File No. CA 003-05

H. Dianne Sutter	)	Wednesday, the 27th day
Deputy Mining and Lands Commissioner	)	of May, 2009.
Linda Kamerman	)	
Mining and Lands Commissioner	)	

THE CONSERVATION AUTHORITIES ACT

IN THE MATTER OF:

An appeal to the Minister pursuant to subsection 28(15) of the **Conservation Authorities Act**, R.S.O. 1990, c.C. 27, as amended, against the refusal to grant permission for development through re-grading within the Fill Regulated Area and within a well defined valley of the Don River, municipally described as 119R Glen Road, City of Toronto;

AND IN THE MATTER OF:

R.R.O. 1990, Regulation 158, Toronto and Region Conservation Authority, Application #029/03/TOR and Resolution B262/04.

B E T W E E N :

DEREK RUSSELL

Appellant

- and -

TORONTO AND REGION CONSERVATION AUTHORITY

Respondent

O R D E R

WHEREAS this appeal to the Minister of Natural Resources was received by the tribunal on the 14th day of February, 2005, having been assigned to the Mining and Lands Commissioner ("the tribunal") by virture of Ontario Regulation 795/90;

AND WHEREAS a hearing was held in this matter on the 27th, 28th and 29th days of May, 2008 and the 21st, 22nd and 23rd days of July, 2008, in the courtroom of the tribunal, in the City of Toronto, Province of Ontario;

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UPON visiting the site, hearing from the parties and reading the documentation filed and submitted at the hearing;

1. IT IS ORDERED that the appeal to the Minister pursuant to subsection 28(15) of the **Conservation Authorities Act**, R.S.O. 1990, c. C.27, as amended, against the refusal to grant permission for development through re-grading within the Fill Regulated Area and within a well defined valley of the Don River, municipally described as 119R Glen Road, City of Toronto, be and is hereby dismissed.

2. IT IS FURTHER ORDERED that no costs shall be payable by either party to this matter.

DATED this 27th day of May, 2009.

Original signed by H. Dianne Sutter

H. Dianne Sutter
DEPUTY MINING AND LANDS COMMISSIONER

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

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Appellant

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TORONTO AND REGION CONSERVATION AUTHORITY

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REASONS and FINDINGS

The matter was heard in the courtroom of the Mining and Lands Commissioner, 700 Bay Street, 24th Floor, in the City of Toronto, in the Province of Ontario on the 27th, 28th and 29th days of May, 2008 and on the 21st, 22nd and 23rd days of July, 2008.

A site visit was undertaken by the Commissioner, Linda Kamerman and Deputy Commissioner, H. Dianne Sutter, on the 8th day of May, 2008. The Registrar and the Administrative Assistant of the Office of the Mining and Lands Commissioner, Mr. Daniel Pascoe and Ms. Dawn Jollymore were also in attendance.

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Opening Comments

This appeal came before the Mining and Lands Commissioner pursuant to subsection 28 (15) of the **Conservation Authorities Act**, R.S.O. 1990, c. C. 27, as amended, whereby:

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

With regard to the filling of this appeal, the proper procedure was followed by the appellant.

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

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

Appearances

Mr. Michael Melling	Co-Counsel for Derek Russell
Ms. Amber Stewart	Co-Counsel for Derek Russell
Mr. Jonathan H. Wigley	Counsel for the Toronto and Region Conservation Authority (hereinafter referred to as the "TRCA")

Witnesses for Appellant

Mr. Graham Smith	Architect, Partner with Altius Architecture Inc.; Qualified as an Expert witness in architecture and sustainable envi-ronmental building design;
Ms. Dale Leadbeater	Senior Biologist/Manager of Ecology for Gartner Lee Limited; Qualified as an Expert witness entitled to give professional opinions in biology and ecology;

Witnesses for the Respondent

Mr. Steven Heuchert	Manager of Development Planning and Regulation TRCA; Qualified as an Expert witness in environmental planning and the policies of the TRCA;

Ms. Dena Lewis	Manager of Terrestrial and Aquatic Biology, Ecology Division of the TRCA; Qualified as an Expert witness with regard to terrestrial ecology;
Ms. Carolyn Woodland	Director of Planning for the TRCA; Qualified as an Expert witness regarding land use planning and specifically with regard to development review, environmental assessment and the policies and enforcement areas of the TRCA;

Background:

Mr. Derek Russell, the appellant, purchased 1.22 acres of land in 1995 with a driveway right-of-way access from Glen Road, in the City of Toronto at which time the 119R address was applied to this remnant parcel. The parcel was created during the 1956 sale of the 41 Binscarth Road residence when the owners retained the rear portion of the land, located in the valley corridor. The Binscarth Ravine virtually ends at this property.

Despite the Official Plan's *Natural Area* designation and attempts by the City of Toronto through a Ravine By-law to negate the development rights to the property, subsequent Ontario Municipal Board hearings and appeals to the courts, the lot of record classification was upheld and the City of Toronto's *Residential* zoning designation was maintained. Several immediate neighbours were involved in these appeals. The Courts also upheld the independent approval position of the TRCA, which required a Fill Permit to be issued by the Conservation Authority prior to the release of a Building Permit.

In 2002, Mr. Russell and his wife, Tina, submitted an application to the TRCA to build a residence with a detached garage on the western end of the property, all of which is located within the Regulation Area of the TRCA. Reports were submitted dealing with the topography, bank stability and the ecology of the site, along with a specific architectural plan. The applicants offered to undertake a Ravine Stewardship Plan for the remainder of the property in order to revitalize it, remove invasive species such as Norway Maples and provide an on going Management Plan.

The staff of the TRCA recommended that the application be refused, on the basis of the policies detailed in the Authority's Valley and Stream Corridor Program, as it would affect the conservation of land, was located below the top of bank and was to be built on a valley wall. A hearing before the Executive Committee was held on November 14, 2003, at which time, the Executive Committee/Hearing Board decided, in an in-camera meeting, in favour of the "unique" application and directed staff:

> *"to ensure that the conservation easement which forms part of the application and submissions today by the applicant be registered on title and that it contain provisions to ensure that no additions or additional buildings are to be constructed on the property and that the vegetation management plan be implemented to the satisfaction of the TRCA." (Ex.1a-tab 2)*

A group of neighbours sought the right to appeal the decision of the Executive Committee/ Hearing Board to the Minister of Natural Resources and through delegation, to the Mining and Lands Commissioner. This request was refused on the basis that

> *"the **Conservation Authorities Act** does not provide the right of appeal to an individual or individuals who are not the original applicant(s) before the conservation authority".* (Ex. 25b- tab 15)

In the meantime, the Russells undertook the implementation of the Ravine Stewardship Plan that had been approved by the Hearing Board of the TRCA. As of this date, a large part of the plan, approved by The City of Toronto's Urban Forestry Committee, has been implemented.

By letter, dated September 20, 2004 (Ex.1b –Tab 21), Altius Architecture Inc., on behalf of Mr. and Mrs. Russell, submitted a request to the TRCA for an amendment to the previously approved application #29/03/Tor. Mr. Russell had decided that the house design could be significantly improved and was proposing a reduction in the footprint area and the incorporation of a greening strategy, including green roofs and green facades. The request to amend the first application was denied by the TRCA, requiring the Russells to file a second application. A copy was not provided to the tribunal.

