ISSUE DATE:

March 09, 2012

PL110845

Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Rideau Valley Conservation Authority
Applicant:	Carrie Anne Hamilton
Subject:	Minor Variance
Variance from By-law No.:	2008-250
Property Address/Description:	26 Burland Street
Municipality:	City of Ottawa
Municipal File No.:	D08-02-10/A-00221
OMB Case No.:	PL110845
OMB File No.:	PL110845

APPEARANCES:

Parties

Rideau Valley Conservation Authority	T. Fleming
Carrie Anne Hamilton	

DECISION DELIVERED BY M. C. DENHEZ AND ORDER OF THE BOARD

1. INTRODUCTION

This hearing, about a variance for construction in a floodplain, was part of a larger legal dispute on three fronts, including this Board, the local Conservation Authority, and the Courts.

Ms Carrie Anne Hamilton (the Buyer) bought a supposed building lot from Mr. Christopher Holloway (the Seller) on Burland Street in the City of Ottawa (the City). The real estate listing called it "Site Plan Approved", and according to her uncontradicted testimony, she purchased "after receiving assurances from the previous owners and real estate agent… that approval for residential construction had been granted and a building permit application was on file awaiting issuance to a new owner".

That information was incorrect on two counts:

- The lot was in the floodplain of the Ottawa River; according to engineering studies, a hundred-year flood would put Burland Street under a half-metre of water. The applicable planning documents (including the Zoning By-law) limited prospects for future development dramatically.

- Although the Seller had indeed been "grandfathered" on his *own* application to build, that permission plainly specified (in writing) that it was non-transferable to the Buyer.

The Buyer had several possible recourses. One was to the Courts. Another was to request permission from the Rideau Valley Conservation Authority (RVCA) for separate approval to build in the floodplain, under different legislation; but the RVCA was clearly opposed. A third was to apply for a variance to build in the floodplain notwithstanding the Zoning By-law; that is the subject of this proceeding.

City planning staff did not support it. The Committee of Adjustment (COA) decided, however, that in its "discretion", this was a "unique" situation, calling for those planning rules to be "tempered". The COA authorized the variance – which was then appealed to the Board by the RVCA.

At the hearing, the RVCA was represented by Counsel, and called three expert Planners to testify that the variance was contrary to the planning documents. One of those experts was a City Planner testifying under summons from the RVCA; the City did not otherwise attend.

The Buyer was not represented by counsel, and called no witnesses other than herself; but she presented a methodical paper trail on how the situation had arisen, reflecting a thorough understanding of the issues.

The Seller also attended, as a Participant unrepresented by counsel. He supported the COA decision. He had also been present during the Buyer's oral testimony about his assurances at the time of sale; but he chose not to raise a single

word of contradiction – nor did the Buyer ask him a single question on cross-examination.

The Board has carefully considered all the evidence, as well as the submissions of both sides, including the Buyer's 25-page written argument. Although the Board agrees that the project has attractive features, the Board finds that the status of the floodplain, and its treatment under the planning documents, were at all relevant times a matter of public record. The Provincial Policy Statement (PPS) bans such development in the floodplain, and the City's Official Plan does likewise. With all possible sympathy to the Buyer, the Board concludes, as the experts did, that the *Planning Act* does not authorize the Board to reach a decision overtly inconsistent with the above. The RVCA appeal is allowed accordingly. The Board notes, with interest, that the RVCA Director of Planning's recommended course of future action, at least for public authorities, would be to study opportunities for floodproofing the neighbourhood. The details and reasons are set out below.

2. PROJECT AND HISTORY

2.1 Physical Context

The subject property is at 26 Burland Street. The neighbourhood (called Belltown, near the Lac Deschênes Reach of the Ottawa River) has been settled for a century. Gradually, a loose collection of modest summer cottages has been replaced by substantial urban homes.

