

RIDEAU VALLEY CONSERVATION AUTHORITY
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APPROVED MINUTES

Executive Committee Meeting November 10 2022 8:30 pm #6/22

Present:	Brian Dowdall Pieter Leenhouts	Victor Heese
Staff:	Sommer Casgrain-Robertson Sarah MacLeod-Neilson	Terry Davidson Marissa Grondin
Guests:	Scott Reid	
Regrets:	Judy Brown	Anne Robinson

Hearing of Applicant:

File Number: RV1-28/17
Date Received: December 1, 2017

Name: Robyn Mulcahy
Address: 17638 Highway 7, Part Lot 26, Concession 3,
 geographic Township of Bathurst, now in Tay Valley
 Township

Purpose of Development Application:

1. Retroactive permission to construct a 416 ft² building for an art studio as an auxiliary use to the Blueberry Creek Forest School and Nature Center
2. The building as detailed in submitted in drawings titled *New Construction Art Studio*, Project No. 1720, Drawing No. A-1 to A-4, prepared by Laura Hands Design, dated September 7, 2017
3. Development consisting of grading associated with the reconstruction of the accessory structure.

Legal Description of Property:

1. 17638 Highway 7, Part Lot 26, Concession 3, geographic Township of Bathurst, now in Tay Valley Township

1.0 Roll Call and Introductions

The Chair, Pieter Leenhouts, called the meeting to order at 8:30 p.m. The General Manager conducted a roll call and asked for a round of introductions from the applicants and agents.

2.0 Executive Committee to sit as Hearing Board

Motion 1B-221110 **Moved by:** Brian Dowdall
Seconded by: Victor Heese

THAT the Rideau Valley Conservation Authority's Executive Committee sit as a Hearing Board.

Motion Carried

3.0 Declarations of Interest

There were no declarations of interest.

4.0 Chair's Opening Remarks

Chair Leenhouts, outlined the purpose of a hearing under Section 28 (12) of the *Conservation Authorities Act*, R.S.O. 1990 as amended, to Robyn Mulcahy's representative, Scott Reid.

5.0 Administration of Oaths or Affirmations

Brian Dowdall administered the oaths and affirmations. Sarah MacLeod-Neilson representing the Rideau Valley Conservation Authority was sworn in. Terry Davidson representing the Rideau Valley Conservation Authority was sworn in. Scott Reid representing the applicant was sworn in.

6.0 Presentation by RVCA Staff

The following exhibits, information and attached slides were presented by Sarah MacLeod-Neilson.

Exhibit 1 – Case Overview

- RVCA file: RV1-2817
 - Municipal address:
 - 17638 Highway 7, Tay Valley Township
 - Owner: Robyn Mulcahy
 - Development Proposal:

- Retroactive permission to construct a 416 ft² building for an art studio as an auxiliary use to the Blueberry Creek Forest School and Nature Center
- The building as detailed in submitted drawings titled *New Construction Art Studio*, Project No. 1720, Drawing No. A-1 to A-4, prepared by Laura Hands Design, dated September 7, 2017
- Development consisting of grading associated with the reconstruction of the accessory structure

Exhibit 2 – Site Location

- Map of the area pinpointed with a red dot to indicate the location of the accessory structure.

Exhibit 3 – RVCA Hazard Map

- Map of the area depicting floodplain, regulation limit, and area of reduced flood risk. The red square is the location of the property.

Exhibit 4 – Existing Conditions

- Developed lot situated largely within the 1:100-year flood plain of Blueberry Creek and Regulation limit
- Regulated flood level is 136.2 metres above sea level
- Blueberry Creek flows through the southeast portion of the lot, access to the property from Highway 7 is via a wooden bridge over the creek.
- An existing dwelling and accessory building are present, the Blueberry Creek Forest School and Nature Centre is located on the property

Exhibit 5 – Flood Conditions

- A photograph taken on April 8, 2017, at 17638 Highway 7, depicting a wooden bridge for access/egress with floodwater levels reaching the bridge.

Exhibit 6 – Project history [1/2]

- December 1, 2017, application submitted to RVCA
- October 24, 2018, RVCA provided written comments indicating that the application did not meet policy respecting development within the floodplain and at a staff level a recommendation for approval could not be made.
- August 26, 2021, following a series of discussions between RVCA staff and the applicants, revised drawings were received to propose the construction of a storage building in place of an art studio.
- September 7, 2021, preliminary feedback was provided outlining outstanding issues to be addressed before our office could support the revised proposal.

