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The Mining and Lands Commissioner
Le Commissaire aux mines et aux terres

File No. CA 013-91

L. Kamerman) Monday, the 16th day
Mining and Lands Commissioner) of January, 1995.

THE CONSERVATION AUTHORITIES ACT

IN THE MATTER OF

An appeal to the Minister under subsection 28(5) of the **Conservation Authorities Act** against the refusal to issue permission to construct a residence on Part of Lot 42, in Concession IV, in the Township of Rideau, in the Regional Municipality of Ottawa-Carleton.

B E T W E E N :

RENE AND PATRICIA LACELLE

Appellants

- and -

RIDEAU VALLEY CONSERVATION AUTHORITY

Respondent

ORDER

WHEREAS an appeal to the Minister of Natural Resources was received by the tribunal on the 11th day of September, 1991, having been assigned to the Mining and Lands Commissioner (the "tribunal") by virtue of Ontario Regulation 795/90;

AND WHEREAS a hearing was held on Friday, the 21st day of October, 1994 in Hearing Room #2, Rent Control Programs, 255 Albert Street, 4th Floor, in the City of Ottawa, in the Province of Ontario;

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UPON hearing from the parties and reading the documentation filed;

1. **THIS TRIBUNAL ORDERS** that the appeal from a refusal of the Rideau Valley Conservation Authority to issue permission to construct a residence on Part of Lot 42, in Concession IV, in the Township of Rideau, in the Regional Municipality of Ottawa-Carleton be dismissed.

2. **THIS TRIBUNAL FURTHER ORDERS** that no costs shall be payable by either party to the appeal in respect of this appeal.

Reasons for this order are attached.

DATED this 16th day of January, 1995.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

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RIDEAU VALLEY CONSERVATION AUTHORITY

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REASONS

This matter was heard in Hearing Room #2, Rent Control Programs, 255 Albert Street, 4th Floor, in the City of Ottawa, in the Province of Ontario on October 21, 1994.

. . . . 2

Appearances:

Dylan McGuinty and David McGuinty	Counsel for Mr. and Mrs. Lacelle
Helmut Brodmann	Counsel for the Rideau Valley Conservation Authority

Preamble:

Rene and Patricia Lacelle (the "appellants") initially applied to the Rideau Valley Conservation Authority (the "RVCA") for permission to construct a residence on Part of Lot 42, in Concession IV, in the Township of Rideau, in the Regional Municipality of Ottawa-Carleton (the "subject property") on July 3, 1991. After a meeting of the Executive Committee of the RVCA on August 8, 1991, a Notice of Decision refusing permission dated August 14, 1991 was sent to the appellants from which they appealed to the Minister of Natural Resources on September 11, 1991.

Before the tribunal could hear the matter, the RVCA was considering the impact of the Long Reach Flood Damage Reduction Study on its existing policies, which might have had an impact on the initial application. Also, the appellants attempted to reach an accommodation with the Township of Rideau in accordance with the study to have access to the subject property improved, the outcome of which is presented in evidence below.

The result of these delays was that the application was reconsidered by the Executive Committee. The amended application was made on August 25, 1994 (Ex. 5). A meeting of the Executive Committee was held on September 8, 1994, and a second Notice of Decision (Ex. 7) was sent to the appellants, setting out the following reasons:

> 1) the Application does not meet the Authority's Development Policies or the Provincial Policy with respect to safe access and public safety since the access road will be flooded with up to 0.48 metres of water for a length of 200 metres.

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2) property and access were flooded in March of 1976 during less than a 1:100 year flood (1:25 year approximate return period).

3) potential cumulative impacts.

4) precedential (**sic**) implications.

The tribunal was advised by the solicitors for both parties that the hearing of the appeal could proceed.

An appeal pursuant to subsection 28(5) of the **Conservation Authorities Act**, R.S.O. 1990, c. C.27 is to the Minister of Natural Resources. The Mining and Lands Commissioner (the "tribunal") is appointed by virtue of subsection 6(1) of the **Ministry of Natural Resources Act**, R.S.O. 1990, c. M.31. The Minister's authorities, powers and duties are assigned to the tribunal by virtue of Ontario Regulation 795/90, pursuant to subsection 6(6) of the **Ministry of Natural Resources Act.** Part VI of the **Mining Act**, R.S.O. 1990, c. M.14 applies to the hearing of appeals, with necessary modifications.

Facts Not in Dispute:

Mr. Brodmann gave a brief history of the matter. The appeal was filed in 1991 and a Pre-Hearing Conference was held in May of 1992. A full hearing was initially set down for September and then October of 1992, with the appellants having requested an adjournment. This roughly coincided in time with the conservation authority report known as the Long Reach Flood Damage Reduction Study Mitigative Measures Final Report (Ex. 2) was due. It was felt, at the staff level, that this report would implicate existing policies, including those dealing with forecasting and flood damage procedures. Mr. McGuinty was given a copy. Ultimately, changes to exiting policies were adopted, resulting in the Policies Regarding The Construction Of Buildings And Structures, Placing Of Fill And Alteration To Waterways (Ex. 3), which was adopted by the Executive Committee of the RVCA. However, staff still felt that they could not recommend permission for the proposed construction by the appellants, their primary concern being that of safe access.

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Mr. Brodmann identified a topographic map of Kemptville, on a scale of 1:50,000, produced by the federal department of Energy Mines and Resources dated 1982 (Ex. 12). The Rideau River flows from south to north with Kemptville shown at the southern end. The subject property is 7 km. north of Kemptville on the west side of the river. Access is off Old Highway 16 and Fairmile Road.

Also identified was a Map of a Plan of Subdivision of Fairmile on the Rideau, being part of Lot 42, Concession IV, Township of North Gower, County of Carleton, dated July 21, 1958 and drawn on a 1:200 scale (Ex. 13). The Rideau is shown flowing from the southwest to northeast with the Fairmile on the Rideau subdivision located along the north bank of the river. The subdivision is roughly the shape of an elongated rectangle and bordered on its northern extremity by the Old Highway 16, identified as the King's Highway No. 6, which runs parallel to the river. The main road through the subdivision, known as the Fairmile Road, is crescent shaped, runs southeast from Old Highway 16 at the southernmost and northernmost extremities of the subdivision and turns to run parallel to the river. The property running along either side of the River Road has been subdivided into lots, with a few exceptions nearest to Old Highway 16. Those lots south of Fairmile Road back directly onto the Rideau.

At either inside corner of the crescent formed by the River Road there is a road allowance which forms a crescent running in the opposite direction. The northern road allowance, shown on Exhibit 13 as Cable Crescent, is unopened.

