

The Chair, Pieter Leenhouts, called the meeting to order at 7:00 p.m. and asked for a round of introductions.

Chair Leenhouts, outlined the purpose of a hearing under Section 28 (12) of the *Conservation Authorities Act*, R.S.O. 1990 as amended to Morris and Anita Kertzer.

Morris Kertzer was affirmed and his legal counsel Paul Francis, Francis Lawyers, was sworn in. Ralph Burwash, Contractor, declined to be sworn at this time but was sworn in later. Eric Lalande, Terry Davidson and Sommer Casgrain-Roberson representing the Rideau Valley Conservation Authority, were sworn in. Helmut Brodmann, Bell Baker LLP, was in attendance on behalf of the RVCA.

The following exhibits, slides, and information were presented by Eric Lalande:

- Exhibit 1 - Application RV6-4504 received September 13, 2004
- Slide 1 - Site Description. 2295 Wildlife Way is a vacant lot with frontage along Wildlife Way. There are vacant lots adjacent to the south and an existing residential lot adjacent to the west. The whole lot is entirely within the floodplain of the Rideau River.
- Exhibit 2 - Location plan – 2295 Wildlife Way
- Slide 2 - Site Description. The lot is generally flat with a frontage of approximately 48.79 metres, and an irregular depth of approximately 66.45 metres. No points of the subject lands are identified as being at or above the 1:100 year flood elevation and the approximate existing elevations in the location of the proposed dwelling are 86.85 metres above sea level.
- Exhibit 3 (a)- Site Photo taken September 1, 2021.
- Exhibit 3 (b) -Site Photo
- Exhibit 3 (c) -Site Photo taken August 10, 1995
- Slide 3 - Application Summary
 - Proposed development to permit the construction of a structure to be used as a residential building and construction be supported by a private sewage system.
 - Placement of fill to accommodate the dwelling, attached garage, and private sewage system
- Exhibit 4 - Proposed Site Plan
Site Grading Plan for proposed single family dwelling prepared by Paterson Group.
- Exhibit 5 (a) -Proposed Building Plans – floor plan
- Exhibit 5 (b) -Proposed Building Plans – exterior views
- Slide 4 - Application History
 - Application was previously heard by the Executive Committee at its meeting held on November 10, 2004. The application was adjourned at the applicant’s request.
 - The application heard in 2004 could not be approved by staff based on the governing policies of the day.
 - The reason for adjournment was to provide more time to research and prepare evidence.

- The RVCA issued a letter indicating that the application does not meet policy on June 10, 2021. The application is being treated as a new application.
 - The applicant has indicated by correspondence dated July 22, 2021 that the applicant wishes to resume the hearing.
- Slide 5 - Policy Considerations
- The regulated floodplain was set at 87.72 metres above sea level (masl) geodetic at the time of application in 2004.
 - The RVCA undertook a review of the floodplain associated with the Rideau River in 2017 and based on updated information collected, the regulated floodplain was adjusted to 87.3 masl geodetic
 - It should be noted that while the levels have lowered, the entirety of the lot remains entirely within the regulated 1:100 year floodplain.
- Slide 6 - RVCA Policy Considerations Cont.
The RVCA Policies Regarding the Construction of Buildings and Structures, Placing of Fill and Alterations to Waterways outline specific policies that apply to the proposed development:
Section 1.1 General Principles, indicates the following:
- a) New development must result in no significant impact on expected flood levels or velocities, taking into consideration the direct and cumulative effects of the development on flood plain conveyance capacity and storage capacity.
 - c) New development must not increase the risks to public safety which are expected to be preset during the regulatory flood (or more frequent floods); in this regard the availability of access to and egress from the structure and the potential depths of water over access routes will be the primary consideration.
- Slide 7 - RVCA Policy Considerations Cont.
Section 1.2 vii) states that development shall be prohibited within the 1:100 year floodplain including within areas of reduced flood risk (flood fringe) where the use is:
- Development within the 1:00 year regulatory floodplain shall not be permitted except as allowed by specific policies elsewhere in this document. This includes:
 - ...
 - vii) new development on vacant lots of record.
 - ...
- It should be noted that no other policies provide for an exception to this subsection. It is noted that exceptions outlined in Section 1.3 relate to reconstruction, relocation, repairs and renovations whereas the construction of a new residential building does not qualify. The proposed development is expressly prohibited by policy therefore cannot be supported for approval by staff.
- Slide 8 - RVCA Policy Considerations Cont.
Section 1.4.4 policy states:
- For vehicular and pedestrian 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 of right-of-way is not greater than 0.3 metres.