The floodplain was mapped in 1984, as part of a large Federal-Provincial engineering research project. Despite multiple dams on the Ottawa River, the level of Lac Deschênes fluctuates. It sometimes falls below 57.5 metres geodetic; but since 1950, there were 25 occasions when it rose above 59.5 metres, and the "hundred-year flood" level (1:100 flood) was projected at 60.8 metres. In comparison, the crown of the road (Burland Street) in front of the subject property is at 60.28 metres geodetic – meaning that in a 1:100 flood, Burland was expected to be a half-metre underwater. Indeed, on this and surrounding streets, the 1984 floodplain mapping indicated some 80 Belltown homes within that floodplain boundary. That mapping is currently reproduced

at Schedule K of the City's Official Plan (OP), and in both the previous and current Zoning By-laws.

Ottawa is no stranger to flooding. Part of the response has been structural: in neighbourhoods like Windsor Park and Brewer Park, flood control facilities were erected to mitigate risk. However, there is no official dyke system for Belltown. There is a conspicuous raised bicycle path (bikeway) belonging to the National Capital Commission (NCC), atop a former railway roadbed near the water; it is entirely above the flood plain (according to an NCC communication in evidence – Exhibit 6, Tab 20). However, it was said to have one or more culverts. In testimony, the RVCA's Director of Planning said that the bikeway's prospects for dyke purposes were unknown, and that despite its prominence, and the known flood risk in Belltown, this bikeway had never been studied for its floodproofing potential. In contrast, the Buyer's written evidence (Exhibit 6, page 9) suggested that Environment Canada considered the primary flood risk from Lac Deschênes to be further downstream (in Britannia Village), and that the bikeway's floodproofing potential had been considered, and appeared promising. However, that did not change the existing floodplain mapping.

In still other neighbourhoods, the response to the flood threat was not structural, but legal/regulatory, with restrictions on construction. For property near the Ottawa River, said the RVCA's Director of Planning, the RVCA is routinely asked whether real estate transactions are affected by the floodplain rules: "We receive hundreds of letters from lawyers with questions, before the deal closes".

That regulatory system can be divided into two eras: pre-2005/06, and post-2005/06, with distinct legal regulatory/treatment under Provincial policy, and under both the City's OP and zoning.

2.2 The Old Floodplain Regime

Pre-2005/06, under what the Board will call "the old regime", the Ontario land-use system was guided by the 1997 version of the PPS. According to the *Planning Act* at the time, decisions of the COA (and of this Board) had to have "regard" for Provincial policies, like those in the PPS, but were not unequivocally bound by them.

That included the 1997 PPS policies for "floodways":

> 3.1.2 Development and site alteration will not be permitted within:
>
> c. a floodway, except in those exceptional situations where a Special Policy Area has been approved.

The PPS glossary added that a "floodway" meant "the portion of the floodplain where development would cause a danger to public health and safety or property damage. Where the one zone concept is applied, the floodway is the entire flood plain". The Belltown floodplain is not a "Special Policy Area" (Provincially-designated), nor is it in a "two-zone concept" flood area; it is a "one-zone concept" flood area – meaning that the entire Belltown floodplain would *all* be considered "floodway" where development and site alteration would "not be permitted".

However, since the PPS was not entirely binding at the time, Ottawa's own planning documents had leeway to take a less stringent view, notably the Zoning By-Law (dating from 1998). It contained a "Floodplain Overlay" (the By-law duplicated the 1984 mapping). It banned some uses in the floodplain – but not residential. Instead, it inserted the following "Note" at Section 12, with the ambiguous statement that Conservation Authority permission "*may*" be required:

> Development in a floodplain is regulated under the *Conservation Authorities Act* and, in addition to a building permit from the municipality under the *Building Code Act,* ***may*** require a permit from the conservation or other authority having jurisdiction over the floodplain. [Emphasis added]

The RVCA's own legislation, however, did not make RVCA permission a prerequisite at the time. Indeed, the RVCA did not issue any binding decisions about construction in the floodplain; instead, on an application for a building permit, the RVCA would issue a "Letter of Advice" (LOA) – confined to the single subject of floodproofing. The Board was told that it was also standard practice of the RVCA to insert two clauses into every LOA. The first was a two-year time limit for development:

> This letter of advice is valid for a maximum period of 24 months after it is issued and shall not be extended.