TRCA staff maintained their "refusal" position in a report to the Executive Committee, dated January 14, 2005 (Ex. 1b- tab 27). The applicants provided several new/updated studies in support of their amendment application, as well as argument against the Staff interpretation of the Valley and Stream Valley Corridor Program. (Ex. 1b – tabs 23 and 24). On January 14, 2005, the Authority's Hearing Board refused the second application. (Ex. 1b – tab 26). Within the thirty day appeal period under the **Conservation Authorities Act,** the Russells appealed the matter to the Minister of Natural Resources, and through delegation, to the Mining and Lands Commissioner.

Following this action, the group of neighbours sought a judicial review by the Ontario Superior Court of Justice (Divisional Court) of the TRCA's 2003 decision This was submitted with the argument that the first application was now moot since the Russells had submitted, been refused and appealed the matter of the second application to the Minister. On September 20, 2005, the Court ordered the matter stayed, pending the outcome of the appeal of the second plan to the Mining and Lands Commissioner. (Ex. 25b – tab 16)

Issues/Facts Not In Dispute

Both parties have acknowledged the following facts:

1. The property is completely within the TRCA's Fill Regulation Line under O. Reg. 158, save a portion of the access driveway closest to Glen Road, which runs between two lots, then behind several of the lots whose frontage is on Glen Road. This driveway or laneway provides rear access to several adjacent properties with an easement on title, reflecting this use..

2. The whole property lies well above the Regional Storm Flood Line of the Don River, and lies generally in the rear yards of the surrounding properties.

3. The property is zoned for residential development under City of Toronto By-Law 438-86 but is designated *Natural Area* under the City's Official Plan.

4. The residence is being proposed within the ravine. Under Ontario Regulation 158, most of the property was subject to TRCA jurisdiction, but all of it is subject to Ontario Regulation 166/06.

5. The proposal includes a Conservation Easement over the sensitive portion of the site, said easement to be registered on title to ensure that no additions would be constructed.

6. A Ravine Stewardship Plan would be implemented to the satisfaction of the TRCA.

7. The steep slopes of the driveway were created by fill when the rear laneway was constructed. In addition, other fill was placed in the ravine during the construction of a swimming pool, retaining walls and other terracing on several of the neighbouring lots.

8. Early reports (1997) indicate no significant slope instability but the ravine was used as a dumping ground for yard waste. The Ravine Stewardship Plan (2002) also notes no significant slope instability. Slope stability was not a concern to the TRCA.

9. Ravine restoration began in 2004. The work covers 4,366 m2 or 94% of the property below the driveway. Fifty-eight trees have been removed to date, along with much of the non-native ground cover. The project, which represents the largest and most comprehensive private ravine restoration in the Greater Toronto Area (GTA), has provided for the planting of 5000 trees representing 80 different native species.

10. The TRCA's Valley and Stream Corridor Program encourages and supports such restorative efforts as outlined in the Ravine Stewardship Plan.

11. There are several Butternut trees on the property, which are now classified as endangered under the **Endangered Species Act,** 2007, S.O. 2007, c.6, thereby requiring the approval of a government agency for their removal. A healthy twin tree would be affected by the house construction.

12. The respondent accepts the data submitted in the 2008 Environmental Impact Study (EIS – Ex.2a –tab 3) by the appellant. The data covers the existing flora and fauna and states that:

> *"the Park Drive and Binscarth Ravines provide an area of relatively high quality habitat, given the context of urban stresses".* (Ex. 2a – tab 3, p.18)

The respondent also accepts the EIS statement that the proposed development could have an impact upon the ravine's natural environment by:

. . . . 6

> *"(a) direct loss of habitat; and*
> *(b) indirect influences that impact the integrity of the remaining forested area."* p. 19

13. The technical capability exists to place a building anywhere.

ISSUES

1. What is the jurisdictional authority of the Mining and Lands Commissioner in the matter of Conservation Authorities?

2. Is the jurisdictional authority for policy development and implementation by the Conservation Authority clearly mandated and what weight will the tribunal place on the TRCA's policy documents?

3 Should the TRCA policy be interpreted in accordance with what the tribunal finds is its general intent or should it be interpreted more strictly in accordance with rules of statutory construction whereby each discrete word must have one meaning ?

4. Do the policies of the Toronto and Region Conservation Authority meet the test of the conservation of land?

5. Does the proposal adhere to the applicable policies of the Valley and Stream Corridor Management Program and the Terrestrial Natural Heritage Strategy?

6. Would an approval of this application by the tribunal be a negative precedent for the TRCA and the other provincial Conservation Authorities?

EVIDENCE AND FINDINGS

Preliminary Comments:

The tribunal will present this decision issue by issue. The first three issues deal, in effect, with administrative matters with one decision leading to the next. The final three issues deal with the substance of the hearing, but they again lend themselves to the format chosen by the tribunal. In addition, the tribunal has undertaken a historical review of the past Mining and Lands Commissioner's decisions regarding the conservation of land and it's meaning in order to clarify this issue for the future.

ISSUE 1:

WHAT IS THE JURISDICTIONAL AUTHORITY OF THE MINING AND LANDS COMMISSIONER IN THE MATTER OF CONSERVATION AUTHORITIES?

Summary:

The issue of the relevancy to the tribunal of any legislation other than the **Conservation Authorities Act** was brought forward during the hearing by counsel for the appellant's introduction of appeals to the Divisional Court of various Ontario Municipal Board ("OMB") decisions. Following a review of the various statutes and provincial policies, the tribunal upholds the **Conservation Authorities Act** as its jurisdictional authority and finds that there is no applicability of the **Planning Act** to the decision required by the tribunal.

Evidence:

The point of the discussion with regard to the above noted issue relates to the relevance, for the tribunal, of the **Planning Act** and through it, the OMB decisions.

In argument, Mr. Melling cited the OMB's approval of an appealed zoning by-law decision of the City of Mississauga. *(Bele Himmell Investments Ltd. v. Mississauga (City), 1982, para 22)* The OMB decision was appealed to and upheld by the Divisional Court. In this case, Mr. Melling compared the policies of the TRCA to an Official Plan document. The Court decision found:

> "*Official Plans are not statutes and should not be construed as such*"….
> …and should be given
> " *a broad liberal interpretation*". (Ex. 25a –p.36)

Mr. Melling further cited a OMB decision concerning a Niagara Peninsula Conservation Authority policy document as further authority for the issue of weight. In this case, the OMB found that the policy document did not have any legal status since it had no status as a regulation and the document had not been subject to public scrutiny. By bringing forward these decisions, Mr. Melling suggested that the tribunal should be bound, in some way, by OMB decisions and their subsequent appeals.

Mr. Wigley, on the other hand, stated that Official Plans are adopted under the **Planning A**ct, which has *"a very different statutory regime with legal consequences attaching to nonconformity"* than the **Conservation Authorities Act**, the legislation of note in this appeal. Mr. Wigley further stated that:

> *"The Planning Act simply does not provide a mechanism for recognizing those documents in a formal way and the Ontario Municipal Board is dealing with far different issues"* (Ex. 26 – p. 16-17)

Findings:

The tribunal has undertaken a thorough review of the legislation and policies, which provide the basis for the jurisdiction of the Mining and Lands Commissioner and the Deputy Mining and Lands Commissioners. Full copies of these documents are located in Exhibit 25b. The following is the chain of legislation:

. . . . 8

First, subsection 6 (1) of the **Ministry of Natural Resources Act,** R.S.O. 1990, c. M. 31, **("MNR Act")** states:

> *"The Lieutenant Governor in Council may appoint a Mining and Lands Commissioner and one or more deputy mining and lands commissioners. R.S.O. 1990, c. M. 31, s. 6 (1)."*

Clause 6 (6) (b) of the **MNR Act,** authorizes the:

> *(b) assigning to the Commissioner authorities, powers and duties of the Minister. RSO.1990, c.M.31,2.6 (6)"*

Ontario Regulation 571/00 assigns the Minister's power's and duties:

> *"The Mining and Lands Commissioner is assigned the powers and duties of the Minister of Natural Resources for the purpose of hearing and determining appeals under subsection 28 (15) of* ***the Conservation Authorities Act. O. Reg. 571/00, s. 1."***

Subsection 6(7) of the **MNR Act** provides that Part VI of the **Mining Act** applies to these appeals, with necessary modifications. Section 113 requires that "a new hearing" be held.