Exhibit 6 – Project history [2/2]

- Aug 23, 2022, it was confirmed that the applicants wished to reconsider the original proposal for an Art Studio Auxiliary Structure to the Forest School and Nature Centre with drawings dated September 7, 2017.
- Sep 12, 2022, RVCA provided written comments indicating that the application did not meet policy respecting development within the floodplain and at a staff level a recommendation for approval could not be made.

Exhibit 7 - Subject Structure

- A photograph taken on November 14, 2017, depicting the Art Studio accessory structure under construction.

Exhibit 8 – Construction Drawings [1/2]

- A drawing plan of the Art Studio at 17658 Highway 7, Tay Valley, Ontario, depicting the foundation slab plan and ground floor plan. Received by the RVCA on December 13, 2017.

Exhibit 8 – Construction Drawings [2/2]

- A drawing plan of the Art Studio at 17658 Highway 7, Tay Valley, Ontario, depicting the front elevation and elevation notes. Received by the RVCA on December 13, 2017.

Exhibit 10 – Hazard Mapping

- Map of area depicting floodplain, regulation limit, and floodplain cross-section and ground elevations.
- Depicts the subject structure and the footbridge to access the property.

Exhibit 11 – Flood Hazard

- Regulated flood level is 136.2 metres above sea level (geodetic)
- Existing grades at the building are approximately 135.5 m geodetic, 0.70 m below the flood level.
- Access to the property is via bridge with the deck at approximately 135 m geodetic, 1.20 m below flood level.

Policy Implications

- The information received in the application was reviewed under RVCA's Development Policies which the Conservation Authority administers under Section 28 of the Conservation Authorities Act
- Specifically, the application was reviewed under:
 - Section 1.1 *General Principles*
 - Section 1.2 *Development within a One-Zone Regulatory Floodplain of a River or Stream Valley*
 - Section 1.4 *Floodproofing*
- The proposed development does not meet the criteria outlined in the noted sections of RVCA's Development Policies

RVCA Development Policies [1/3]

- Section 1.1 General Principles:
 - *d) 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*

RVCA Development Policies [2/3]

- Section 1.2 Development within a One-Zone Regulatory Floodplain of a River or Stream Valley:

- 2. Further to Section 1.1, development shall be prohibited within the 1:100 year floodplain including within areas of reduced flood risk (flood fringe) where the use is:
- *An institutional use associated with hospitals, nursing homes, preschool, school nurseries, day care and schools, where there is a threat to the safe evacuation of the sick, the elderly, persons with disabilities or the young during an emergency as a result of flooding and/or failure of floodproofing measures or protection works.*

RVCA Development Policies [3/3]

- Section 1.4 Floodproofing:
 - 1.4.4 Floodproofing — 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 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.*
 - *Access / egress shall remain dry at all times for institutional buildings servicing the sick, the elderly, the disabled or the young and in buildings utilized for public safety (ie. police, fire, ambulance and other emergency measures) purposes.*

Provincial Policy Statement, 2020

- Section 3.0 Protecting Public Health and Safety
 - 3.1.5 *Development shall not be permitted to locate in hazardous lands and hazardous sites where the use is:*
 - *an institutional use including hospitals, long-term care homes, retirement homes, pre-schools, school nurseries, day cares and schools;*

Exhibit 12 – Notification letter [1/2] and [2/2]

A notification letter was issued by the RVCA on October 24, 2018 informing the applicant that their application submitted on December 1, 2017 does not meet policy requirements for development within the floodplain and at a staff level.

Exhibit 13 – Notice of Violation

A notice of violation letter under Section 28 of the *Conservation Authorities Act* was issued by the RVCA to the applicant on October 24, 2018.

Exhibit 14 – Notification Letter [1/2] and [2/2]

A notification letter was issued by the RVCA on September 12, 2022, informing the applicant that the application does not meet the current local and provincial policy respecting development with the floodplain and that a recommendation for approval cannot be made at a staff level, and only the Executive Committee may grant an exception.

Exhibit 15 – Notice of Hearing

A notice of hearing concerning an application under Ontario Regulation 174/06 for the construction of a structure was issued by the RVCA informing the applicant that under Section 28, subsection 12 of the *Conservation Authorities Act*, R.S.O. 1990 as amended, the Executive Committee of the Rideau Valley Conservation Authority will be meeting to review their application on November 10, 2022.