The proposal is seeking to provide safe access by way of placement of fill on/within the floodplain.

The estimated levels of fill based on the proposal ranges up to approximately 1.5 metres.

Slide 9 -

Other Policy Considerations

Provincial Policy Statement 2020

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

d) a floodway regardless of whether the area of inundation contains high points of land not subject to flooding.

Exhibit 6(a) -

Letter of Notification from RVCA to Morris Kertzer dated June 10, 2021 advising that if an application does not meet the current local policy respecting development within the floodplain, it cannot be approved at a staff level. The applicant was advised that if he wished to proceed with a proposal for development on the property, he would need to file an application for development to start the process to proceed to a hearing in front of the Executive Committee.

Exhibit 6(b) -

Letter of Notification from Eric Lalande to Morris Kertzer dated August 23, 2021 of Hearing to be held before the Executive Committee on September 9, 2021.

Slide 10 -

Conservation Authorities Act – Right to Hearing

- (12) Permission required under a regulation made under clause (1) (b) or (c) shall not be refused or granted subject to conditions unless the person requesting the permission has been given the opportunity to require a hearing before the authority or, if the authority so directs, before the authority's executive committee. 1998, c. 18, Sched. I, s. 12.

Slide 11 -

Summary

Approval at a staff level cannot be made for the following reason:

1. The Rideau River is administered as a one zone floodplain, wherein the floodway is considered to be the entire limits of the mapped regulated floodplain.
2. The entirety of the subject land is within the limits of the floodplain.
3. The subject land is considered a vacant lot of record.
4. New development is prohibited on vacant lots of record.
5. The granting of permission will set a precedent.
6. The granting of permission may jeopardize the health or safety of persons or result in the damage or destruction of property.

Slide 12 -

Ontario Regulation 174/06

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. 174/06, s. 3 (1).

- Slide 13 - Next Steps:
Approve the application
Approve the application with conditions
Deny the application.
- Slide 14 - Conditions:
Any decision to approve the proposal should consider the following conditions as part of their direction to staff for administration of permission issuance:
1. That private services be designed and approved in accordance with the Ontario Building Code, to the satisfaction of the Ottawa Septic System Office.
 2. That a notice on title be registered with a warning clause advising of the dwelling being located within the floodplain hazard limits associated with the Rideau River floodplain, and that safe access may not be available in an emergency.
 3. That a professional engineer certify the designed structure shall meet or exceed the floodproofing standards of the RVCA's Policies Regarding the Construction of Buildings and Structures, Placing of Fill and Alterations to Waterways.
 4. That standard permit conditions related to access, inspection and fill placement be implemented.
 5. That a permit be approved for up to 2 years from the date of permit issuance.

Summary of Considerations:

Application for Development

Eric Lalonde noted that the application was previously heard by the Executive Committee at its meeting held on November 10, 2004. The application was adjourned at the applicant's request. The reason for adjournment was to provide more time for research and prepare evidence. The applicant has indicated by correspondence dated July 22, 2021, that the applicant has obtained the evidence required and wishes to resume the hearing. It is noted that the application was brought to its original hearing because the application could not be approved by staff based on the governing policies of the day.

Site Description

The subject lands are located along Wildlife Way, a cluster of lots located approximately 800 metres south of Hwy 416 crossing the Rideau River. The lot is located adjacent to a mix of residential and vacant lots. The lot has an irregular shape and is approximately 48.79 metres in width and 66.45 metres in depth. The subject lands have an approximate grade of 86.7 metres.