Subsection 28(15) of the **Conservation Authorities Act**, R.S.O. 1990, c. C. 27, as amended, provides an opportunity for an appeal of a decision of the Authority or its executive committee, as follows:

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

The Russells, therefore, had to appeal the TRCA decision to the Minister of Natural Resources under the applicable **Conservation Authorities Act**. There was no appeal under any other provincial legislation. Nor could there be.

Mr. Melling has implied that the tribunal should take account of decisions made by the OMB under the **Planning Act.** Although there is agreement that a statute has more authority than a policy, the important point is that the decisions cited were made under the **Planning Act** and the OMB is governed by that **Act.** In realty, the tribunal's decisions are not planning decisions. There are no references to the Mining and Lands Commissioner being guided by the **Planning Act** in that **Act**.

On page 74 of the tribunal's decision in *611428 Ontario Limited vs. Metropolitan Toronto and Region Conservation Authority, (MTRCA),* CA 007-92, February 11, 1994, (unreported), the tribunal stated:

> *"The use of Official Plans, Official Plan Amendments and by-laws is of no assistance in determining the jurisdiction of a conservation authority or, under appeal, the tribunal. In fact, it must be recognized that, notwithstanding a designation on an Official Plan which would be favourable to development, a proposal must still obtain the permission of the conservation authority for lands within its jurisdiction.*
>
> *The objectives of the Conservation Authorities Act are quite distinct in relation to subsection 28(1) applications."* (Ex. 24b – tab 4)

The only applicability to the tribunal's narrow involvement with the **Planning Act** deals with subsection 3 (1) which requires the tribunal to have regard for the principles outlined in the *Provincial Policy Statement* The authority for this Policy Statement is as follows:

> *"The Minister, or the Minister together with any other minister of the Crown, may from time to time issue policy statements that have been approved by the Lieutenant Governor in Council on matters relating to municipal planning that in the opinion of the Minister are of provincial interest. R.S.O. 1990, c. P.13, s. 3 (1)."*

The tribunal is not bound by the *Provincial Policy Statement* since it is primarily used as a planning document. However, because of the analytical and technical background and the resource principles outlined, there is indirect applicability to the natural resources aspect of any appeal. As a result, the tribunal has and will continue to have regard for this document.

ISSUE 2:

(a) IS THE JURISDICTIONAL AUTHORITY FOR POLICY DEVELOPMENT AND IMPLEMENTATION BY THE CONSERVATION AUTHORITY CLEARLY MANDATED? and
(b) WHAT WEIGHT WILL THE TRIBUNAL PLACE ON THE TRCA'S POLICY DCOCUMENTS?

Summary:

Within this issue, the tribunal needed to re-examine if the Authority has a clear mandate and jurisdiction to write policies to provide a guide for decision making regarding development in its regulated area. The tribunal finds that a conservation authority's jurisdiction for policy development and implementation is clearly mandated under the **Conservation Authorities Act.** As to the matter of weight, the tribunal accepts the TRCA's policy documents as providing the detailed application of the Authority's goals (objects) and as such, they will be applied to the circumstances of this appeal.

Evidence:

The appellant discussed the issue of the validity of policy documents and their adoption through a public process with several of the respondent's witnesses. As alluded to earlier, Mr. Melling cited an OMB decision concerning a Niagara Peninsula Conservation Authority policy document with regard to the weight the tribunal should place on a policy document, which in his view, did not meet a test of public involvement in the decision making process. In the particular decision (c.f. p. 7 - issue 1), the OMB ruled that a conservation authority policy document did not have any legal status since it was not a regulation and the document had not been subjected to public scrutiny.

In argument, Mr. Melling submitted that the tribunal should view the policy, in this case, the TRCA's Valley and Stream Corridor Management Program (VSCMP), with

> *"significantly less weight than the statutory framework. It is not a statute, a regulation or a by-law. It is a policy document, and an internal one at that."* (Ex. 25a – p.35 - 82)

Mr. Melling cited the same Divisional Court decision, *Bele Himmell Investments Ltd. v. Mississauga (City), 1982 Carswell, Ont 1946 at para. 22 (Div. Ct.) ("Bele Himmel"), Book of Authorities, Tab 26 :*

> *"Official Plans are not statutes and should not be construed as such. ….In such a document there will almost inevitably be inconsistencies and uncertainties when considered in light of a specific proposal.... In doing so, the Board should give to the Official Plan a broad liberal interpretation with a view to furthering its policy objectives."*

He further reiterated that the tribunal should give the VSCMP *"a broad liberal interpretation with a view to furthering policy objectives. This is known as the "purposive approach" to interpretation"*. (Ex. 25a – p.40-par 92)

During cross-examination, Mr. Heuchert, on behalf of the TRCA, confirmed that the VSCMP is a policy of the TRCA, not a provincial policy. It is not a statute, regulation or a municipal by-law. It was adopted by the TRCA and it did not require provincial approval. He further noted that the policy adoption by the Authority was not subject to any appeal process. No interpretation manual has been prepared as back up for the document. (Ex. Tr. July 21, 2008 – p. 73-76)

However, Mr. Heuchert continued by outlining the typical process that Authority documents and policies are subject to in order to secure approval. Once the draft document has been prepared, the document is vetted by the various boards and committees, which are part of the administrative structure of the Authority. Amendments may be made as the process progresses. Mr. Heuchert indicated that staff consults with external users of the policy such as representatives of the development industry and that the full Authority holds a public meeting on the document prior to final adoption. (Tr. July 21, 2009 – p. 226) Mr. Heuchert acknowledged that he was not a staff member when the VSCMP was adopted by the Authority and indicated he was outlining the typical procedure.

Findings:

Issue 1 dealt with the applicability of the **Planning Act** and through it, decisions of the OMB and the tribunal. However, Mr. Melling raised an interesting point as to the weight the tribunal should place on TRCA or any other Conservation Authority policy documents. His argument was that the weight should be tempered because policy documents are not statutes or in the case of Conservation Authorities, Regulations and have no "public approval process".

This issue leads the tribunal back to the establishment of Conservation Authorities and what they are allowed to do or not do and under what legislation they are ruled. Obviously, it is the **Conservation Authorities Act**, R.S.O. 1990, c. C.27, as amended that provides the jurisdiction for the TRCA. The Toronto and Region Conservation Authority (formerly the Metropolitan Toronto and Region Conservation Authority) was established under this **Act** in 1957. The Authority members are appointed by the member municipalities and subsequently, the Authority may appoint an Executive Committee from among its members and may also appoint Advisory Boards. These Advisory Boards may be composed of people who are not Authority members. In the view of the tribunal, these Boards are the beginning of public involvement in the development and/or amendment process surrounding the policy documents.