The subject property is identified as Lots 36 and 37. Lot 37 fronts on Fairmile Road, with one side running along the undeveloped Cable Crescent. Lot 36, which lies directly northeast of Lot 37, fronts only on Cable Crescent, so that the sole means of access is currently through Lot 37.

Exhibit 14, which is the Rideau Valley Conservation Authority Floodline Mapping of the Rideau River from Smith Falls to Kars (the "Floodline Map") is an airphoto map of 1:5,000 scale. The subject property is shown in yellow, with all of Lot 37 and most of Lot 36 lying within the floodline, and the rest of Lot 36 lying within the fill line. Although not specifically mentioned by Mr. Brodmann at this time, the tribunal notes that a substantial portion of the existing development of the Fairmile on the Rideau subdivision lies within the flood or fill lines.

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Issues:

1. Is the test of "safe access" within the jurisdiction of the RVCA as being contemplated by the **Conservation Authorities Act**?

2. Should the tribunal adopt the policies of the RVCA and should they be applied in these circumstances?

3. Would allowing the proposed construction create a precedent for other applications; how should the tribunal regard precedent in making its findings?

Evidence of the Witnesses:

Bruce Allan Reid, P. Eng., Water Management Coordinator for the RVCA gave evidence on its behalf. Mr. Reid's duties include the management of water and related land management program delivery, including flood control and plan review input and technical assistance. Mr. Reid was qualified as an expert witness in the above-noted areas.

Mr. Reid referred to the Floodline Map (Ex. 14), upon which are plotted the floodlines and fill lines having been prepared by James F. MacLaren, who was engaged by the RVCA. He described the Fairmile on the Rideau Subdivision as having a rural character, built in 1959, with private services surrounded by agricultural or reforested lands, with a provincial park to the west.

Of the 58 lots in the subdivision, all are developed with the exception of six vacant and two underdeveloped properties, meaning that they contain either garages or sheds. Although Lot 58 is considered undeveloped, approval to build has been recently granted.

With respect to Lots 36 and 37, the Lacelles want to build a three bedroom bungalow on top of a crawlspace, which would straddle both lots. The proposal includes a private septic system to the north on Lot 36.

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On August 8, 1991 the Executive Committee of the RVCA conducted a hearing and rendered a decision with reasons, dated August 14, 1991, refusing the application.

On September 14, 1994 there was a subsequent hearing of the Executive Committee on the application, which had not changed in substance from 1991. The decision of the Executive refusing permission is set out in a letter dated September 16, 1994 (Ex. 7), which outlines four reasons for the refusal, which are set out in the "Preamble" above.

Mr. Reid explained that the RVCA policies which were applied in reaching this decision are the Policies Regarding the Construction of Buildings and Structures, Placing of Fill and Alterations to Waterways (Ex. 3) (the "RVCA Policies") which were adopted by the Executive Committee on October 21, 1993 and the Provincial Flood Plain Planning Policy Statement made pursuant to section 3 of the **Planning Act**, which was approved by the Lieutenant Governor in Council by Order in Council 1946/88 on August 11, 1988 (Ex. 17) (the "Flood Plain Planning Policy") along with Implementation Guidelines issued in October, 1988 (not filed as an exhibit).

Referring to the Flood Plain Planning Policy, Mr. Reid noted the "Objectives" at the bottom of page 5, which state:

Objectives

(1) to prevent loss of life;

(2) to minimize property damage and social disruption; and

(3) to encourage a co-ordinated approach to the use of the land and the management of water.

and the fourth principle at the top of page 6:

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Principles

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(4) new development susceptible to flood damages or which will cause or increase flood related damages to existing uses and land must not be permitted to occur; however, some communities have historically located in the flood plain and as a result, special consideration may be required to provide for their continued viability;

The RVCA has undertaken studies to show the extent of flooding along the Rideau River, the regulatory flood standard of which is the 1:100 year storm. Referring to the Floodline Map, Mr. Reid stated that it is the product of a study which was completed in 1976. He described three steps necessary to the drawing of the floodline: 1. the hydrologic analysis or stream flow analysis of the Rideau River; 2. the hydraulic calculations regarding water levels; and 3. plotting the flood levels on the map. The Floodline Map does not show topographic demarcations. However, the floodline limits were drawn on contour lines at which correspond to the elevations calculated for each cross section. What has been represented on the map are the hydraulic changes in water levels.

As applied to this case, the nearest downstream cross section is 32A, which shows a floodline elevation of 287.5 feet or 87.6 metres, which would result in all of Lot 37 and most of Lot 36 being within the flooded area.

Referring to the sketch showing elevations of the subject property (Ex. 18), Mr. Reid stated that the property is flat, with elevations between 86.9 and 87.1 metres. The roadside ditch along the southern end of the property is shown to be between 86.3 and 86.4 metres. The elevation of the access road, Fairmile Road, via three spot elevations, is between 87.12 and 87.13 metres.

Since the sketch was made in 1991, Fairmile Road has been improved as the Township did an asphalt overlay, and spot elevations taken in October, 1994 show the southwest and southeast corners of Lot 37 to be 87.17 and 87.19 metres respectively.

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The RVCA commissioned a study of the mitigative measures to reduce flood damage, the final report of which was dated April, 1993, entitled "Rideau River - Long Reach Flood Damage Reduction Study Mitigative Measures Final Report" prepared by A.J. Robinson and Associates Inc., Consulting Engineers (Ex. 2) (the "Long Reach Study"). The purpose of this study was to:

1. prepare estimates of flood damage potential of the area proximate to Long Island in the Rideau River;

2. provide better information on the degree of risk faced by residents due to flooded access routes; and

3. provide recommendations on flood reduction measures including cost effectiveness.

As access conditions currently exist, Mr. Reid estimated that in the event of a 1:100 year storm event, the depth of flooding on the access road to the subject property at the most easterly corner of Lot 37 would be 41 cm. and that one must travel a distance of approximately 120 metres to a point where the surface of the road would be dry during such a storm event.

Since the study which resulted in the Floodline Map in 1976, Mr. Reid stated that there have been two other studies which shed light on the earlier estimates of flood-line elevations. The first is the Long Reach study referred to above, and the second is a study on the reach between Mooney's Bay in Ottawa and Regional Road 6. The results of the latter included a higher estimate of flooding at Regional Road 6, being a difference of 31 cm.