The second was about non-transferability:

> This letter of advice shall not be transferred to any other party.

2.3 The New Floodplain Regime

This "old regime", however, was about to change. In 2005, the *Planning Act* was amended: instead of COA and Board decisions merely needing to have "regard" for the PPS, they now had to be "consistent with" it. In short, the PPS became entirely binding. The PPS wording also changed, leaving no room for doubt about its ban on development within floodplains:

> 3.1.2(b) Development and site alteration shall not be permitted within... the one hundred year flood level…

In 2006 the Province also enacted *Ontario Regulation 174/06, Rideau Valley Conservation Authority Regulation of Development, Interference with Wetlands and Alterations to Shorelines and Watercourses (O. Reg 174/06)*, mandating the RVCA to issue binding decisions about development in floodplains, not just "Letters of Advice".

Provincial initiatives also prompted changes to Ottawa's OP and Zoning By-law. At Section 4.8.1, the City's new OP included extensive provisions for floodplains, including a requirement for RVCA permission under *O. Reg. 174/06*:

> 3. The City will not permit any building, structure or septic system in a flood plain, regardless of the underlying designation, except:
> a. In accordance with policies 4, 5 and 6 of this subsection;
> c. Repairs and minor additions.…
>
> 4. …Through a zoning by-law amendment.
>
> 5. …The zoning by-law may permit repairs, minor additions, and new construction, provided that:
> a. The zoning by-law… has given consideration to the need to issue a permit under (*O. Reg. 174/06*) prior to the issuance of a building permit;
> b. The proposed development is permitted on Schedules A and B.
>
> 6. The City may request the Conservation Authority… to give consideration to further defining the flood plain as two distinct zones, the "floodway" and the "flood fringe".
>
> The floodway is defined as that area where development would not be permitted due to depths and velocities of floodwaters.

Reg Authority to seek two-zone system

> The flood fringe is defined as that area where depths and velocities of floodwater may be safely overcome.
>
> Where the two-zone approach is applied, development may be considered in the flood fringe, subject to review and approval by the City and the Conservation Authority.
>
> 7. All new development and infrastructure in the flood plain will be subject to the approval of the appropriate Conservation Authority, in accordance with the applicable provincial legislation.

The City did not initiate any steps toward a "two-zone concept" for Belltown.

In another chapter of the OP, the City appeared to temper the above restrictions with the following, at Section 5.3.2:

> Irrespective of any other policy in this Plan, an individual has a right to develop a single-detached dwelling on a lot of record…, if the lot was created under the *Planning Act* prior to the date of adoption of this Plan, if the zoning permits the use….

But did the zoning "permit the use"? In 2008, the City also adopted new Zoning By-law 2008-250, which did not permit uses (with few exceptions) in floodplains:

> 58. The following provisions take precedence over the provisions of the underlying zone. They apply to land uses within an area affected by a flood plain overlay in order to restrict development in a floodplain area to minimize the threat of injury or loss of life… where flooding may compromise the ability to deliver essential services, or where flooding may cause unacceptable risk of property damage.
>
> (1) Despite the provisions of the underlying zone or other zoning provisions of the Zoning By-law, development is prohibited within any area subject to a floodplain overlay.

As mentioned, there were exceptions, such as a change of use, an accessory structure, or an addition of 20 metres or less; but none of those exceptions would allow a new house. The new regime was stricter than the old. Furthermore, in accordance with the OP, the Zoning By-law specified unambiguously that to obtain a building permit, permission from the Conservation Authority was now necessary:

> Development in a floodplain is regulated under the *Conservation Authorities Act* and, in addition to a building permit from the municipality under the *Building Code Act,* ***will*** require a permit from the conservation or other authority having jurisdiction over the floodplain. [Emphasis added]

The RVCA also changed practices. For applications arriving after the date when *O. Reg. 174/06* took effect (May 4, 2006), the RVCA discontinued sending an LOA. However, it would send an LOA, in accordance with the "old regime", for applications that had arrived *before that deadline,* i.e. those that were "grandfathered".