Subsection 20 (1) of the **Act** outlines the Objects of an Authority as being:

> *"The objects of an authority are to establish and undertake, in the area over which it has jurisdiction, a program designed to further the conservation, restoration, development and management of natural resources other than gas, oil, coal and minerals. R.S.O.1990, c C.2, s. 20."*

Each Authority is given certain powers, the major one applicable to this hearing being 21 (1**)**:

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

Further, clause 28 (1)(c) states:

> *"Subject to the approval of the Minister. an authority may make regulations applicable in the area under its jurisdiction,….*
> *(b) prohibiting, regulating or requiring the permission of the authority for development if, in the opinion of the authority, the control of flooding, erosion,*
> *(c) dynamic beaches or pollution or the conservation of land may be affected by the development;"*

The Toronto and Region Conservation Authority was operating under Regulation 158 (1990) until the new Ontario Regulation 166/06 was approved by the TRCA on April 28, 2006 and subsequently, approved by the Minister of Natural Resources on May 4, 2006.

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This Regulation prohibits development subject to certain conditions. The relevant section of the Regulation in this appeal is as follows:

> *"2. (1) Subject to section 3, no person shall undertake development, or permit another person to undertake development in or on the areas within the jurisdiction of the Authority that are,*
>
> *(d) river or stream valleys that have depressional features associated with a river or stream, whether or not they contain a watercourse, the limits of which are determined in accordance with following rules,"*

Subsection 3. (1) of Regulation 166/06 reflects Section 28 of the **Conservation Authorities Act** by stating:

> *"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."*

It is clear to the tribunal that the Authority has the right, and in fact has the responsibility to develop programs to *"accomplish its objects"*. Ontario Regulation 166/06 outlines the objects (goals) accepted by the TRCA. The Valley and Stream Valley Corridor Program has been developed to guide the Authority in the implementation of its objects. In effect, the Policy's purpose is to further the aims and objectives of the Authority and provides a "purposive approach" to both of the **Act** and the regulation.

It is also clear to the tribunal that these are the legislative, the regulatory and the Policy documents derived from the Conservation Authority related "statute" that must guide the tribunal. Neither the tribunal nor the Conservation Authority are guided by the **Planning Act** except through the direction provided to public bodies under the *Provincial Policy Statement*, as discussed in Issue 1. While a policy may not be applied as rigourously or as rigidly as a regulation, nevertheless, it does set a standard against which applications and/or appeals may be considered.

The TRCA is faced with the problem of addressing very specialized and very real environmental concerns affecting the most highly urbanized area of the province. The natural environment, especially in the geographic area of the City of Toronto, has been and continues to be subject to clear, present and ongoing threats of degradation. As a result, the tribunal accepts that the policies followed by the TRCA need to reflect the reality of the existing situation and to provide the guidelines for protecting the Authority's core values and strategies.

As a result, the question with regard to the weight that the tribunal might apply to Authority policy statements is significant. The tribunal finds that the policy will not be so much given weight in and of itself, but that the weight should be applied to the evidence provided by the parties as to how the policy is applied to the circumstances of the appeal. The final decision to be made by the tribunal will be whether it adopts the policy in general or whether it will adopt/accept it under the circum-

stances of this appeal. Since the Legislation does not deal with technical details, the policies provide the means by which the tribunal can flesh out the statutory test that must be dealt with.

The tribunal would also like to comment on the issue raised by Mr. Melling regarding the subject of a process of public examination and appeal of a policy before and after its approval. The Authority is not mandated to go through the public participation process as outlined in the **Planning Act**. However, as the tribunal has noted above, the Authority members are appointed by a public body - the area municipalities - those members are elected by the public. The Authority then has an internal vetting process, which also involves members of the community who are knowledgeable about specific issues and the watershed they represent. It appears that consultation concerning any new policy occurs with many public and private groups who would be affected by the proposed policy. It is agreed that there is no appeal process to the Ministry, but there certainly is public involvement.

In addition, the tribunal notes that the Authority is actively involved in the planning process with the area municipalities, in official plan processes, rezoning applications and Committee of Adjustment and severance applications. The goals of the Authority's policies have been included in most municipal documents as was noted at the hearing. The Toronto Official Plan and the Ravine Stewardship program of the City are examples. The tribunal finds that it is not concerned with the lack of a mandated public process with regard to the Authority's policy documents and accepts that the process followed has allowed for a significant degree of review for fairness and technical applicability, prior to their adoption.

ISSUE 3:

SHOULD THE TRCA POLICY BE INTERPRETED IN ACCORDANCE WITH WHAT THE TRIBUNAL FINDS IS ITS GENERAL INTENT OR SHOULD IT BE INTERPRETED MORE STRICTLY IN ACCORDANCE WITH RULES OF STAUTORY CONSTRUCTION WHEREBY EACH DISCRETE WORD MUST HAVE ONE MEANING?

Summary:

The appellant argued that the principles of statutory interpretation require that the policies of the TRCA be interpreted so that each time the same word is used within the document, it must have the same meaning and that different words which in normal parlance might mean the same thing within the policies must have meaning different from each other. The appellant's discussed a number of examples to illustrate this argument. The respondent, on the other hand, argued that the intent of the actual policy should be the over riding guideline for the tribunal, not the strict meaning of words that have the same intent but a different spelling.

The tribunal finds that the intent of the words used in the VSCMP as well as the basic goal of the Authority with regard to development in a valley is that development is not permitted below the top of bank, except in certain circumstances. The tribunal accepts this premise and will review the specific Russell proposal in that context.

Evidence:

Throughout the Hearing, Mr. Melling frequently commented upon the exact meaning of words and the validity of the TRCA's interpretation of the Valley and Stream Corridor Program document. He argued that by "*plain reading of the policy*" [the VSCMP], a different interpretation can be made:

> *"the TRCA is "interpreting" the VSCMP in a way that simply does not reflect, and has nothing to do with, the actual wording."*
> (Tr. July 21, 2009 – para 114 – p. 49)

For example, Sections 4.2.2.A and 4.2.2.G:

> "*New multi-lot and/or large lot development including all buildings and structures and associated private servicing, or comparable redevelopment/intensification, shall not be permitted."* (Ex. 2b – tab 26 – p. 37)

and

> *"Where an existing lot of record small lot only, eg. single family residential is vacant and is between existing developed (urban) lots, a new structure or building may be permitted provided the new development, its construction, and any associated private servicing requirements:……"*
> (Ex. 2b – tab 26- p.44)

The latter section is followed by a list of requirements, which must all be met before approval is given.

There being no definition of what a large lot is in the policy document, Mr. Graham Smith's evidence on behalf of the appellant, proposes that the policy cannot be read in such a way that a property can be both a large lot or a small lot. Mr. Smith stated that, in his opinion, a large lot would be a large commercial and institutional facility such as a hospitals or a school and a commercial facility such as a factory.

On the other hand, Mr. Heuchert's evidence is quite different and described by Mr. Melling, as confusing:

> *"…this policy has been consistently interpreted as pertaining to two different things, one being multi-lot development where you have severances or subdivisions, which we don't have here. And the other would be development on a lot. And I know it doesn't say that, and quite honestly this document has not been written by lawyers and I will agree that it is somewhat difficult to interpret. However the authors of this document, many of them are still with the Conservation Authority. There has been a continual learning process, an education process with the Conservation Authority staff since this document was put in place. And we've consistently interpreted large lot development to being development on the lot; ie. whether it's a house, whether it's an industrial property, whether it's retail, anything on a lot."*(Tr. July 21, 2009 – ps. 121-122)

Mr. Heuchert reiterated that his comments related to *"a lot within a valley in an area of existing development"*.

Mr. Heuchert was further questioned on this issue, responding that in Section 4.2.2.G, a small lot is actually referring to a physically smaller lot within residential areas while in Section 4.2.2.A, large lot means large development on a lot.