In the Long Reach Study, conducted during 1992/93, the higher estimates of Regional Road 6 were taken into account and the hydrology and hydraulic calculations were updated, although this work was not done at the level of detail required for regulatory purposes. Done only for purposes of flood damage estimates, the Study indicated that if more rigorous review of the flood plain mapping were to occur, the floodlines would be drawn at higher elevations.

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Referring to excerpts of the Rideau River Flood Risk Mapping Study prepared by M.M. Dillon Ltd. (Ex. 19) (the "Dillon Flood Risk Study"), dated February 21, 1989, the floodline elevation shown on the last page for the 1:100 year storm at cross section 28.435 is 87.61 metres.

Mr. Reid stated that there is evidence of flooding on the subject property in 1976, when the river experienced its highest recorded flow rates due to snow melt. Referring to a photograph taken on March 29, 1976 (Ex. 20A), Mr. Reid described the very dark areas as land under water, while the snow is white. 75 percent of the subject lands are under water. A second photograph from the RVCA files (Ex. 20B) taken the same day reveals that a significant portion of the property is under water and Fairmile Road, although not paved at the time, is inundated.

The 1976 flood event is described on the third page of excerpts from the Dillon Flood Risk Study at the Carleton University Gauge of Q_{100} being 654 cubic metres per second. On the third page of excerpts from the Historical Streamflow Summary Ontario to 1990, produced by the Inland Waters Directorate Water Resources Branch, Water Survey of Canada, Ottawa, Canada, 1992 (Ex. 21), which features "Annual Extremes of Discharge and Annual Total Discharge for the Period of Record" for the Rideau River, Station No. 02LA004 as 597 cubic metres per second at 4:29 AM on March 28, 1976. This corresponds with figures on the third page of the Dillon Flood Risk Study of between a 25 to 30 year frequency storm event.

From this comparison, Mr. Reid concludes that the floodline limits as depicted on the Floodline Map (Ex. 14) are reasonable in identifying the property as flood prone. The basis for this conclusion is that the property was inundated during a more frequent statistical storm event. Mr. Reid applied this reasoning to the second reason for refusal to grant permission (Ex. 7), and stated that both the subject property and access were flooded in 1976 during a less severe event.

With respect to the third reason for refusal (Ex. 7), that of cumulative impacts, Mr. Reid stated that technically, this is a reference to the loss of storage volume and effect on the flood attenuation hydrograph. He admitted that the Lacelle application would have a marginal effect on cumulative impacts.

With respect to the fourth reason for refusal (Ex. 7), Mr. Reid stated that if the RVCA were to use its discretion and allow the application, it would give rise to

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numerous other applications. As the subject property is in the same situation as other subdivisions having properties subject to flooding, to allow the application would create a precedent. Other residents in flood prone areas would be put at risk or experience added inconvenience during a flood event.

Under cross-examination, Mr. Reid agreed that the owner of Lot 58 of the Fairmile on the Rideau Subdivision has been given permission to construct a dwelling. In addition to the Lacelle property, there are four undeveloped and two underdeveloped properties, for which Mr. Reid was not aware of the RVCA having currently received any applications. There are no other appeals to the Minister concerning this subdivision.

Referring to the Flood Plain Planning Policy, Mr. Dylan McGuinty ("Mr. McGuinty") reiterated the portions highlighted by Mr. Reid and questioned whether the Fairmile plan of subdivision would come under the second part of the principle, namely that special consideration be given to those communities which have historically located in the flood plain. Mr. Reid pointed out that this reference is to special policy areas as outlined under clause 9.6.1., where municipalities must apply for special policy area status. To date, no one from the Township of Rideau has suggested to the RVCA that this might be done.

Referring to the Long Reach Flood Damage Study, Mr. Reid agreed that it is feasible to floodproof Fairmile Road. Page 20 of the study describes the ranking, including the number of people currently at risk and a cost benefit analysis. Fairmile was ranked 10th out of 34 stretches of road, estimated to cost $241,500 to undertake, if successful in being approved by the conservation authority staff of the Ministry of Natural Resources ("MNR"). If MNR decides to support such a project, 50 percent of the cost will be paid by the province, with the conservation authority paying 2.5 percent and the municipality paying the rest.

Mr. Reid agreed that the Executive Committee of the RVCA recommended that the Township of Rideau be contacted in connection with the Long Reach Study to determine whether it would be interested in raising Fairmile Road (Ex. 22). On May 11, 1994, Mr. McGuinty followed up this proposal in writing to the Township of Rideau (Ex. 23). On October 13, 1994 the Township wrote to Mr. McGuinty advising that it does not make improvements to roads on a piece meal basis (Ex. 26). The letter also advised that it does not have the funds to undertake this expenditure. The letter does indicate that Fairmile Road had recently received a new asphalt overlay, but he suggested improvements do not constitute routine maintenance.

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Mr. McGuinty had also proposed to the Township that the Lacelles be allowed to raise that portion of Fairmile between Lot 37 and the edge of the fill line, a distance of 90 metres and was advised by the Township by letter dated June 13, 1994 (Ex. 4) that this would not be possible. Mr. Reid expressed frustration that Fairmile Road had been resurfaced in July of 1994, which would have been an ideal time to allow the Lacelles to add elevation to the relevant portion. The letter of June 13, 1994 gives the appearance that no work is contemplated on Fairmile Road which was not the case.

Mr. Reid agreed that, had the Lacelles been allowed to raise the road .18 metres, it would bring the elevation to 87.31 metres. The RVCA Policies (Ex. 3) apply so that flood depths in excess of 30 cm. on access routes would not receive permission. However, had the proposed elevation been undertaken at the time of resurfacing, the result would be to permit safe access to the subject properties as contemplated by the 1993 RVCA Policies. Mr. Reid clarified that 0.18 metres is 0.59 feet or 7 inches.

Mr. McGuinty also proposed that the Lacelles be allowed to construct Cable Crescent at their own expense, but a new plan of subdivision planned to the north of Fairmile on the Rideau indicates that the proposed located of Cable Crescent has been changed so that it extends further to the north. Mr. Reid agreed that the Township did not appear to be receptive to any of the Lacelle's proposals as another property owner in the subdivision had been allowed to make a contribution to a road maintenance program which resulted in safe access for that property.

Mr. Reid explained that the 1:100 year storm is not defined as meaning that such a storm would occur only every hundred years. Rather, it is a statistical calculation which indicates that in any year, there is a 1 percent chance of such a storm occurring.

Mr. Reid stated that the RVCA Policies allowing safe access came into force in October, 1993. Prior to that time, since the RVCA was created in 1966, the policy had been for dry access only.