To recap, the PPS policies under the old regime were not entirely binding; they became binding under the new regime. Furthermore, the RVCA summarized its change of practices, in its report to the COA:

> Before May 2006, the City of Ottawa required that the RVCA review the engineered floodproofing component of building plans and prepare a letter of advice (LOA) prior to the approval of any building permits on a property in the floodplain. An LOA is a purely technical review of the floodproofing design, it expires after two years, and it does not address any land planning or regulatory policy.
>
> After May 2006, a permit from the RVCA under O. Reg. 174/06 has been required prior to receiving a building permit approval from the City.

2.4 Initiatives by Mr. Holloway (the Seller)

The Board was told that in November 2005, the Seller acquired both

- the subject lot at 26 Burland Avenue,
- and the abutting lot at 24 Burland, closer to the river.

Both were lots of record, but an old car mechanic's shop straddled them both – an isolated commercial use in this mainly residential neighbourhood. That enterprise, and its building, disappeared.

In early 2006, in anticipation of *O.Reg. 174/06*, the RVCA took measures to let the public know that its practices were about to change. In particular, said the RVCA Director of Planning, it notified lawyers practicing real estate law, and various others, of *O.Reg. 174/06* and its start date of May 4, 2006. Not surprisingly, "several applications came in just before May 4, 2006", and were "grandfathered" accordingly, meaning that they did not require RVCA permission under *O.Reg. 174/06.*

Those applications included Mr. Holloway's. In April, 2006, just before *O.Reg. 174/06* took effect (and before the new OP and Zoning By-law took effect). Mr. Holloway applied for projects on *each* of the two lots:

- **Subject property, 26 Burland:** Mr. Holloway applied for a Building Permit.
- **Abutting property, 24 Burland:** Mr. Holloway also applied for a Building Permit – this time to build a house for himself, directly facing the river. (In due course, his house was built).

This would leave the subject property facing Burland Street, surrounded by dwellings on the other three sides.

Mr. Holloway duly received an LOA consistent with the old regime. The two-page letter, dated August 2, 2006, contained a bulleted list of points, including the two prominent specifications about the LOA being "valid for a maximum period of 24 months", and not being "transferred to any other party". However, the LOA went further, adding the following (bold in original):

> **This new construction may not be in conformity with policies approved for use under the Planning Act as access would appear to be a constraint on Burland Street during a flood event.**

It also added:

> This letter does not relieve you of the necessity or responsibility for obtaining any other permits that may be required for this type of work.

Mr. Holloway apparently went on to build his own house at 24 Burland. As for the subject property, the RVCA's report to the COA said his application for 26 Burland went nowhere:

> (He) requested a review by the RVCA of the floodproofing design for a residence at 26 Burland St. on April 3, 2006, just prior to the regulations (O. Reg. 174/06) being put in place, and was issued an LOA on August 2, 2006…. A building permit was applied for on May 1, 2006, and has been pending,

> deemed incomplete, since that time for outstanding issues, including lot grading and drainage plans, deficiencies under the Ontario Building Code, and the zoning review has been deferred. Ultimately, the building permit process was never completed and the LOA from the RVCA expired on August 2, 2008 with no option to extend it.

Indeed, the Board heard of no record of any permit, of any description, in any official capacity, being issued for the subject property. There was certainly something called a "Site Plan" in evidence (Exhibit 6, Tab 1D, a bungalow by "Miroca Design") – dated April, 2006 – but with no indication that it (or anything else) had been "approved".

That property was, however, put up for sale. The real estate listing (2007) was submitted in evidence (upper case in original):

> Site plan approved.
>
> 26 BURLAND IS A GREAT LOCATION NEXT TO BRITANNIA BAY ON A CUL-DE-SAC. VIEW OF OTTAWA RIVER AND NEXT TO BIKEPATHS. PARKLIKE CONDITIONS. BUILD YOUR DREAM HOME WITH A VIEW OF OTTAWA RIVER. ENVIRONMENTAL AND APPRAISAL INFO ON FILE. SITE PLAN APPROVAL AND BUILDING PERMIT DOCUMENTS ON FILE.