The regulated floodplain was set at 87.72 metres above sea level geodetic at the time of application in 2004. The RVCA undertook a review of the floodplain associated with the Rideau River in 2017 and based on the updated information collected, the regulated floodplain was adjusted to 87.3 metres above sea level geodetic. It should be noted that while the levels have lowered, the entirety of the lot remains entirely within the regulated 1:100 year floodplain.

Consideration

The application submitted on September 13, 2004 along with supporting documents including site plan, grading plans, building plans, septic design and photographs. The application granted the opportunity for a hearing, which on the request of the applicant was granted an adjournment at its November 10, 2004 Executive Committee Hearing.

Given that the application was submitted during the Transitional Period of Ontario Regulation 174/06, the following considerations are provided:

Transitional Procedures Guidelines for permission pursuant to Section 28 of the Conservation Authorities Act. (April 18, 2006)

1.2.1. Applications Submitted under the CA Act before May 1st, 2006

“Applications for permission that are submitted to the Authority prior to May 1st, 2006 (or the date of approval by the Minister) will be subject to the procedures for the administration of the existing “Fill, Construction and Alteration to Watercourses” Regulation provided that the application is complete, and all fees are paid to the satisfaction of the Authority.

Applications that are deemed by the Authority to be incomplete, and are within an area regulated under the new “Development, Interference with Wetlands and Alterations to Shorelines and Watercourses” regulation, as of May 1st, 2006 (or the date of approval by the Minister) will be subject to the procedures under the new regulation, and the proponent must re-submit a new application under the new regulation. The appeal provisions of Section 28(12) of the act may be invoked by the applicant.”

The approved April 18, 2006 regulations accompanying the procedure guidelines noted that: *“Until such time as the review and approval process is complete, the adopted Transition Provisions dated April 18, 2006 remain in effect.”* The review and approval process of the Minister was completed May 4, 2006, and the RVCA approved amendments the regulation policies on February 18, 2010, November 25, 2010 and February 22, 2018 (wetland policies). Staff considers that that the transition policies no longer apply in this instance and the application, as submitted, along with new information provided by the applicant in 2021 with regard to their application be considered under current legislation and regulations as follows:

Legislation and Regulation Considerations:

Conservation Authorities Act – Section 28

28 (1) *Subject to subsections (2), (3) and (4) and section 28.1, no person shall carry on the following activities, or permit another person to carry on the following activities, in the area of jurisdiction of an authority:*

2. *Development activities in areas that are within the authority's area of jurisdiction and are,*
i. hazardous lands,

28.1 (1) *An authority may issue a permit to a person to engage in an activity specified in the permit that would otherwise be prohibited by section 28, if, in the opinion of the authority,*

- (a) the activity is not likely to affect the control of flooding, erosion, dynamic beaches or pollution or the conservation of land;*
- (b) the activity is not likely to create conditions or circumstances that, in the event of a natural hazard, might jeopardize the health or safety of persons or result in the damage or destruction of property; and*
- (c) any other requirements that may be prescribed by the regulations are met. 2017, c. 23, Sched. 4, s. 25.*

Hearing

28.1 (5) *An authority shall not refuse an application for a permit or attach conditions to a permit unless the applicant for the permit has been given an opportunity to be heard by the authority. 2017, c. 23, Sched. 4, s. 25.*

The applicant was advised prior to the application being made and by formal letter, dated June 10, 2021 that staff would not be in a position to support the application and thus the application has been brought forward to a hearing with the Executive Committee.

Ontario Regulation 174/06, Development Prohibited – Section 2, 3, 5,

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,*

(c) hazardous lands;

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. 174/06, s. 3 (1).*

Policy Considerations

The RVCA Policies Regarding the Construction of Buildings and Structures, Placing of Fill and Alterations to Waterways outline specific policies that apply to the proposed development:

Section 1.1, General Principles, indicates the following:

a) New development must result in no significant impact on expected flood levels or velocities, taking into consideration the direct and cumulative effects of the development on flood plain conveyance capacity and storage capacity.

c) New development must not increase the risks to public safety which are expected to be present during the regulatory flood (or more frequent floods); in this regard the availability of access to and egress from the structure and the potential depths of water over access routes will be the primary consideration.