In conclusion, Mr. Reid agreed that a portion of the Lacelle property is above the floodline, that the application has been on file since 1991 although the Lacelles have done nothing to contribute to any delay in resolving the matter and that there are existing non-conforming dwellings in the subdivision.

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Rene Claude Lacelle gave evidence on his own behalf. He has lived in Ottawa for 27 years and has been retired since 1992, wishing to build his retirement home on the subject property.

Mr. Lacelle stated that he purchased the two lots in 1972 for $1,000 a piece and intended to build his principle residence at that time. In 1974 he had an opportunity to purchase the home which he was renting so that his plans for the subject property changed, involving a retirement home only.

Mr. Lacelle started making inquiries with the RVCA in the late 1980's. His brother had already built a home on the upper south side of the subdivision and told him to apply.

Mr. Lacelle stated that the RVCA had refused permission for his application as the subject lands are within the flood plain. Safe access was the main problem. While he did not have a problem with raising Fairmile Road, Mr. Lacelle suspected that his neighbours might, as it would create pockets of drainage problems. He was unaware of the fact that the Township had raised the road through resurfacing, and found out that it had been done only two days before the hearing upon visiting the property.

Mr. Lacelle introduced 23 photographs into evidence (Ex. 27, 1 through 23), having been taken on October 19, 1994, which he described:

> 1 and 2 show the open land behind his property bordering the unconstructed Cable Crescent.
>
> 3 is of his property looking towards the river taken while standing on Cable Crescent.
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> 4 is of the unconstructed Cable Crescent. Mr. Lacelle speculated that the Township might use the road for service vehicles, as there is a series of tire tracks worn on the ground. Also, the parkland behind his lots is used as a ball park and the tracks might have come from its use.
>
> 5 is of the Lacelle property taken from Fairmile, with the trees denoting the boundary.

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6 is the building on Lot 38, which is on the north side of Fairmile across Cable Crescent from the subject property to the west.

7 is the home on Lot 33, which is the second house from the subject property to the east.

8 is the home on either Lot 27 or 28, which is located on the south side of Fairmile directly across from the subject property.

9 is taken from Fairmile Road showing his vehicle parked on the ramp to Cable Crescent.

10 is of the house on Lot 34, which is next to the subject lands to the east.

11 is of the house on either Lot 24 or 25, which is across Fairmile Road and to the west.

13 and 14 are taken from Fairmile Road, the former showing the subject property and the latter showing homes along the road, with pavement driveways rising to meet it. Most of the homes are occupied for four seasons.

20 and 22 show footings on the property of Hans Snippe, owner of Lot 58.

Mr. Lacelle described the subdivision as a middle to upper middle class neighbourhood. Most of the homes have been improved, and it is well organized and laid out. There is a property owners association and regular garbage pick up and mail delivery.

Mr. Lacelle stated that he has spoken to his neighbours about his plans and no one has opposed him. If not allowed to build as a result of this appeal, he would pursue the matter further. He would propose to the RVCA or the Township that he should be compensated for the loss of his property or inability to use it as he had planned. Rather than be taxed for an unserviced lot, his property taxes have increased considerably from what was paid in 1972, due to further development and increased services. If permission were granted, he would put a reverse mortgage on his current home and build.

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Under cross-examination, Mr. Lacelle was asked about other construction within the subdivision. He stated that Mr. Snippe had called him to say that the footings were in on Lot 58. Mr. Young has constructed a property on Lot 33. Other houses have gone up since the lots were purchased, including on Lots 1 to 8. His brother used to own Lots 1 and 2.

Mr. Reid was recalled to give reply evidence. He stated that he is familiar with the Snippe construction, with the files going back to 1981. The foundation and construction in the photographs relates to an application made in 1994. The design includes floodproofing. The requirement for safe access as opposed to dry access, and the attendant changes in the policies in 1993 facilitated the permission.

Mr. Reid stated that there are a total of 17 files for new construction in the subdivision, of which 8 have received permission, being Lots 4, 5, 8, 32, 33, 48 and 58. In addition, other files not included in this analysis are renovations or shoreline improvements. The RVCA did not conduct hearings in all cases. Permission was granted for Lot 4 in 1990 without a hearing because staff found that the proposed construction met all policy requirements. Lot 8 received permission in 1991. Lot 48 received permission in 1990 for construction of a garage. Lot 6 received permission in 1984 without a hearing. Lots 33 and 34 received permission in 1982 and 1983 after a hearing. Mr. Reid explained that hearings are held when staff do not recommend approval. If staff finds that the requirements of the RVCA Policies are not met, the facts are presented to the Executive Committee at a hearing after which a decision is made. In some of the foregoing cases, the policies were not fully written, which allowed some of the approvals to be given as there was no basis to refuse.

Under cross-examination, Mr. Reid agreed that staff would recommend approval of the Lacelle application if the test of safe access could be met. The test had been met for Lot 58 both before and after the July 1994 resurfacing, which was confirmed by the Long Reach Study. Mr. McGuinty suggested that the difference between existing levels and what is required for the Lacelles to achieve safe access is 0.3 metres. Mr. Reid pointed out that two prior applications for Lot 58 had been refused permission prior to the adoption of the 1993 policies.

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Submissions:

Mr. Brodmann commenced his submissions by laying out the regulatory framework governing the RVCA. It is a corporate body under the **Conservation Authorities Act.** Its objects are set out under section 20, with the powers to accomplish those objects set out under section 21. One of the powers listed, which it embodies in section 28, is to make regulations applicable to areas under its jurisdiction. Of relevance to this appeal is its powers under section 28(1)(e) which states:

> **28.** -(1) Subject to the approval of the Lieutenant Governor in Council, an authority may make regulations applicable in the area under its jurisdiction,
>
> (e) prohibiting or regulating or requiring the permission of the authority for the construction of any building or structure in or on a pond or swamp or in any area susceptible to flooding during a regional storm, and defining regional storms for the purposes of such regulations;

Revised Regulation 166/90, being a regulation governing fill, construction and alteration to waterways, made pursuant to section 28, provides in clause 3(a):

> 3. Subject to section 4, no person shall,
>
> (a) construct any building or structure or permit any building or structure to be constructed in or on a pond or swamp or in any area susceptible to flooding during a regional storm;

Section 4 states:

> 4. Subject to **The Ontario Water Resources Act** or to any private interest, the Authority may permit in writing the construction of any building or structure or the placing or

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> dumping of fill or the straightening, changing, diverting or interfering with the existing channel of a river, creek, stream or watercourse to which section 3 applies if, in the opinion of the Authority, the site of the building or structure or the placing or dumping and the method of construction or placing or dumping or the straightening, changing, diverting or interfering with the existing channel will not affect the control of flooding or pollution or the conservation of land.