The Buyer's account of the lead-up events was described in writing; the following account was also read aloud at the hearing:

> I purchased 26 Burland Avenue in May 2007 after receiving assurances from the previous owners and real estate agent acting on their behalf that approval for residential construction had been granted and a building permit application was on file awaiting issuance to a new owner when any possible design changes had been confirmed and construction was set to begin.

She said the Agreement of Purchase and Sale had been handled with all appearances of professional due diligence. She said:

> No limitations were brought to my attention by any of these professionals or the previous owners as to the potential for me to build a residence on this property…. The legal opinion was given that I had acquired good and marketable title.

On the subject of professional due diligence, the RVCA report to the COA expressed some puzzlement:

> At the time of purchase (May 2007), information relating to the Conservation Authority regulations as implemented in May 2006, on the property, and the direction contained in the 2005 Provincial Policy Statement were available from the RVCA if they had been requested through a standard property inquiry initiated by purchasers or lawyers representing the purchaser of a property.

For good measure, the Buyer also started receiving property tax bills from the City, clearly computed on an appraisal based on full development potential.

2.5 Initiatives by Ms Hamilton (the Buyer)

The Buyer acquired the property as a serviced building lot in May, 2007, for $153,000. Her apparent intention was to build a bungalow for herself, along the lines of what purported to have been “approved”.

She said she learned of the floodplain overlay only in November 2008 – and then, only from of third party. When she approached the City to obtain the "building permit documents on file" and other documents as indicated in the real estate listing, she was denied access, on the grounds of privacy. She said that when she then asked the Seller for his authorisation to access that file, he demanded thousands of dollars.

As the reality of the legal situation eventually unfolded, she agreed to floodproofing the house. To normalize the zoning situation, one of her legal options was an application for a variance, for relief from the Zoning By-law. Her application was specifically to build a new single detached residence in the floodplain overlay area.

When the application was circulated, the RVCA said a report directly to the COA, advising of its opposition:

> The Official Plan and the 2005 Provincial Policy Statement to not permit development within the floodplain.

City Planning staff, for its part, told the COA that it agreed with the RVCA:

> Section 4.8.1 of the Official Plan requires written permission from the Conservation Authority for development in the floodplain. In the absence of such permission, the Department supports the Rideau Valley Conservation

Authority and its objection to this proposal.

On the other hand, the Buyer had the support of the local City Councillor, who observed that this infill project in an empty lot would complement the "feel and style" of the street. The COA reached the following conclusion:

> The Committee is aware of the many policies that are in place to preclude development in floodplains. However, the Committee has also been made aware of the unique reasons associated with this application that requires some exercise of discretion… Policies that have been put in place for all the best reasons do, from time to time, have to be tempered by considerations of fairness and, particularly in this situation, the appropriateness of the application within the context of the surrounding community…
>
> There are already many surrounding dwellings located in the floodplain overlay…. The proposal to build a new single dwelling in the style of the other properties in the area, on what is presently an unsightly vacant lot, will improve the neighbourhood and help complete the fabric of the community….
>
> Excluding only the floodplain issue, the proposal meets the spirit of all four tests set out in the *Planning Act* for minor variances….
>
> The owner, through her presentation and correspondence, has demonstrated that this is a unique situation and has provided sufficient reasons for the Committee to exercise the kind of discretion that is not available to the staff of the commenting agencies and to grant the requested minor variance. By doing so, the Committee hopes to expedite the process for the owner to seek further special consideration from the Conservation Authority… without such consideration being summarily dismissed on the grounds of non-compliance with the zoning by-law.

That is the decision now under appeal by the RVCA.

3. APPLICABLE CRITERIA

For variances, the criteria (often called “the four tests”) are set out at Subsection 45(1) of the *Planning Act,* namely that a variance from the applicable By-law may be authorized if it is minor, desirable for the appropriate development or use of the property, and maintains the general intent and purpose of both the Zoning By-law and of the Official Plan.