The remainder of that section continues by stating that major additions are not permitted. Mr. Melling submitted that the policy does not say that new development is not allowed. However, Mr. Heuchert stated that it made no sense to not allow additions – large or small – but to proceed to grant new development. (Tr. July 21, 2009 – p. 125)

Mr. Melling's interpretation of this is that the Policy could be saying:

> *"Isn't it possible, sir, that the drafters of the document drew a policy distinction between people who have something and people who have nothing and they said to people who have something that they can have a small addition but not a large addition, and they said to the people who had nothing, you can have something in accordance with 4.2.2;"* (Tr. July 21, 2009 – p. 125)

In response, Mr. Heuchert disagreed strenuously with this interpretation and indicated that staff have consistently interpreted the document, since it was approved, on the basis that it allows minor additions within existing communities but

> *"on lots that are not developed and entirely in the valley, the public policy interest is to keep them there, to keep them as part of the valley system so that the overall health of the valley system can be protected"* (Tr. July 21,2009 – p. 126)

Another example of Mr. Melling's emphasis on words and attributing an alternative meaning to them can be seen in his reference to the words "in or on" relative to development in a valley as outlined in Regulation 166/06. Mr. Melling argues that the **Act** and the Regulation grant the Authority the right to issue permits for construction in or on the valley, defined as the area between the opposite tops of banks, plus 15 metres.

Mr. Melling has taken the position that Mr. Heuchert's interpretation basically would preclude any building in the regulated zone except within the setback area, which he concluded is "nonsensical". (Ex. 25a – p.57)

Mr. Melling further argued that the "on" can mean that construction could take place on a flat surface within the valley that is not vertical and as such, the Policy does not preclude development in or on a valley. Graham Smith's opinion was that the VSCMP prohibits development on a "valley wall" but because the Policy is silent with reference to development on a 'valley floor' or 'valley slope', then it follows that development has not been prohibited.

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There was much discussion with all the witnesses about the definitions of "valley wall', "valley slope" and valley floor" as well as 'sloping valley floor'. Mr. Heuchert, as did Ms. Woodlands, stated that valley wall and valley slope mean the same thing – it is the area between top of bank down to the valley floor. Mr. Heuchert did talk about a valley having slopes and flat areas as topographical features. However, all are below the top of bank.

Mr. Melling is distinguishing the word meanings to show that development can take place in a valley while Mr. Heuchert states:

> *"this is in the context of putting a new development on a valley wall/slope. And so there's no real criteria to meet; you just don't put it on the valley wall/slope at all, period."* (Tr. July 21, 2008 – p. 134)

This issue or valley wall/valley slope will be discussed further in Issue 5 as it relates to development on a "valley floor".

Findings:

The tribunal generally understands why the appellant has attacked the clarity in the policy document. The policy descriptions, such as in Section 4.2.2.A and others, regarding large lots/small lots and descriptions of valley slope/valley wall, etc. certainly could be described or defined with more clarity with a "definition" section added to the Policy. The tribunal understands that this policy is under review and the comments made by the appellant, as well as those being made by the tribunal, could be of benefit to this review.

Ms. Woodland, in cross-examination, indicated that she thought the discussion about valley walls and valley slopes was "splitting hairs". (Tr. July 23, 2009 - p. 49). The terms in and of themselves mean something different but, in the context of describing the form of a valley, the cross sections drawn by Mr. Smith in Ex. 2b – tab 17 as well as Figure 6 of the VSCMP (Ex. 2b – tab 26 – p. 15) both show a valley form which has "table land" or "valley floor" or "hills" on the "valley slope" or "valley wall". Unless it is a sheer bluff, which could describe the filled driveway in the Russell proposal, a valley wall will have varying degrees of steepness, producing a stable or unstable slope, all the way down to the ultimate valley floor, which would be the watercourse, in this case the Don River. The intent of the terms is to describe the topography of a valley from the top of bank on one side to a top of bank on the other.

All the TRCA's witnesses agreed that the words used have the same intent as they refer to the valley topography. They also agreed to the fact, (which is one of the facts accepted by both parties), that the proposed development is below the top of bank. This is the issue that drives the Policy, not the need to use similar words to define the topography of a valley. The appellant's arguments continually ignored this point of the Policy.

The Valley and Stream Corridor Management Program's objective that is clearly relevant for the tribunal is:

> *"To prevent development that negatively impacts on the natural landform, functions and features and/or affects the control of flooding, pollution or conservation of land within valley and stream corridors."* (Ex 2b – Tab 26 at 2.2.2.B)

As has been discussed, the TRCA has the right to develop programs/policies to implement O.Reg. 166/06. This regulation enunciates the basic goal of the Authority, to prevent development in a valley from "*the stable top of bank, plus 15 metres, to a similar pint on the opposite side"*. It is clear that the property is totally located within the Regulated area of the TRCA.

The tribunal has reviewed the issue of alternative interpretations of words and finds compelling the Authority's argument that the words used are consistent with the intent of the Policy and that the appellant's argument leads to a contrary meaning of the Policies. It remains that the relevant issue is that the property is below the top of bank. It really does not matter in the long run whether we call it a small lot or large lot – it is development in the valley below the top of bank. It does not matter that the proposed house is to be built on a valley wall, a valley slope or a valley floor - it is development in the valley below the top of bank. It does not matter whether the house is built "on" a valley wall – it is development in the valley below the top of bank. That is the relevant fact for the tribunal. Further, the tribunal accepts that the TRCA appears to be a consistent interpretation of the VSCMP with regard to the policy's words.

ISSUE 4:

DO THE POLICIES OF THE TORONTO AND REGION CONSERVATION AUTHORITY MEET THE TEST OF CONSERVATION OF LAND?

There is no definition of the phrase "conservation of land" in any legislation, regulation or policy document in the province of Ontario. However, over the years, there have been many hearings before the Mining and Lands Commissioner that have focused on this issue, resulting in decisions by tribunals that have provided an interpretation of these words and clarity to the issue.

The tribunal carried out a complete and comprehensive review of decisions made by past Mining and Lands Commissioners and as a result, has accepted a broad interpretation of the meaning of "conservation of land" to include all aspects of the physical environment, be it terrestrial, aquatic, biological, botanic or air and the relationship between them.

The tribunal has also considered the program framework and the principles of the TRCA's Valley and Stream Corridor Program to determine their relationship to the tribunal's accepted interpretation of "conservation of land" in the context of clause 28(1)(f).

The tribunal finds that the VSCMP policy document has, as its basis, the concern for the conservation of natural resources and all that that entails. The TRCA has adopted an holistic ecosystem approach which satisfies the tribunal that the VSCMP's framework and objectives meet the test to provide for the conservation/protection of all aspects of the physical environment, (be it terrestrial, aquatic, biological, botanic or air as well as the relationship between them).

Evidence:

The parties to this hearing have supported different interpretations of the words "conservation of lands".

The respondent has accepted that the "meaning" of the term has evolved over time. Mr. Wigley cites the appeal to the Divisional Court of the tribunal's decision made in *611428 Ontario Limited v. MTRCA, CA-007-92,* February 11, 1994, (unreported) in which the tribunal's decision was upheld by Divisional Court, concluding that the decision should be *"a significant starting point for any further discussion of the words"*.

At page 63 of that decision, the tribunal found:

> *"that 'conservation of land', in the context of clause 28(1)(f), includes all aspects of the physical environment, be it terrestrial aquatic, biological, botonic or air and the relationship between them."*

and further,

> *"notwithstanding the fact that the term was not used, "ecosystem", having not yet been coined, "ecosystem" is found to be included in the definition of 'land' as used in 'conservation of land'"*.