Mr. Brodmann submitted that the discretion of the RVCA under section 4 of the regulation is not an unfettered one.

Section 1 of the regulation defines the regional storm as a combination of snowmelt or rain which would produce flows at Hurdman's Bridge on the Rideau River of 26,000 cubic feet per second. The area affected by flooding on the Rideau River is delineated by the maps outlined in Schedule 6 to the regulation, including map RV6-14, which has been submitted as Exhibit 14.

The Ministry of Natural Resources, in conjunction with the Ministry of Municipal Affairs, have produced the Flood Plain Planning Policy pursuant to section 3 of the **Planning Act**, which has received the approval of Cabinet. The wording of section 3 requires that agencies should have regard to the policy, with the result, in Mr. Brodmann's submission, that the RVCA and the tribunal should have regard to the criteria, objectives and principles enunciated therein.

The Flood Plain Planning Policy sets out basic concepts of flood plain management. One is that new development is not permitted in existing areas which could be damaged by flooding or cause damage to other buildings as a result of increases in flooding.

The regional storm for the area under the jurisdiction of the RVCA is the 1:100 year storm. Nearly all of the subject property would be inundated in such a storm event and the access road would be inundated to a distance of 120 metres in the event of a flood. Mr. Reid has demonstrated that the property has been flooded in the past, in 1976, having had a severity of a 1:25 or 1:30 year storm.

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Mr. Brodmann submitted that the application fails to satisfy concerns as regards access and egress. This issue of public safety is at the heart of a conservation authorities mandate, and is contained in the Flood Plain Planning Policy as well as the RVCA Policies. In conclusion, Mr. Brodmann submitted that the decision of the RVCA was sound and well reasoned, having been based on the objectives set out in the **Act**.

The tribunal questioned Mr. Brodmann on whether the wording of section 4, which captures the wording of clause 28(1)(f) of the **Act**, which does not permit the placing of fill if "... in the opinion of the authority the control of flooding or pollution or the conservation of land may be affected ..." constitutes a proper test to be exercised in cases involving construction. Mr. Brodmann explained that section 4 captures all of the matters under the jurisdiction of the RVCA listed under those provisions of subsection 28(1) which permit the making of regulations.

Mr. McGuinty submitted that the test in section 4 must be applied such that, if the proposed construction does not affect the control of flooding, it will be met. There is nothing in the facts which suggest that pollution or the conservation of land are in issue. Access is not listed as an issue for consideration.

According to Mr. Reid's evidence, the Lacelles have met a number of tests, but not that of safe access. Mr. McGuinty submitted that a tribunal must be cautious in exercising its discretion in such a manner which would deprive a landowner of his or her statutory rights. Referring to **Stacey v. Oxford On Rideau Township** (1989) 46 M.P.L.C. 15 (Ontario District Court) at page 27, "... where a statute confers a power, particularly one which may be used to deprive the subject of proprietary rights, the Courts will confine those exercising that power to the strict letter of the statute." Mr. McGuinty reiterated that safe access is not one of the permitted tests under the legislation.

In **Hinder v. Metro Toronto and Region Conservation Authority** (1984) 16 O.M.B.R. 401 (Mining and Lands Commissioner), the tribunal, in considering the meaning of "conservation of land" was of the opinion that where a private landowner was being deprived of property rights, no extended meaning should be applied to the words.

In his written submissions to the tribunal Mr. McGuinty states at paragraph 7:

> 7. We submit that the word "may" in Section 4 of the Regulations will, in the proper circumstances, bestow a

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> duty on the Conservation Authority to permit the issuance of a building permit (sic), and that it is not discretionary. If the issuance of a building permit will not affect any of the matters within the jurisdiction of the Conservation Authority, as set out in the regulations, we submit that the Conservation Authority cannot forbid the building permit's issuance by the Township. Where the provisions of a statute are for the benefit of the public, a duty to do the permitted act or to exercise the power granted may arise. (E.A. Driedger, Construction of Statutes (2nd Ed.) p. 14.). In the case of Upper Thames River Conservation Authority v. Corporation of the City of London (1989) 42 M.P.L.R. 241, (Ontario District Court), the Court was again dealing with the interpretation of Section 28(1)(e) of the Conservation Authorities Act and the regulations thereunder. The regulations in that case were identical to the regulations in our case. The Court stated on page 259: "The combined effect of s.s. 3 and 4 of the Regulation ... is to prevent the construction of any kind of building in a flood plain without the permission of the Authority and the permission is to be granted only if the Authority is satisfied that the site of the building and method of construction 'will not affect the control of flooding or pollution or the conservation of land'".

Mr. McGuinty submitted that there is no jurisdiction to refuse permission in this case, as there is no evidence that pollution, the control of flooding or the conservation of land will be affected.

With respect to the issue of precedent, Mr. McGuinty submitted that in being concerned about the impact on its operations if exceptions are granted, the Conservation Authority is demonstrating a very natural and human reaction. Mr. McGuinty invited the tribunal to consider the reasoning used by the Ontario Municipal Board at page 12 of its

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decision in **Brown v. City of Ottawa** (unreported) September 13, 1993, Files No. Z 920070; V 910524; V 910525; C 910571; and C 910572:

> The danger of setting a precedent is often raised as an issue at hearings of this nature. The Board thinks it is incumbent upon it to attempt to rationalize the issue of precedent and its relevance. A presumption exists that granting relief here constitutes a precedent encouraging further applications in the area. That may be the case. However, upon such other applications being made, it would then lie with the authorities having approval jurisdiction to determine whether in fact a precedent had been established by this hearing, and if so what effect, if any, that precedent should have at that time on other applications. The Board cannot today dictate that this decision will or will not be a precedent in other applications based on other circumstances at other times.
>
> The precedent of these applications, if successful, may encourage subsequent applications in this neighbourhood. How those applications are dealt with in turn lies with the approval authority. Every application for consent or variance is to be considered on its merits; there are tests and planning issues to be considered and applied in every case. One of these issues is neighbourhood concerns as to proposed development. Another is the size and configuration of lots already in existence. It is here that the precedent of earlier created lots becomes relevant. However, again, that is only one of several issues, all going to the measure of the merits of any individual application. The Board concludes that precedent, although one of several important issues that should be considered, is not the overriding issue in consideration of the present appeals.