Conservation Authorities Act

- Regulations by authority re area under its jurisdiction
 - *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.*

Summary

- The development proposal cannot be approved at a staff level due to the following reasons:
 1. The development has the potential to increase risks to public safety during a regulatory flood because the site would be inundated with 0.70 m of water during a regulatory flood.
 2. Safe access/egress is not available. The bridge over Blueberry Creek would be under approximately 1.20 m of water during a 1:100 year flood.
 3. Institutional uses are prohibited in the floodplain.
 4. The granting of permission will be inconsistent with the approved Development Policies amended and approved by the Executive Committee, February 2018, as outlined in a letter from our office dated Sep 12, 2022.
 5. The granting of permission will set a precedent.

Next steps

- Approve the application
- Approve the application with conditions
- Deny the application

Staff Recommendation

- Given RVCA's Development Policies under Section 28 of the Conservation Authorities Act, staff recommend denial of application number RV1-28/17

Chair Leenhouts thanked Ms. MacLeod-Neilson for her presentation. He stated that questions regarding the presentation will be held until after the applicant has had the opportunity to present.

7.0 Presentation by Applicant's Representation

Scott Reid presented the attached statement which was received and circulated to Executive Committee members earlier on November 10, 2022. Mr. Reid stated that he is presenting on behalf of his wife, Robyn Mulcahy, who is not presently in the country. She is the owner of the property at 17638 Highway 7, in Tay Valley Township.

Mr. Reid divided fourteen points into four categories.

First, five pieces of information about the origins of the issue being discussed tonight:

1. Early in 2017 Robyn acquired the property;
2. First, she confirmed that the zoning for the property would permit her to operate a forest school. One of the permitted uses for the property as it was then zoned, was what Tay Valley Township's zoning bylaw refers to as "Community Use." This definition clearly includes activities such as the forest school.
3. It is worth noting that the property was not, at that time, zoned as "Floodplain."
4. In an email to the township's planner (Noelle Reeve), in April or May, Robyn explained her intended use of the property (ie for educational purposes). Noelle forwarded this email to Martha Bradburn at RVCA---so both organizations were aware of the intended use for the property, before any approvals were sought;
5. In September 2017 Blueberry Creek Forest School opened at the property;

Now, five pieces of information regarding the building which is in dispute (the "Studio"):

6. In the summer of 2017, the Rideau Septic System Office granted approval for a septic system for the Studio;
7. Robyn also sought a building permit from Tay Valley Township. Drawings of the Studio were approved and a building permit was granted in September 2017;
8. Construction commenced, until a Stop-Work order was issued in November;
9. At a meeting that took place on the day that the Stop-Work order was issued, the Township's building officer admitted that the Township had made an error in issuing the building permit without consulting the watershed authority;

10. Costs for construction were roughly \$50,000. I can't remember whether this includes the costs that would be involved in tearing down and removing the half-finished structure. I also can't remember whether or not this total includes the cost to install and remove the approved septic system.

Two points that I think are relevant, regarding the dispute over the zoning of the property:

11. In 2018, the Zoning for the property changed, following a change to the Township's zoning bylaw; one aspect of this change to the zoning is that any existing activity on the property which conformed to the old zoning for the property is allowed to continue;

12. In the case of this property, two activities had been commenced under the existing zoning, that might not be permitted under the new zoning: the creation of the Forest School, which opened in September 2017, and the establishing of an Airbnb on the property;

And now two observations about the property itself:

13. The property is not an island, and it would not be an island even in the event of a 1:100 year flood. In the utterly unimaginable scenario that the school is open and children are on the property as the waters in the creek rise towards their 1:100 year crest, the children, accompanied by the teachers who are always onsite, would simply exit the property on foot, to the property to the west or north.

14. During the spring season, alternate arrangements are made anyway, and school takes place offsite.

Mr. Reid also responded to the five points listed by RVCA staff in their written presentation, under the heading, "A staff approval cannot be made for the following reasons."

Reason #1: *"The development has the potential to increase risks to public safety during a regulatory flood because the site would be inundated with 0.70 m of water during a regulatory flood."*

... and ...

Reason #2. *"Safe access/egress is not available. The bridge over Blueberry Creek would be under approximately 1.20 m of water during a 1:100 year flood."*

Response: I'll address both of these together.