(Ex. 24b-tab 4 – p.64))

Although not providing a suggested definition, Mr. Wigley concluded that:

> *"conservation of land" includes consideration of:*
>
> - *the protection of the natural environment from harm or loss;*
> - *the preservation of the land in question;*
> - *the interaction of that land, its features and its functions within the ecosystem;*
> - *its place in the broader context of the valley or landform in which it occurs;*
> - *the effect of a current decision on all other lands. In other words the issue of incremental and cumulative loss of a valley by operation of policy made by the very decision in question." (Ex. 24a – p. 16)*

On the other hand, the appellant's argue that the TRCA's position that the application has a negative impact on the conservation of land is *"not tenable in policy or law"* (Ex. 25a- p.8-para. 24/25) With regard to policy, the contention is that any proposal which results in loss of land would never meet the tests of approval and therefore, *"the entire statutory permitting regime would be moot"*. (para. 25)

With regard to the case law, *Hinder v. Metropolitan Toronto & Region Conservation Authority, (MTRCA),* October 22,1984, (unreported) was cited by Mr. Melling as the interpretation that the tribunal should follow. Commissioner Ferguson concluded that conservation of land *"does not mean preservation of land in its natural state"*. *Hinder* established certain principles which Mr. Melling argues are applicable to the Russell case:

> *" (a) Where the legislative act of a conservation authority deprives landowners of property rights (such as the issuance of a fill permit) the conservation authority should exercise that power to the strict letter of the statute, in accordance with rules of statutory interpretation;*
>
> *(b) 'conservation' has a narrower meaning than 'preservation'. 'Conservation of land' does not the mean the same thing as 'preservation of land in its existing state'.*
>
> *(c) The proper meaning of the word 'conservation' is the concept of 'wise use' as contrasted with 'retention in its existing state'."*
>
> (Ex.24a – pages 8/9 – para. 27)

Mr. Melling cited other past decisions of the tribunal such as *Baker v. Quinte Conservation* Association, (QCA), CA 007-00, May 11, 2001 (unreported), stressing the references to restoration where harm has been caused and to development where improvements can be made. (para. 29) His main argument, however, was that the "conservation of land" constitutes "wise use" and that on that basis, the Russell proposal meets all the tests.

Ms. Woodland put the view of what conservation of land is in simplistic terms:

> *"We look at the conservation of land and the broader ecology in context; they [City of Toronto] look at the tree by-law. We look at the issues of grading, drainage, geo-technical issues, water and hydrology issues, they look at development form, architecture, relationship to neighbours, all those kinds of issue. And together, we try to make these pieces begin to try to fit together."* (Tr. July 23, 2009 – pages 36-37)

And further on page 37, she stated:

> *"We need to get back to designing with nature – and I think the Conservation Authority advocates that, where we're finding that right balance between development form and maintaining and enhancing systems for protection first and enhancement and rehabilitation second."*

Findings:

The tribunal has reviewed the following five decisions made by past Mining and Lands Commissioners, which deal, in part, with the issue of conservation of land.

1. *Farkas v. The Halton Region Conservation Authority* - May 15, 1979, (unreported)
2. *Shell Canada Limited v. Central Lake Ontario Conservation Authority* - June 25, 1979, (unreported)
3. *Hinder v. The Metropolitan Toronto and Region Conservation Authority* - October 22, 1984, (unreported)
4. *611428 Ontario Limited v. The Metropolitan Toronto and Region Conservation Authority (MTRCA), CA 007-92,* February 11, 1994 (unreported)
5. *Baker v. Quinte Conservation Association (QCA),* CA 007-00, May 11, 2001 (unreported)

It appears that the issue of "conservation of land" came late to the table in appeals before the Mining and Lands Commissioner. However, in 1979 there were two decisions that made some reference to the "conservation of land".

Of minor importance was *Farkas v. The Halton Region Conservation Authority,* May 15,1979 (unreported). This was an appeal against refusal to issue permission to construct a single-family dwelling in an environmentally sensitive swamp area. Commissioner Ferguson doubted that the "conservation of land" phrase is "*synonymous with the maintenance of a natural state or the creation of conformity to an official plan"*. It was not, however, necessary to make a ruling with regard to this issue, so no definitive discussion took place.

Commissioner Ferguson dealt with the legislative jurisdiction of a conservation authority as opposed to its administrative powers in *Shell Canada Limited v. Central Lake Ontario Conservation Authority*, June 15, 1979, (unreported) Relating these powers, he found that the former was narrower than the latter. This appears to be the underlying reason for his subsequent finding in *Hinder v. MTRCA*, October 22, 1984, (unreported) regarding the conservation of land.

In the *Shell Canada Limited* case, he noted that:

> *"the proposal is a very significant enhancement of the control of flooding or of erosion which is one of the recognized aspects of the conservation of land. There was some argument and evidence in respect of the return of the subject lands to a state of nature or to a less commercial use. This tribunal has indicated on a previous occasion that it does not consider that the phrase "conservation of land" means retention of land in a state of nature."*

Commissioner Ferguson appears to view "conservation of land" in terms of flooding and erosion and since this was not the issue, he concluded that it was outside the purview of the conservation authority to deny permission on the basis of "returning land to a state of nature".

Hinder v. MTRCA, October 22, 1984, (unreported) provides the reasons behind the finding of Commissioner Ferguson regarding 'conservation of land', to which the appellant subscribes. This particular case is similar to the Russell proposal in that the only issue involved is the "conservation of land" and there were no issues related to flooding, pollution or erosion.

Hinder's professional planning witness, John R. Bousfield, indicated that:

> *"in his fairly extensive experience this was the first occasion on which the respondent had adopted this reason for rejecting the placing of fill."*
> (Ex. 25b - tab 20 - p. 3)

Mr. Ferguson also acknowledged that he was not aware of any decisions dealing with the phrase, other than his own. It was this hearing that began the substantive discussion of what has progressed to the 2009 interpretation of "conservation of land". The appellant's case followed from the context of Commissioner Ferguson's previous ruling that the "conservation of land":

> *"relates to erosion and slippage but does not permit the denial of an application for permission to place fill, on the ground that the conservation authority wishes the land to remain in a natural state". (p. 13)*

The respondent in this case, being the former MTRCA, submitted:

> *"that the phrase "conservation of land" should be afforded a broad definition so that it includes, in addition to erosion and slope stability, the preservation of the natural resources within a conservation authority's jurisdiction. It was submitted that it should be interpreted in the light of the objects of section 20 of the Act, which creates the jurisdiction of conservation authorities, as contrasted with section 21 which provides the powers of a conservation authority. It was stated that the object of the Act should be the guiding light". (p. 16)*

This tribunal acknowledges that the **Conservation Authorities Act** has been amended throughout the years and the mechanism's to enforce the 'objects' have been enlarged, which the respondent submitted, should mandate a broad interpretation of the words "conservation of land". In the Hinder case, the respondent further submitted, as the TRCA has done in refusing the Russell proposal, that conservation of land can/should mean *"the preservation of natural resources in the state of nature"*. (p. 18)

During the *Hinder* hearing, counsel for Metropolitan Toronto, as a party to the hearing, submitted:

> *"that the definition uses the words "preserve" and "natural resources" and he submitted that the major rivers or valleys in Metro Toronto are natural resources and preservation thereof falls within the term "conservation of land". (Ex.25b - tab 20 - p.18-para. 101)*