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Mr. McGuinty referred to Evans, Janisch, Mullan and Risk, **Administrative Law Cases, Text, and Materials.** Toronto: Emond-Montgomery Limited, 1980 at page 742:

> Law and discretion are not separated by a sharp line but by a zone, much as night and day are separated by dawn. Instead of the two categories of law and discretion, we could recognize five or fifty, as may be convenient. For present purposes, five seem convenient - those in which the tribunal's prevailing attitude is that precedents are (1) almost always binding, (2) always considered and usually binding, (3) usually considered by seldom binding, (4) occasionally considered but never binding, and (5) almost never considered. The first two categories fit what we usually call case law, the last two fit what we usually call discretion, and the third is the zone between law and discretion.
>
> One's first impulse is to prefer law to discretion and therefore to suppose that the greater the role of precedents the better. After all, consistency is clearly desirable for two main reasons: Equality is a major ingredient of justice, and striving for consistency reduces arbitrariness. But other factors must also be considered. Turning all discretion into law would destroy the individualizing element of equity and of discretion. Binding precedents may make for undue rigidity. For instance, we do not want precedents to be as strongly binding on some of the looser problems of public law as they are and ought to be in some areas of real property law. Precedents have greater force in English courts than in American courts, and my opinion is that we would lose much if our courts were to imitate the English courts; we benefit by the flexibility which helps keep our law abreast of changing conditions and new understanding. ...

Mr. McGuinty submitted that the RVCA may be unduly inhibited by the fear of setting a precedent, but this should not govern the decision. Even the House of Lords and the Supreme Court of Canada are not bound by past decisions.

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Mr. McGuinty pointed out that the Lacelles had done everything in their power to attempt to achieve what the RVCA considers to be safe access. They have exhausted attempts to have Fairmile Road raised, including at their own expense, but the Township refused to cooperate. If the tribunal finds that safe access is a valid test, then the facts as they currently exist are that the road is 1/2 foot too low.

Mr. McGuinty stated that the appellants purchased the subject property in 1972. Had they attempted to build immediately, they would have been granted permission by the RVCA. Instead, they jumped on an opportunity created by their then landlord. He submitted that they are good citizens, having acted in good faith in this matter. When the legislation came into force, it did not have a provision to grandfather or create legal non-conforming rights. If an exception is not granted in this appeal, the land is rendered useless and valueless. There is a presumption, he submitted, that in the absence of express words, the legislation cannot be permitted to interfere with priority rights without compensation.

Mr. McGuinty submitted that the tribunal need not be concerned about setting a precedent by allowing the appeal. It has equitable jurisdiction under section 121 of the **Mining Act** to make its decision on the real merits and substantial justice of the case. While conservation authorities are not given this discretion under the **Conservation Authorities Act**, it has been specifically imported into these proceedings by virtue of subsection 6(7) of the **Ministry of Natural Resources Act** which provides that Part VI of the **Mining Act** applies.

Mr. McGuinty submitted that the duty of the tribunal is to balance the interests of the two parties involved and ensure that the final outcome is not harsh or unreasonable. He submitted that the decision of the RVCA is unduly harsh, rendering an unreasonable and unjustifiable limitation on the facts. The definition of equity is fairness, which provides an alternative to the harsh rules of the common law, and imposes a duty on the tribunal to do what is fair in the circumstances.

Mr. McGuinty concluded by submitting that this appeal is a case which begs for an exception based upon the real merits and substantial justice of the case. He therefore requested relief in the form of the granting of the appeal, whereby permission to construct the proposed dwelling is given. Mr. McGuinty also submitted that the Lacelles should be given their costs and disbursements.

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Mr. Brodmann replied by submitting that the contention that control of flooding not being related to safe access should not be subscribed to. The primary manner in which control of flooding can be achieved is through the control of access to areas susceptible to flooding.

Referring to the third principle on page 6 of the Flood Plain Planning Policy, Mr. Brodmann submitted that access is implied in the terms, "degree of risk (threat of life and property damage") and at page 2, pointed out the three elements which are involved in flood plain management, namely emergency response, protection and prevention, the last of which incorporates the idea of safe access.

Concerning the precedent implications of allowing such an application, Mr. Brodmann suggested that the member of the Ontario Municipal Board in **Brown** cited above was attempting to rationalize his position. Applied to the facts in this situation, if the Executive Committee determined that it would allow this application, regardless of its non-compliance with either the Flood Plain Planning Policy or the RVCA Policies, it could be assumed that other applications of non-compliance would be received. In attempting to provide a coordinated approach to its own and the provincial policies, they are applied by the RVCA in a fair and even-handed manner. It would be difficult to determine the effect of a decision by the tribunal allowing the appeal in a case where the application clearly did not meet the guidelines set. The RVCA would be put in the position of determining what is fair in the next situation where the guidelines have not been met. There is an enormous pressure for development on the Rideau River as is the case with other watersheds.

Mr. Brodmann submitted that the **Stacey** case, referred to above, does not have much application to the facts of this appeal. Instead, he referred to a statement of Commissioner Ferguson in an earlier decision of this tribunal in **Young v. Credit Valley Conservation Authority,** (unreported), April 17, 1978, wherein he stated commencing at the bottom of page 12:

> The second general aspect of the submissions of counsel for the appellants related to a concept that the legislation and the creation of jurisdiction in a conservation authority deprives a landowner of his basic rights. While this general approach may be true in some aspects in that use of land may be prohibited or written permission may be required prior to

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> exercise of use, the jurisdiction of conservation authorities is not analogous with building control, subdivision control or zoning laws. The latter are oriented to management concepts and a basic philosophy that the control benefits the public good even if an individual landowner's rights may be affected by preventing a use of which the land is reasonably capable. In contrast, the theory of the jurisdiction of conservation authorities is related not to control of land otherwise suitable for development but to the prevention of development of land that is inherently unsuitable for development. It is not a case of preventing the use of a capability of land but rather a definition of and the prevention of the abuse of an incapacity of land and while the affected land has an appearance of utility, in reality it does not equate with land not having such incapacity. For this reason it is not proper to make complete analogies to the legal considerations of such other areas of jurisdiction.

Mr. Brodmann submitted that this excerpt sums up the RVCA's role in this matter. It is not acting to deny the right to use land as one wishes, but rather, it involves a determination of whether the land is unsuited to development and in this way is not interfering with the property owners' rights.

In conclusion, Mr. Brodmann wished the record to show, that although the Lacelles have indicated that they no longer have children living at home who would be at risk, and that they are willing to assume whatever risk there may be involved in living on property which may be subject to flooding, this is no answer as the property could be disposed of to persons who have not elected to assume such a risk.