Section 1.2 vii) states that development shall be prohibited within the 1:100 year floodplain including within areas of reduced flood risk (flood fringe) where the use is:

Development within the 1:100 year regulatory floodplain shall not be permitted except as allowed by specific policies elsewhere in this document. This includes:

...
vii) *new development on vacant lots of record;*
..."

It should be noted that no other policies provide for an exception to this subsection. It is noted that exceptions are outlined in section 1.3 relate to reconstruction, relocation, repairs and renovations which construction of a new residential dwelling does not qualify. The proposed development is expressly prohibited by policy therefore cannot be supported for approval.

Section 1.4.4 policy states:

For vehicular and pedestrian 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.

Further, Section 2.0 provides for policies on the "Minor removal or placement of fill / minor site grading in the floodplain." This applicant has not submitted originally, or through the additional information provided, engineering details to address the regulation policies contained by Section 2.0 of the RVCA Development Policies.

The applicant is seeking the permanent placement of fill based on the premise that the area should be considered flood fringe. Under regulation, the floodplain on the applicant's property is considered a one-zone floodplain whereby the entirety of the flood hazard is considered the floodway. There is no provision for consideration of flood fringe under regulations to this regard.

Correspondence was received by the applicant by way of letter dated November 5, 2014, detailing personal knowledge, and citing City of Ottawa Official Plan policies applying to areas which are classified within the RVCA regulation policies as Areas of Reduced Flood Risk. It should be noted that the polices for Areas of Reduced Flood Risk do not apply to the subject lands or any of the adjacent existing developed and vacant lands.

Wildlife Way along the centre line is identified above the regulated flood elevation of 87.3 masl. While the proposed grading plan does not indicate or include an access route or relevant proposed grades as prepared by Paterson Groups 2004, the grading plan indicates a driveway grade of 3.5%, and a finished floor of the garage to be above the flood elevation at 88.1 masl. While the grading plan provides insufficient information to adequately review the proposed fill, it appears to be reliant of the placement of fill up to approximately 1.5 metres higher than existing based on limited proposed and existing grades provided on the plan.

Previous Development Policies

It is noted that the application originally was originally submitted in 2004. The original application precedes the current in force and effect regulatory policies directing the review of development applications. The policies available at the time of the application were titled: "Policies regarding development including the construction / reconstruction of buildings and structures and placing of fill and alterations to waterways under Section 28 of the Conservation Authorities Act of Ontario as adopted by Executive Committee dated October 21, 1993 and amended February 21, 2002.

While this policy document has been replaced by its contemporary, it is noted that the relevant policies of the previous document also noted that residential development on vacant lots of record are not permitted, and this application would not meet criteria for exception. It was for those reasons the application was not able to be approved by Staff and was brought to an Executive Committee hearing on November 10, 2004. Staff also note that previous policies were reviewed based on the previous 87.72 masl, which in effect is a more restrictive than current policies.

Provincial Policy Statement, 2020

*3.1.2 Development and site alteration shall not be permitted within:
d) a floodway regardless of whether the area of inundation contains high points of land not subject to flooding*

Staff Recommendation

Approval at a staff level cannot be made for the following reason:

1. The Rideau River is administered as a one zone floodplain, wherein the floodway is considered to be the entire limits of the mapped regulated floodplain.
2. The entirety of the subject land is within the limits of the floodplain.
3. The subject land is considered a vacant lot of record.
4. New development is prohibited on vacant lots of record.
5. The granting of permission will set a precedent.
6. The granting of permission may jeopardize the health of safety of persons or result in the damage or destruction of property.