Under Subsection 3(5) of the *Planning Act*, a decision on such a matter must be consistent with Provincial statements issued under Subsection 3(5), as the PPS was:

> A decision of the council of a municipality, a local board, a planning board, a minister of the Crown and a ministry, board, commission or agency of the government, including the Municipal Board, in respect of the exercise of any authority that affects a planning matter… shall be consistent with the policy statements issued under subsection (1) that are in effect on the date of the decision….

4. OBSERVATIONS AND FINDINGS

4.1 Introduction

The Board's first question is: why is this dispute before this Board?

Superficially, one would expect it to be debated elsewhere, for two reasons. First, disputes concerning alleged misrepresentations during a real estate transaction are quintessentially the purview of the Courts, not of this Board.

Second, the Buyer acknowledged throughout these proceedings that RVCA approval was indispensable to this project. Even if the Board agreed with the COA, and authorized the variance, construction could still not proceed without that approval; the Buyer knew that, and the COA knew that.

The matter could apparently be taken to the Executive Committee of the RVCA, with a further possible appeal to the Mining & Lands Commissioner under other legislation. Since RVCA authorities appeared intractably opposed to any such approval *ever* being granted, why were the current variance proceedings carried to this point, when (at least according to the RVCA) the project would have been *independently* doomed anyway? By that reasoning, the entire venture appeared moot.

However, the Board does not consider the question moot – not only because the Board has a statutory mandate, to adjudicate this appeal under subsection 45(12) etc. of the *Planning Act*, but also because the Board's findings, on the applicable land-use regime (a topic long recognized as within this Board's particular purview) may be of assistance in other proceedings.

4.2 Recap of the Positions

The Buyer's predicament was clearly expressed:

> In addition to my $153,000 capital outlay, interest only mortgage payments and residential property taxes amount to an annual carrying cost of approximately $6000. Based on my monthly income, this amount is virtually all of the funds remaining after other cost-of-living expenses are paid. For the past five years, I have diligently made these payments without the opportunity to make use of this property whatsoever. The potential to sell the property has been unavailable due to the restrictions placed on this land. I cannot even liquidate this property in the event of an emergency, such as loss of income or illness.

Weighed against that is the PPS, reflecting two longstanding concerns with flooding:

(a) One is the flooding of property: it causes property damage, and potentially threatens personal safety.

(b) The other is the flooding of streets, which obstructs emergency vehicles, with further implications for personal safety.

An individual property-owner can undertake floodproofing measures for (a), but not (b).

According to the paper trail, a 1:100 flood would immerse Burland Street in over a half-metre of water at the crown (deeper at the edges). The RVCA Director of Planning testified that a depth of 0.30 metre was usually considered the maximum safe depth at which many emergency vehicles could operate. He added that in Ottawa, officials had actually done measurements, and determined that, on Burland Street in a 1:100 flood, emergency vehicles' exhaust systems could be underwater. That was contrary to established standards. A report in evidence was *River & Stream Systems: Flooding Hazard Limit,* by the Ministry of Natural Resources. It explained:

> 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.…
>
> Difficulty would probably be experienced in starting most vehicles if the vehicle was standing in water at a depth that covers the muffler.…
>
> Emergency vehicles operate under the same constraints relating to the

> electrical/exhaust system. Most police vehicles and ambulances would be limited by exhaust considerations….

The core of the RVCA's case, however, was that the proposal was not consistent with the PPS, and was hence precluded by the *Planning Act*, which insists on such consistency. In response, the Buyer referred not only to her circumstances; she also advanced *bona fide* planning arguments:

- It was incongruous that the Seller was able to build a house *closer to the river*, whereas the Buyer was not allowed to build at all.

- There was currently a gap tooth appearance to the streetscape. It would be equally incongruous for a lot like this – a lot of record – to stand vacant in a built-up neighbourhood. The better solution, as the COA said, would be to "complete the fabric of the community" by filling in that blank.

- Her proposed new house would, as the Councillor said, complement the "feel and style" of the street.