Mr. McGuinty concluded by repeating the main points of his earlier argument and sought to have the tribunal distinguish **Young** on the basis that the case involved preventing a use which the land was not reasonably capable of. In the case of this appeal, the land would be rendered valueless and useless if the requested permission is not granted.

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Findings:

The RVCA did not make an issue of the construction of the proposed dwelling within the flood plain. Therefore, for purposes of this appeal, it has been assumed that the structure can be floodproofed to the satisfaction of the RVCA. Therefore, the only technical issue is that of safe access.

Safe Access

Safe access, along with risk to loss of life, is not mentioned in section 20, the objects of the **Act**, nor in those clauses of section 28 under which an authority considers applications such as the one currently under appeal. Susceptibility to flooding and the control of flooding **are** mentioned in clauses 28(1)(e) and (f) respectively. Flooding is not mentioned as one of the objects of an authority under section 20, but is mentioned as one of the powers to accomplish those objects in clause 21(j) as "prevent[ing] floods".

A flood is defined in Funk and Wagnalls, **Canadian College Dictionary**: Fitzhenry & Whiteside Limited (Toronto), 1986 as:

> **Flood** ... **n.** **1.** An unusually large flow or rise of water; inundation; deluge...

This definition describes a conclusion based upon objective facts as opposed to the ramifications associated with flooding. The ramifications of flooding flow from this conclusion, namely, "What can happen as a result of flooding and what can be done in advance to mitigate or prevent flooding?"

Those clauses of subsection 28(1) of the **Act** which give the conservation authority power to regulate allow an outright prohibition. In other words, no construction or placing of fill in any area within its authority. This is embodied in section 3 of the RVCA regulation, Revised Regulation 166/90. However, the clauses also permit regulation on the granting of permission by the authority. As flooding is an objective fact, it must be understood that the granting of permission must rest on some other test rather than the presence or absence of flooding. In other words, there is discretion to determine under what conditions permission may be granted.

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The scope of this discretion is further clarified under the Objectives listed at the bottom of page 5 of the Flood Plain Planning Policy. They are, "to prevent loss of life; to minimize property damage and social disruption; and to encourage a co-ordinated approach to the use of the land and the management of water." These can otherwise be summed up as prevention, mitigation and management planning. While these are necessary components in the control of flooding, they also provide the framework for the proper exercise of discretion in the granting or refusing of permission.

Within the context of the **Act** as a whole, it is unduly narrow and misleading to suggest that all concerns related to flooding must be enumerated. The analysis of the flood situation and the setting of thresholds for flood depths, velocity of flows, the rate at which water rises for safe evacuation, structural integrity and floodproofing measures for buildings, along with access and egress, are all integral parts of the three components of flooding listed above. The alternative to such policies setting thresholds in each of these areas, based upon rigorous analysis and scientific data, would be absolute prohibition. The tribunal finds that access is a proper criteria, being within the jurisdiction of the RVCA for determination of whether it will grant its permission.

Adoption of the Policy of Safe Access

The tribunal will consider whether it will adopt and apply the level of safe access set by the RVCA, namely 0.3 metres.

Access and egress are considered in both the Implementation Guidelines prepared to assist in further explaining the Provincial Flood Plain Planning Policy Statement (not provided as an exhibit at the hearing), dated October, 1988 (the "Implementation Guidelines") and the RVCA Policies. Relevant portions of each are reproduced.

Appendix D of the Implementation Guidelines deals with Vehicular Access commencing at page 145:

> (6) Vehicular Access
>
> Little or no information exists in the literature regarding ingress/egress criteria for vehicles.

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The question of safety for the passage of vehicles can be subdivided into:

- flood depth and velocity considerations affecting egress of private vehicles from floodproofed areas

- flood depth and velocity affecting access of private and emergency vehicles to floodproofed areas.

(a) Private Vehicles

In general, water contact is one critical issue in terms of its effect on the ignition/electrical system and the exhaust system. In the former, the distributor and/or spark plugs are the main items of concern and those which are typical problem areas for most motorists.

Private vehicles come in all shapes and sizes and it is practically impossible to identify a "typical" vehicle for assessing the elevation of key electrical components from the road surface. It appears likely that a depth of about 0.4 m - 0.6 m (1.5 - 2 ft.) would be sufficient to reach the distributor or plugs of most private vehicles. They would fail to start at this depth and hence vehicular egress will be halted. Cars may start at lower depths but then "splash" from driving on wet pavement or from the radiator fan would become a concern.

The issue of the exhaust system and the effect that flooding can play on engine back

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pressures/expulsion of exhaust gases appears to be the controlling factor. Difficulty would probably be experienced in starting most vehicles if the vehicle is standing in water at a depth that covers the muffler. The vehicle may start and continue to run if it is quickly removed from the water but if it remains at that depth, there is a strong possibility that it will fail soon after.

Again, it is practically impossible to generalize this depth but for most family automobiles something in the range of about 0.3 m - 0.4 m (1 - 1.5 ft.) would be the maximum depth of flooding before potential egress problems would result.

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(b) Emergency Vehicles

Emergency Vehicles operate under the same constraints relating to the electrical/exhaust system. Most police vehicles and ambulances would be limited by exhaust considerations, although emergency vans are better equipped to avoid splash problems since the key electrical components are higher above the road surface.

Diesel fire vehicles with top exhausts appear best suited for flood conditions. Their road clearance is high and it is suggested that 0.9 m - 1.2 m (3 - 4 ft.) of flood depth would not present a problem. ...

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This is compared with the provisions of the RVCA Policies (Ex. 3) with respect to Safe Access set out at page 3:

> 1.2.6 Safe Access/Egress
>
> The following principles related to the facility of access/egress and associated with overall public safety and the provision of emergency services will apply:
>
> For vehicular access routes (municipal roadways and private rights-of-way) safe access will be considered to be available if the depth of flooding at regulatory (1:100 year) flood level along the full length of the travelled surface of the access roadway or right-of-way is no greater than 0.3 metres.
>
> For pedestrian access routes (private laneways, driveways and walkways between residences and vehicular access routes) safe access will be considered to be available if the depth of flooding at regulatory (1:100 yr.) flood level along the length of the access/egress route is no greater than 0.8 metres.