Any decision by the Executive Committee to approve the proposal should consider the following conditions as part of their direction to staff for administration of permission issuance:

1. That private services be designed and approved in accordance with the Ontario Building Code, to the satisfaction of the Ottawa Septic System Office.
2. That a notice on title be registered with a warning clause advising of the dwelling being located within the floodplain hazard limits associated with the Rideau River floodplain, and that safe access may not be available in an emergency.
3. That a professional engineer certify the designed structure shall meet or exceed the floodproofing standards of the RVCA's Policies Regarding the Construction of Buildings and Structures, Placing of Fill and Alterations to Waterways.
4. That standard permit conditions related to access, inspection and fill placement be implemented.
5. That a permit be approved for up to 2 years from the date of permit issuance.

Discussion

In response to a question from Brian Dowdall, Eric Lalande confirmed that most of the residential buildings in the subdivision were constructed prior to the RVCA's regulations coming into effect.

In response to a question from Judy Brown, Mr. Lalande stated that lots in the area are generally flat and of the same general topographic elevation as they slowly slope towards and out to the Rideau River

In response to a question from Judy Brown regarding safe access, Mr. Lalande confirmed that safe access and egress should be to the residence. He added that there is safe access on Wildlife Way but not at the residence which would be 86.11 metres above sea level or 1.2 metres below the regulated flood elevation.

In response to a question from Anne Robinson regarding changes since 2004, Eric Lalande noted that applications submitted before May 1st, 2006 would be subject to the procedures for the administration of the existing "Fill, Construction and Alteration to Watercourses". The original application was received during the Transitional Period of Ontario Regulation 174/06. The review and approval process of the "Development, Interference with Wetlands and Alterations to Shorelines and Watercourses" regulations was completed on May 6, 2004. The RVCA approved amendments to the regulation policies on February 18, 2010, November 25, 2010, and February 22, 2018 (wetland policies). Staff considers that the transition policies no longer apply in this instance and the application, as submitted, along with new information provided by the applicant in 2021 should be considered under current legislation and regulations. Mr. Lalande added that none of the changes affect this property. He did note that while the wording in

the Provincial Policy Statements of 1995, 2005, 2014, and 2020 changed from “have regard to” to “be consistent with”, the policies themselves did not change.

Staff confirmed that Wildlife Way is a public road.

Chair Leenhouts questioned what “parcel activity” in Exhibit 2 referred to. Eric Lalande clarified that the red stars in Exhibit 2 identify properties where applicants have received permits from the RVCA. These applications are generally minor in nature.

In response to a question from Chair Leenhouts, Eric Lalande clarified that the residences in the subdivision were built prior to RVCA regulations approvals.

The applicant, Morris Kertzer asked whether the RVCA was not permitting a septic system on the subject property because the land was too low?

Morris Kertzer asked whether the RVCA had considered Clause 9 of the subdivision agreement. Victor Heese stated that he was not familiar with Clause 9 of the subdivision agreement and asked that the applicant read the pertinent section. Morris Kertzer read from Exhibit 8: Clause 9 of the Subdivision Agreement between Angus James McDonald and The Corporation of the Township of North Gower dated the 28th day of May, 1962 which states:

“The Owner agrees with the Township to place sufficient fill in each lot on the said plan, to insure that a sufficient portion of the surface of each lot is raised to at least four feet above the established level of the water table for the efficient operation of septic tank disposal systems and such filling of the land shall be to the satisfaction of the Medical Officer of Health. Until this condition has been complied with as aforesaid, the Township shall not be obliged to issue building permits for the erection of buildings on any lot which does not comply with the provisions of this paragraph. No floor of any building will be constructed at a level below 284.5 being the maximum elevation of water level.”

Morris Kertzer referred to Supreme Court of Canada rulings stating that conservation authorities must be flexible and act reasonably. Mr. Kertzer stated that the RVCA was not and has never been flexible. He added that it is common knowledge that the RVCA only turns down applications and never approves them which is against the Supreme Court ruling. He asked if the RVCA considers itself to be above the law.

In response to a statement by Morris Kertzer that this would constitute grounds for appeal, Helmut Brodmann advised that a decision could be appealed to the Mining and Lands Commission now known as the Ontario Land Tribunal.