- Most importantly, the floodplain mapping overestimated the risk:

    - According to voluminous Environment Canada data in evidence, she said, the primary flood risk from Lac Deschênes was further downstream; she raised the question of whether the flood risk *specific to Belltown* had been overestimated;

    - The remedial potential of the bikeway, she said, had been underestimated;

    - Large emergency vehicles might still be able to make their way along Burland Street in a flood (and even if they could not, the local fire station was equipped for "water rescue").

She summarized the risk question as follows:

> In 100 years, how many times does the average household call 911 requiring assistance to an emergency at their home? What is the probability that this would occur at the same time as a possible flood which came about without any warning? The answer is virtually nil. With respect to access to and egress from the property during a possible 1:100 yr flood, would this be impossible? No.

By her reasoning, her proposal met the purpose of the planning documents, including the PPS. She added that in a city where (by her count) 1800 digressions from various By-laws had been authorized in recent times, one more would not be fatal.

By far the largest apparent issue for the COA, however, was what it called the "fairness" question. The COA clearly found the Buyer's predicament unconscionable, crying out for a resolution.

This led the COA to conclude that “policies that have been put in place for all the best reasons do, from time to time, have to be tempered by considerations of fairness”, adding that “excluding only the floodplain issue, the proposal meets the spirit of all four tests set out in the *Planning Act”*.

4.3 Options

It was clear to all concerned that a variance was not the Buyer's only option. As mentioned, the Buyer was also expected to apply directly to the RVCA for approval, though that prospect was not promising. Another more obvious option was to pursue "civil remedies" concerning all aspects of the purchase, via the Courts.

Other legal/regulatory options were also mentioned, to circumvent legal problems in the Belltown floodplain – by renaming it. One was to designate Belltown a "Special Policy Area" under the PPS; that would permit some development – but would need approval of one or more Provincial Ministries. Another was to apply a "two-zone concept", meaning that although development would continue to be restricted in the "floodway" (to be redrawn more narrowly), some development might proceed along the "flood fringe". It was not clear, however, whether this arrangement would solve the Buyer's problem; furthermore, the RVCA's Planner said this arrangement could only be pursued on the City's initiative.

A more direct solution – far preferable to an exercise in re-labelling, according to the RVCA's Director of Planning – would be to tackle the fundamental problem, via flood control. Counsel for the RVCA agreed that one recourse would be "to undertake a planning exercise to alleviate the safety issue… But that exercise has not yet taken place…. Let that process occur: that's the only prospect that can allow the development of this lot". The RVCA evidence included a letter of opinion from the Eastern Ontario Manager of Community Planning & Development, for the Ministry of Municipal Affairs and Housing:

> If new development and/or redevelopment is desired by the municipality in the Belltown area, it is recommended for the Official Plan to be revised and the necessary infrastructure upgrades or mitigation measures be undertaken to support development in this area….

The first step would be to study the NCC bikeway's potential as a dyke. "My preferred option", the RVCA Director of Planning concluded, "is to see whether the berm can become a flood control measure". If that were feasible, this might allow Belltown to be reclassified as an "area of reduced flood risk" – like Brewer Park or Windsor Park – with increased development potential accordingly.

Although the Board was told that Provincial financial support for such initiatives is not what it used to be, the cost-benefit appears interesting. Assuming the berm is structurally sound, the cost of converting it into a true dyke might be reasonable. In terms of benefits, the Board can only guess at what this could mean for insurance premiums for homeowners in Belltown. It could also have positive implications for the City, as the Buyer herself pointed out: there is currently a logical inconsistency in the City purporting to collect taxes on properties, based on assessment of their highest-and-best legal use – if that use is legally fictional.

Such assessment, parenthetically, is in the hands of the Municipal Property Assessment Corporation (MPAC), not the City; but the City depends on the revenue. When the Buyer asked the City's Planner how the City could collect taxes on a use that was not legally feasible, he replied: "I don't know the answer to that…. That doesn't make sense to me either". The prospect of revisiting the assessment – pending a

physical solution to the flood problem, as alluded to by the RVCA Director of Planning – is another option that was mentioned.