I respectfully submit that neither statement is truly correct. As noted in point #13 above and confirmed in the elevation maps submitted by staff, the availability of dry egress from the property during a 1:100 year flood means that the property as a whole conforms with RVCA Development Policy 1.4.4, which states,

Access / egress shall remain dry at all times for institutional buildings servicing the sick, the elderly, the disabled or the young and in buildings utilized for public safety (ie. police, fire, ambulance and other emergency measures) purposes.

Mr. Reid explained how full compliance with Policy 1.4.4 could also be achieved for the Studio.

- a) For starters, I note that on a visit to the property in autumn 2018, RVCA officials suggested to Robyn that she purchase the property to the west, build an access road to the property. So I assume that relying upon the existing egress from the Studio to the higher land at the back of the property is in compliance with RVCA policy.
- b) With regard to the issue of vehicular access, a reading of Policy 1.4.4 does not suggest that the lack of vehicular access during a 1:100 year flood would render the use of the Studio for its intended purpose falls afoul of RVCA policy, since pedestrian access to dry ground would continue. Here is what Policy 1.4.4 states in this regard:

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.

The reference, in Policy 1.4.4, to “pedestrian access routes” makes it obvious that there is no need for vehicular access as well, in order to be in compliance with the policy. Thus, as long as the ability to depart the property on foot is accomplished, the Studio would be in complete compliance with Policy 1.4.4.

- c) Therefore, it is worth noting that the floor level of the Studio, as constructed, is already above the water level during the 1:100 year flood;
- d) If, just outside the west entrance to the Studio, the grade were to be built up, and if the built-up ground were extended to the point at which your maps shows that---even during a 1:100 year flood---there is no water at all, this would mean that egress on foot from the Studio would be possible even during such a flood.
- e) It is also worth noting that even during a 1:100 year flood, the water would be very shallow on the part of the property where, under this scenario, the ground level is built up. This would involve a relatively small placement of new material within the 1:100 year floodplain, which could easily be compensated for by the removal of an equal volume of material elsewhere on the property.

It therefore is the case that while both Reason #1 and Reason #2 make correct assertions regarding the ground level of the site and of the bridge, the associated safety concerns are easily addressed, both in terms of RVCA policy and in terms of the underlying safety issues.

Additionally, it is worth restating here that Robyn would be entirely willing to seek a permit for a higher bridge between the forest school and Highway 7, whether or not the Studio build is approved.

And, as a final note, I observe that it may be the case that the Highway 7 bridge over Blueberry Creek, directly downstream from the property, will be reconstructed. If this happens, it may well be the case that the water levels on the property, during a 1:100-year flood will be lower than under the current survey. I do not have access to the relevant data, but it would be an easy matter for the RVCA to gain access to it.

Reason #3. *“Institutional uses are prohibited in the floodplain.”*

Reason #4. *“The granting of permission will be inconsistent with the approved Development Policies amended and approved by the Executive Committee, February 2018, as outlined in a letter from our office dated Sep 12, 2022.”*

Response: I will deal with both reasons together.

I respectfully submit that at the time the building permit was sought, in 2017, the zoning bylaw did not state that this property is in the floodplain. For that reason, this approved Studio structure should be regarded as being compliant with the permitted uses of the property as of that date, and as being a legal non-conforming use of the land.

Once points 2, 11 and 12 are taken into account, the assertion made by RVCA staff on p. 6 of their presentation, that “A zoning by-law amendment is required to rezone the property to ‘Institutional’ to allow the proposed use,” is incorrect. The property is, in fact, in full conformity with the permitted uses under the zoning for the property, and it always has been.

The same thing may be said about the Development Policies, which to the best of my knowledge would not have applied in a legally-binding manner as of the date that construction commenced, in 2017.

Reason #5. *” The granting of permission will set a precedent.”*

Response: I respectfully submit that the combination of circumstances laid out in points #1 – 14 above is so unusual that it is unlikely that the RVCA will ever face a similar circumstance. Thus, it appears to me that the precedent that your staff worry that you would create by approving this build in the requested manner, would be very limited.

Mr. Reid thanked the Hearing Board.

8.0 Discussion

Chair Leenhouts thanked the applicant’s representative for their presentation and opened the floor to questions.