Commissioner Ferguson reiterated his previous position that "the power to legislate contained in section 28 provides for the control of and restriction of the rights of private landowners". (Tab 20 – p. 20-para 118) The section allows the Authority to make regulations and outlines six points these regulations can deal with, the final one being:

> *(f) prohibiting or regulating or requiring the permission of the authority for the placing or dumping of fill of any kind in any defined part of the area over which the authority has jurisdiction in which in the opinion of the authority the control of flooding or pollution or the conservation of land may be affected by the placing or dumping of fill".*

He further stated:

> *"It is clear that the Legislature distinguishes between conservation and preservation and reading the Conservation Authorities Act in the context of related statutes, it can only be concluded that the word "conservation" must have a narrower meaning than the word "preservation".*
>
> *"Regarding the **Conservation Authorities Act** in its own context, it may be noted that while the objects and programs of an authority relate to the conservation of natural resources, the legislative powers extend to conservation of land. The distinction between "natural resources" in the former and "land", which is only*

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> *part of the natural resources, indicate that a narrower interpretation must be placed on the legislative powers as contrasted with the objects and programs of a conservation authority."*
>
> *"In the opinion of the tribunal the legislative jurisdiction does not extend to matters of "preservation" or to matters of "natural resources". The difference in wording is not consistent with a parallel meaning being given to both areas."(p. 22 - para. 126/127/128)*
>
> *"the tribunal is of the opinion that the phrase must be given a narrower meaning than the phrases "conservation of natural resources", where the distinction goes to the subject matter of the control and "preservation of land", where the distinction would go to the nature or extent of the control." (p. 22 – para. 130)*

Finally, Commissioner Ferguson provided an opinion that the meaning of the word 'conservation' should be the "concept of wise use" as opposed to "retention in its existing state" as in "preservation". (para. 131) He explained further:

> *"On the other hand, the word "land" although narrower than "natural resources" does not warrant an exhaustively narrow interpretation. It is not preceded by the definite article so as to limit the consideration to the subject lands and there was no argument that it was irrelevant to consider the effect on adjoining lands or other lands within a range of effect. Also the word normally is not restricted to the earth itself. The word is defined in clause l(e) as,*
>
> (e) "land" includes buildings and any estate, term, easement, right or interest in, to, over or affecting land;
>
> *It would be a strange conclusion to hold that the artificial, both physical and legal, components of land are included but not the natural growth on the land and the tribunal is satisfied that the word includes trees and lesser vegetation. Consequently, the trees and other vegetation have to be considered in the light of the concept of wise use." (para. 132/133)*

In summary, Commissioner Ferguson accepted that the natural growth on the land should be part of the "conservation of land" but continued to view the legislative jurisdiction of the authority in section 28 in a narrower manner and more properly related to water issues. However, he put forth the meaning of the phrase to be "wise use" of the land, without then providing an interpretation of this phrase.

It took another ten years before the next hearing dealing with "conservation of land" came before a Mining and Lands Commissioner. The decision of Commissioner Kamerman in *611428 Ontario Limited v. MTRCA* was issued on February 11, 1994. Issue 2 was as follows:

> *"Does the placing of fill proposed by the appeal affect the conservation of land? Ancillary to this issue is the scope of the meaning of "conservation of land", including what factors may properly be taken into account."(Ex. 25b - tab 21-p 3)*

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The MTRCA's witness discussed the final report prepared by the Crombie Commission entitled Regeneration-Toronto's Waterfront and Sustainable City, which advocated:

> *"the ecosystem approach which recognizes that processes of many disparate features which act in concert to impact on a given watershed, in advocating that the broader ecological and watershed implications be considered when determining whether permission to place fill should be granted. Dr. Eagles referred to the cumulative impact of allowing numerous minor valleys to be filled on the health of the entire watercourse." (p. 8)*

The witness (Dr. Eagles) noted that cumulative environmental effects involve vegetative communities, wildlife habitat, ecological diversity, open space, potential for natural area restoration, ecological functions, as well as the typical water related issues. (p.9) Counsel for the MTRCA advocated, as he has done in the Russell case, that "conservation of land" includes the protection and management of land forms and attributes of land forms and that the valleys and associated landforms are natural resources which must be conserved. This premise goes beyond the issue of flooding and that the concept had evolved to include matters of ecological and landscape diversity (p. 26)

On the other hand, the respondent continued to advocate that the MTRCA's purpose for refusing the application was to "preserve land as open space" and that this was improper based on the previous ruling in *Hinder*.

This tribunal notes the ongoing advances in scientific and ecological thinking and philosophy which occurred throughout the intervening ten years. Commissioner Kamerman accepted that in the *611428 Ontario Limited vs. (MTRCA)*, CA 007-92, February 11,1994, (unreported) case. In those findings, the tribunal noted that clause 28(1)(f) has three parts: "*the control of flooding or pollution or the conservation of land"* which must mean that each issue is "separate and apart" (tab 21, p. 35)

Commissioner Kamerman noted that in Hinder, the tribunal found that "land" used in clause 28(1)(f) must be given a narrower interpretation than "natural resource" in section 20. She went on to dispute this narrow interpretation, providing a lengthy discussion of the definitions of the word "land" culminating in the following:

> *"These definitions entail common as well as distinctive features. If envisaged as two circles with an area of overlap, the common features would be the physical elements inherent in each. Distinctive in the definition of "land" are the legal aspects of ownership. Distinctive in the definition of "natural resources" are those aspects which are associated with values, for example those inherent in land devoted to proper enjoyment, such as parks and recreational areas. The less tangible aspects of the definition of "natural resources", contributing to the health, welfare and benefit of the community require additional differentiation. Pollution and flooding are concerns which directly relate to both land and natural resources. "Conservation of land" extends at the one extreme, to the preservation of the physical attributes, such as soil stability and erosion and at*

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> *the other extreme to recognition of the integrated functions occurring within the various elements of the land. The definition of "land", however, does not encompass the value judgment of whether privately owned land should better be used as open green space or recreational land in preference to some other use."*
>
> *"The term "ecosystem" comes to mind when looking at either definition. It is a recent word which does not appear to have been in common usage at the time the legislation was drafted. Indeed, the 1959 edition of Webster's Dictionary discloses no such word. The tribunal finds that "conservation of land", in the context of clause 28(1)(f), includes all aspects of the physical environment, be it terrestrial, aquatic, biological, botanic or air and the relationship between them. Therefore, notwithstanding the fact that the term was not used, "ecosystem", not having yet been coined, "ecosystem" is found to be included in the definition of "land" as used in "conservation of land".*
>
> *As to the object or purpose of the Act, while it may be possible that the original intention of the clause was to deal with the severe flooding situation concerns caused by the aftermath of Hurricane Hazel, the drafting of the clause goes beyond that concern. The tribunal finds that in the case of the interpretation of "conservation of land" the plain meaning of the words are not ambiguous, notwithstanding that they may extend beyond the recorded concerns of the legislators of the day. While the parties were most helpful in providing earlier copies of the legislation, back to its inception, and related discussions within the legislature, the tribunal is satisfied, as was suggested by Mr. Wigley, that the plain meaning of the words supports the evolution of the practices and policies of the MTRCA in dealing with its jurisdiction in connection to "conservation of land." (Ex. 25b – tab 21 – p.38)*

Both the *Hinder v. MTRCA,* October 22, 1984, (unreported) and the *611428 Ontario Limited, MTRCA,* February 11,1994 (unreported) Findings were part of Deputy Commissioner Sutter's decision in *Baker v. QCA,* CA 007-00, May 11,2001 (unreported). (Ex. 25b – tab 23) The concept of "wise use" was accepted but in a broader sense than Commissioner Ferguson intended, with acknowledgement that the **Conservation Authorities Act** directs that:

> *"the authorities should conserve or keep from harm or loss, should restore where harm has been caused, to develop where improvements can be made and lastly to manage the resources in order to preserve for mankind". (p.19)*

With regard to the tribunal in the Russell case, there is agreement with a definition of "conservation of land" that includes the environmental philosophy, thought and policy that has expanded significantly since 1984 and that the narrow view of protecting the environment is no longer appropriate. The concept of "ecosystem" is broadly accepted and forms the basis of most policies and programs of conservation authorities. Words such as "natural heritage', "matrix influence" and "biodiversity' are commonplace in any environmental studies undertaken to-day.