4.4 Board Findings

The Ontario planning system is described by the PPS as "policy-led". It is not discretionary. The *Planning Act* specifies factors which must be taken into account, as a matter of law. It adds, at subsection 3(5)(a), that decisions must be “consistent” with the PPS.

COA, OMB do not have discretionary powers under the PPS

On this appeal, the RVCA argued that the COA did not have the jurisdiction, let alone the "discretion", to issue a decision that was overtly not "consistent" with the PPS. Neither, for that matter, did this Board. On the plain wording of the statute, the Board is compelled to agree.

PPS Policy 3.1.2(b), with which the Board’s decision must be "consistent", contains a ban on development in the "one hundred year flood level". The rationale is partly to ensure access by emergency vehicles. The Buyer did not dispute that; instead, she argued that such access would still exist (even, if necessary, by boat). The only one to dispute the underlying rationale was the Seller, Mr. Holloway, testifying as a Participant. He said this threat to access should not be a crucial impediment, because other factors can also impede access, like snowstorms. If the threat of snowstorms did not deter development, he reasoned, then perhaps the threat of flooding should not either. He concluded that development here should proceed: the alternative, he said, meant "expropriating the value of that house without paying for it".

The Board was singularly unconvinced by that argument. As a matter of law, the Province enacted a binding PPS Policy restricting development on lands vulnerable to flooding. It enacted no such policy for lands vulnerable to snowstorms (which would have disqualified all of Ontario).

The Board attaches more weight to other arguments. The Board happens to agree with the COA and the Councillor, when they said that, aesthetically, the appearance of the proposed home would be a good fit with the neighbourhood. The

Board also attaches particular weight to the evidence about mitigating the flood risk. That evidence came from both sides. The Buyer had compiled impressive data on how the prospects for Belltown could be reconsidered; and the RVCA Director of Planning alluded to a potential strategy for such a reconsideration, starting with the bikeway. The Board was impressed by both sides on that account.

The problem is that the above is strictly a future hypothesis. In the meantime, the floodplain is still legally what the planning documents say it is.

The risk of flooding by Lac Deschênes has been known since time immemorial. The floodplain has been mapped since 1984; and it is illustrated at Schedule K to the OP, and in the Zoning By-law itself. The Board finds that statements in the paper trail like “Site plan approved”, or “building permit documents (are) on file”, and invitations to “build your dream home”, were clearly at odds with the realities of the applicable planning regime.

The COA had said that "excluding the floodplain issue, the proposal meets the spirit of all four tests in the *Planning Act* for minor variances". The Board agrees, but the problem is that, in law, one *cannot "exclude the floodplain issue*". The PPS would not allow it to be excluded.

As for the exact location of the floodplain (which, in Belltown's case, is officially classified as a "floodway"), the Board is not at liberty, in a variance application, to rewrite the OP, let alone the PPS. As long as this area remains categorized as a "floodway", there is simply no legal way to authorize this project without running afoul of the PPS, and hence the *Planning Act* – notwithstanding the cogent planning arguments cited by the COA and the Councillor. For that reason, the Board is compelled to allow the appeal, and to conclude that the variance is not authorized.

The Board offers no opinion concerning the Buyer's civil remedies. As for the question of assessment and property taxes, the Board is no more capable of understanding the logic of those tax bills than the City's Planner was; however, that is again a matter for another forum.

Finally, the Board notes the "preferred option" of the RVCA Director of Planning. Measures to re-label the area will not solve the fundamental problem. He spoke instead of producing an actual physical/structural solution for Belltown as a whole. Given the prominent presence of the existing NCC bikeway, there appear to be opportunities at hand, which deserve consideration. The Board can only comment that it is not in the public interest that situations like the Buyer's be repeated, or that the underlying problem be left unattended indefinitely. That would not be "planning".

5. CONCLUSION

THE BOARD ORDERS that the appeal is allowed, and the variance is not authorized.

It is so Ordered.

"M.C. Denhez"

M. C. DENHEZ
MEMBER