Helmut Brodmann clarified that the RVCA derives its authority from the Province of Ontario through the *Conservation Authorities Act* and Ontario Regulation 174/06.

Mr. Brodmann noted that the subdivision agreement was dated 1962, four years before the formation of the RVCA. However, provincial regulations supersede subdivision agreements.

Pieter Leenhouts, Chair, thanked Eric Lalande for his information. Chair Leenhouts then asked Morris Kertzer to proceed with his presentation.

Morris Kertzer presented his case.

Exhibit 7 – Location Map – Google Maps - 2295 Wildlife Way

Exhibit 8 - Subdivision Agreement between Angus James McDonald and The Corporation of the Township of North Gower dated the 28th day of May, 1962

Exhibit 9 - Supreme Court of Canada Citation Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 Docket: 37748

Exhibit 10 - Supreme Court of Canada Citation Bell Canada v. Canada (Attorney General) 2019 SCC 66 Docket: 37896, 37897

Exhibit 11 – Supreme Court Case Law excerpts

Morris Kertzer began his presentation with a short review of “a book” that he received in 2004. Mr. Kertzer stated that he was told he would receive a similar book but this time it would be in advance. He stated that he has not received the book.

Morris Kertzer made reference to Exhibit 9, the Supreme Court of Canada ruling which he interpreted as stating that conservation authorities must act reasonably. He then noted the following.

1. The lands in question have not seen a drop of flood water in the last 50 years.
2. His intension was not to increase density. He only wanted his property severed into two lots.
3. He would not have approved the residences that were built in the area.
4. His proposal would result in a waterproofed residence and not just a damp-proofed one.
5. His residence would have a generator and air-conditioning.
6. Services would be located underground.
7. Mr. Kertzer offered as his personal opinion that every residence should have at least two bathrooms. However, when he wanted to install a second bathroom, the RVCA said no.
8. The well company he would use has a positive history.
9. Significant time has been spent on these plans. Mr. Kertzer explained that there is a way to build homes in low areas. He spoke to a property he owned in the United States which was located in a hurricane-prone area. His property was never damaged by hurricanes and he attributed this to his use of strippable caulking which prevented water damage.

Morris Kertzer summarized his application by saying that his house would be built properly, waterproofed and would have a generator.

Mr. Kertzer reiterated that conservation authorities only say no and never work on possibilities or options. Precedent is always bad and never good.

Discussion

Note: Ralph Burwash was sworn in

Ralph Burwash, Contractor, asked why a landowner cannot raise the level of fill to allow safe access from the road to the residence. Eric Lalande responded that adding fill could have an adverse effect on the properties of adjacent neighbours in the event of a flood.

In response to a question from Chair Leenhouts regarding the implication of precedent, Eric Lalande explained that when there is an established hazard, the creation of new development on vacant lots goes against provincial policy. Judy Brown asked whether there were other vacant lots in the area. Eric Lalande responded that there were vacant lots directly to the south as well as vacant lots along the Rideau River.

Paul Francis, Francis Lawyers, questioned why staff are being so rigidly negative when there are six other residences in the area. Eric Lalande responded that those residences already exist, whereas the application as presented is for a vacant lot of record. Current policy prohibits new development on vacant lots of record.

Pieter Leenhouts, Chair, thanked Mr. Kertzer for his information.

Motion 2-210907 **Moved by:** Judy Brown
Seconded by: Victor Heese

That the RVCA Executive move in camera.

Motion Carried

Motion 3-210907 **Moved by:** Judy Brown
Seconded by: Brian Dowdall

That the RVCA Executive Committee members move out of camera.

Motion Carried

Pieter Leenhouts, Chair, stated that the Executive Committee had passed a motion denying the application.

Formal written notice will be provided once the hearing minutes have been prepared. The decision on the application may be appealed directly to the Ontario Land Tribunal within 30 days of receipt of the written reasons.

Motion 5-210907 **Moved by:** Victor Heese
Seconded by: Anne Robinson

That the RVCA Executive Committee move out of Hearing Board and sit as an Executive Committee.

Motion Carried