The tribunal considered the issue of whether it would adopt a policy of the Director of Mine Rehabilitation under Part VII of the **Mining Act** in its decision of **MacGregor v. Director of Mine Rehabilitation** (unreported) December 23, 1994, File No. MA 033-93 commencing at page 22. Although the circumstances governing proceedings under Part VII differ from other mining cases and conservation authority appeals in a number of regards, the tribunal applied the reasoning of the Divisional Court in that case to the issue of how a tribunal should regard policies of a body whose decisions it hears the appeals from. The tribunal finds that the same test is appropriate when considering whether to adopt and apply the policies of a conservation authority. The tribunal stated in **MacGregor**:

> Although the incumbent legislation is different, the principle of the following case describes the requirements of a tribunal

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reviewing a decision made through the statutory exercise of discretion. The Court in **Segal v. The General Manager, The Ontario Health Insurance Plan** (Gen. Div., Div. Ct.) unreported, 347/94, November 24, 1994, Hartt, Saunders and Moldaver JJ., considered an appeal from a decision of the Health Services Appeal Board set out at page 3:

> On an appeal to the Board from the General Manager, the Board may direct the General Manager to take such action as the Board considers he should take in accordance with the Act and regulations, and for such purposes the Board may substitute its opinion for that of the General Manger (s. 21(1) of the Act). Where, as here, the General Manager had adopted a policy as the basis for exercising his discretion, the Board, in our opinion, is bound to consider that policy and not follow it if it considers it to be unreasonable. Once it has considered and adopted a general policy with respect to hospital services in general, the Board need not reconsider the policy in each subsequent case unless there are exceptional circumstances. However, we think it is still the duty of the Board in each case to consider whether the application of the policy is reasonable in the circumstances before it. The Board in a number of cases has found inapplicable some of the conditions in Appendix C in certain situations.
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> In its reasons for dismissing her appeal, the Board stated that the appellant must meet the conditions laid down in Appendix C. In our opinion that was a misdirection so far as hospital services were concerned. In our view the Board, having found that certain Appendix C conditions

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> had not been complied with, should then have gone on to consider whether the imposition of those conditions as part of the policy was reasonable in the circumstances. This is what the Board has done in other cases. In this case, the Board should have considered whether it was reasonable to require a referral to a New York physician, and whether prior approval to the procedure was also required.

From **Segal** the following steps can be derived in reviewing this and any other policy applied by the Director and considered on an appeal:

1. Consider the policy and determine whether generally it will be adopted or rejected by the tribunal.

2. If adopted, it need not be reconsidered, unless a party pleads exceptional circumstances.

3. If rejected, the tribunal will give reasons.

4. If adopted, consider whether it is reasonable to apply the policy in the circumstances.

With respect to the first test, the setting of limits of 0.3 metres of flooding by the RVCA and between 0.3 and 0.4 metres by the province is based upon technical expertise. In the absence of any technical evidence disputing this level for safe vehicular access, the tribunal finds that it will adopt this portion of the RVCA policy.

The second and third tests have no applicability in this situation. In determining whether it is reasonable to apply the policy in these circumstances, the tribunal notes that the distance of travel involved is 120 metres. The potential to be

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stranded along a stretch of flooded road increases with the distance to be travelled. Given this distance and the fact that there is no network of roads forming a grid within the subdivision which might provide alternative access or a means of assistance to a stranded vehicle, the tribunal finds that it will apply this policy to the facts of this case. Therefore, the tribunal finds that, on the evidence, there is no possibility to provide safe access to the subject lands without altering the existing roadway. This alteration, which is discussed at length in the evidence, is not foreseen at this time.

Precedent

The tribunal acknowledges the very thorough and persuasive presentation by counsel for the appellants on this issue.

It is true that a party bringing an application is entitled to the belief that it will be considered on the merits and the facts of their case. Here, the facts are that the subject property is located within the floodline elevations of the Rideau River to a sufficient depth and for considerable distance such that safe access has been put in question.

As was stated above, conservation authorities are able to make regulations both prohibiting or giving permission for certain activities within the flood plain. The conditions under which permission is given by the RVCA are contained in the RVCA Policies. Applications which are successful as coming within the scope of the policies are precedents for not applying the outright prohibition contained in section 3 of Revised Regulation 166/90. In effect, these policies provide the basis upon which precedents are created for the use of the RVCA's discretion.

An analogy can be made to the popular phrase of "things being black and white, with some grey areas falling in between". Development within a watercourse itself and those areas of a flood plain which are flooded with great regularity is not permitted. This is black. Development outside the fill lines of an authority is beyond the jurisdiction of an authority to determine. This is white. Those areas between the fill lines and the watercourse may be developed under certain conditions. This area is both grey and black. Where the delineation between black and grey will occur is very much dictated by the scope of the policies on such matters as flood depths, access, requirements for floodproofing etcetera.

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The policies of an authority amount to an analysis of acceptable risk in a given watershed. There is no suggestion that properties falling within the allowable exceptions are not subject to flooding. Rather, they represent a determination that the extent of flooding which may occur is acceptable, not creating a risk to loss of life or risk of unacceptable levels of property damage.

There may be challenges to the boundary drawn between black and grey through either a competent challenge to the policies by a qualified expert or through updated studies of flood plain mapping, although this is not an exhaustive list.

The request for an exception to allow construction in this appeal is not based upon a challenge to the drawing of these boundaries, as embodied by policies. Rather, it is a request that the rules not be applied in the facts of this case. This is a very serious matter. Essentially, those who are seeking to be exempt from the confines of acceptable risk under conditions of extreme flooding are saying that they are willing to accept the risk. They cannot, however, speak on behalf of innocent third parties who may be visiting or have purchased the subject properties. (In other cases, the requested exceptions may also have severe impacts on flood conditions both upstream and downstream.) It is the conservation authorities who have been given the responsibility of making choices associated with reasonable risk on behalf of those who live, work or visit in flood prone lands.

The issue of precedents created by the granting of permission by a conservation authority must be refocussed. Through its policies, and where there are none, through the regard to the provincial policy, conservation authorities have put the public on notice as to where precedents will be considered to the absolute prohibition on development within certain lands. While the boundary may be fuzzy and open to challenge, it cannot be said, through adherence to these policies, that an authority is failing to exercise its discretion. Rather, it is a case where a body exercising a statutory power of decision has outlined in advance in a manner freely available to the public the extent to which its discretion will be exercised. The precedents exist and they are numerous, being all those cases where permission has been granted. Neither the RVCA nor the tribunal can grant permission which would allow the appellants to undertake development outside the ambit of the legislation.

The tribunal finds that the facts of this case do not fall into the exceptions to the absolute prohibition in section 3 of Revised Ontario Regulation 166/90.

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Issues of need, existing non-conforming uses in the vicinity, and willingness to waive liability in the RVCA are insufficient to create a new exception in these circumstances.

Conclusion:

The appeal should be dismissed, as the facts do not fall within the exceptions developed by the RVCA delineating acceptable levels of risk for access.