In response to a question from Victor Heese, Ms. MacLeod-Neilson confirmed that a permit would be required should the applicant want to raise the existing bridge or create a dry walkway to an area outside the floodplain. She also confirmed in response to a follow up question that raising the bridge was not proposed in the application received by the RVCA.

In response to a question from Victor Heese regarding Mr. Reid's statement about the structure being a legal non-conforming use, Mr. Reid confirmed that he could verify that the forest school commenced operation in September 2017 but would need time to find the information. .

In response to a question from Victor Heese, Mr. Reid confirmed that the Stop Work Order issued by the municipality was for two reasons. First because the building, as constructed, was not fully conforming with the approved drawings. Second, the building location is in the floodplain and a permit should not have been issued by the municipality without consulting the Rideau Valley Conservation Authority.

Mr. Reid referred to point 3 in his statement and stated that at the time of construction the area was not zoned as a floodplain, however, he could not remember if that was stated in the Stop Work Order, but it was mentioned at his meeting with the municipality. Mr. Reid believes the municipality de-emphasized their mistake once they realized the financial cost and misdirected their failure by later stating that it was a zoning issue.

Sommer Casgrain-Robertson, RVCA General Manager reminded the Hearing Board that this hearing is under Section 28 of the *Conservation Authorities Act*, and therefore the decision of the Hearing Board has to be made based on the tests outlined in the Conservation Authorities Act, and that zoning matters are a municipal issue..

Terry Davidson, Director of Engineering and Regulations clarified that the most recent floodplain mapping along the Tay River was approved by the RVCA Board of Directors in 2013 and has been in place since early 2014. Mr. Davidson also stated that floodplain mapping of the Tay River was first completed in 1981.

Chair Leenhouts called for questions from Mr. Reid. Mr. Reid had no questions.

9.0 Hearing Board to move In Camera

Motion 2B-221110

Moved by:

Victor Heese

Seconded by:

Brian Dowdall

THAT the Rideau Valley Conservation Authority's Hearing Board move in camera.

Motion Carried

10.0 Hearing Board to move out of Camera

Motion 3B-221110

Moved by:

Victor Heese

Seconded by:

Brian Dowdall

THAT the Rideau Valley Conservation Authority's Hearing Board members move out of camera.

Motion Carried

11.0 Chair to advise of Hearing Board decision

Motion 4B-221110

Moved by:

Victor Heese

Seconded by:

Brian Dowdall

THAT the Rideau Valley Conservation Authority Hearing Board deny the application as submitted to the conservation authority for the following reasons:

1. The development has the potential to increase risks to public safety during a regulatory flood because the site would be inundated with 0.70 m of water during a regulatory flood.
2. Safe access/egress is not available. The bridge over Blueberry Creek would be under approximately 1.20 m of water during a 1:100 year flood.
3. Institutional uses are prohibited in the floodplain.
4. The granting of permission will be inconsistent with the approved Development Policies amended and approved by the Executive Committee, February 2018, as outlined in a letter from our office dated Sep 12, 2022.
5. The granting of permission will set a precedent.

Motion Carried

Chair Leenhouts advised the applicant's representative that the Hearing Board has passed a motion, the effect of which is to deny permission. This decision of the Executive Committee of the Rideau Valley Conservation Authority on the application as filed with the Conservation Authority is final. The applicant's representative was told they will be informed of the reasons once the hearing minutes have been prepared (usually within a week). Formal written notice will be provided in accordance with Section 4.2 of our Hearing Procedures (meaning registered mail or other means where proof of receipt is provided). They may also appeal the decision on their application directly to the Ontario Land Tribunal within 30 days of receipt of the written reasons.

12.0 Hearing Board to sit as Executive Committee

Motion 5B-221110

Moved by:

Brian Dowdall

Seconded by:

Victor Heese

THAT the Rideau Valley Conservation Authority's Hearing Board sit as an Executive Committee.

Motion Carried

13.0 Approval of Previous Executive Committee Meeting Minutes on July 28, 2022

Motion 6B-221110

Moved by:

Victor Heese

Seconded by:

Brian Dowdall

That the Executive Committee Meeting minutes of July 28, 2022 be approved as circulated.

Motion Carried

14.0 Adjournment

The meeting adjourned at 9:29 p.m. on a motion by Victor Heese that was seconded by Brian Dowdall.

Pieter Leenhouts
Chair

Marissa Grondin
Recording Secretary