the earlier tribunal did not pass judgment on the issues themselves, just on the relevance of the request for party status.

This is where the above dates appear to be relevant. It seems to the tribunal that a preliminary motion could have dealt (in writing) with the Township's issues prior to the full hearing. This tribunal, undoubtedly, would have come to the same conclusion, since it has had many "after the fact" hearings, which must ignore the actual actions which have precipitated the hearing.

As a result of this review, the tribunal finds that no costs will be awarded and that this matter will be dismissed without costs.