The issue of concern here is whether the VSCMP, which was adopted by the MTRCA in 1984, meets the test of the tribunal's understanding of the meaning of the phrase "conservation of land". This Policy was adopted *"to advance the Authority's policies for the protection and rehabilitation of the valley and stream corridors within its jurisdiction"*. (Ex.2b – tab 26 – preface) and was designed to provide strategic direction for the 1989 *Greenspace Strategy*.

The Authority recognizes valley lands as important natural resources. Valley and stream corridors are "*valued as landscape units providing diversity and contributing to environmental quality and the provision of open space*". (p.1)

The Policy continues with:

> *"While the need for risk management related to flooding, erosion and slope instability continues, current public interest recognizes the need to ensure that future environmental degradation is prevented and damaged areas are rehabilitated/regenerated. To accomplish this, future decisions on land use activities must address valley and stream corridor concerns through a planning process which considers natural resource conservation, restoration, protection and management values." (p. 5)*

A review of the framework of the VSCMP, in particular Section 2.0 Program Framework, enunciates the principles which speak to the phrase "conservation of land". The tribunal finds the following of significance to the issue at hand:

> ***Principle 1***
>
> *Valley and stream corridors are important natural resources that function as an ecological system and must be managed within the context of the watershed as a whole;*
>
> ***Principle 2***
>
> *Ecological health and integrity of valley and stream corridors requires that the system be conserved from the headwaters to the river's mouth.*
>
> ***Principle 3***
>
> *The conservation of valley and stream corridor systems requires the protection of the corridor landforms and watercourses.*
>
> ***Principle 4***
>
> *Valley and stream corridors are vulnerable to the incremental and cumulative effects of land uses and land use changes.*
>
> ***Principle 6***
>
> *Proposals affecting valley and stream corridors must contribute to the protection and rehabilitation of ecological health; prevention or reduction in risk from flooding, erosion and slope instability, and should include opportunities for public use and enjoyment." (p.9)*

Section 2.2.2. outlines the Program's Objectives with regard to Environmental Protection and Prevention of New Hazards. Two of these objectives also are significant for the tribunal.

> *"B) To prevent development that negatively impacts on the natural landform, functions and features and or affects the control of flooding, pollution or conservation of land within valley and stream corridors.*
>
> *C) To bring valley and stream corridors into public ownership or to provide fortheir protection through other mechanisms, where appropriate, to ensure public safety; protection of ecological integrity of these systems;…." (p.11)*

The tribunal is satisfied that the VSCMP's Framework and Objectives meet the test to provide for the conservation/protection of

> *"all aspects of the physical environment, be it terrestrial, aquatic, biological botanic or air and the relationship between them".(Findings - in 611428 Ontario Limited v. MTRCA, CA 007-92, February 11,1994, (unreported) – p.38)*

These are the issues that are accepted as being part of "conservation of land' and are in keeping with the objects of the Conservation Authorities Act.

ISSUE 5:

DOES THE PROPOSAL ADHERE TO THE APPLICABLE POLICIES OF THE VALLEY AND STREAM CORRIDOR MANAGEMENT PROGRAM AND THE TERRESTRIAL NATURAL HERITAGE STRATEGY?

Summary:

The appellants have argued that the Russell proposal meets all the tests of the VSCMP. Conversely, the Authority has rejected the proposal on the basis of the impact on the conservation of land with specific reference to the fact that:

- the proposal is below the top of bank,
- it is located on a valley wall,
- it is inconsistent with the primary set backs in the area; and
- it has an impact upon vegetation communities or functions and results in the loss of significant features in the valley;

Eight sub-issues that were discussed throughout the hearing have been examined by the tribunal in order to answer the question posed by Issue 5. This examination has resulted in the tribunal finding that the proposal does not adhere to the applicable policies of the two major policies of the TRCA.

Evidence:

1. <u>Valley wall, valley slope and valley floor in relationship to the top of bank policies and the allowability of residential construction on a valley floor:</u>

A significant amount of evidence was provided regarding the description of the property and the location of the house itself, as it relates to the VSCMP. It was acknowledged that the original top of bank was located further up the valley, even beyond Glen Road. The access driveway to the Russell lands as well as to the rear yards of at least five properties fronting on Glen Road and Binscarth Road, are man made features. Although this feature, theoretically, is below the original top of bank, it was accepted as the top of the bank as far as the Russell proposal is concerned. The remaining area of the "top of bank" has been altered substantially over the years by the construction of retaining walls, swimming pools and gardens.

The TRCA staff report with regard to the Executive Committee's Hearing for the Russell application (Ex. 1b – tab 27) indicated the following requirements which could not be met by the Russell proposal:

- 119R Glen Road is mainly located on lands below the top of bank;
- VSCMP does not support construction within valley features and below the top of bank;
- the house would be constructed entirely below the top of bank (partially on a valley wall and partially on a sloping valley floor);

As discussed in Issue 3, it is the interpretation of what these words mean that has created the argument between the parties. Mr. Smith takes issue with what was identified as a "valley wall". He believes the valley wall is the three metre high constructed embankment supporting the access driveway, however, he stated that:

> *"If that filled embankment was not there, there would be no valley wall. And I do not believe that the policy set out to protect a constructed embankment"*. (p.170)

The tribunal believes that Mr. Smith was not really saying that there was no valley wall when he said this, but that he meant that the rest of the slope was valley floor. This seems to be the basis for his argument that follows.

It has been noted that the VSCMP does not include any definitions for the words "valley wall", "sloping valley floor" or "valley floor". Mr. Wigley discussed Figures 3 and 5 (Ex. 2b – tab 26 - p.4 and p. 15- VSCMP) with Mr. Smith. Figure 3 depicts the cross section of a valley corridor from crest of slope/top of bank to the toe of slope which then becomes the actual floodway and floodplain or floor of the valley. Fig. 5 shows a valley "wall" which slopes gradually and not necessarily evenly to a lower level base where there may or may not be a watercourse. The landform can be described as a top of bank, valley wall sloping to a toe of slope and a valley floor. This is the case with the Russell property. There is no stream but the valley has all of these characteristics.

Mr. Smith did agree that the Russell property is in a valley corridor which has an established or agreed upon top of bank and that the Authority regulates the land 15 metres beyond that. However, he strongly disagrees as to what is a valley wall or a valley slope or sloping valley floor. Mr. Smith stated:

> *"I do not agree with you that just because it is below the top of bank, automatically qualifies it as a valley wall. And your premise is, is that everything below a top of bank is a valley wall until it gets down to the river and then somehow at that bank of the river there's a valley floor in there somewhere.*
>
> *What I am suggesting is that valley floors can exist throughout the valley corridor, whether there is a river running through it or not.."* (Tr. - May 27, 2008 – p. 190)

Exhibit 1b – tab 23 is a letter to the TRCA from Mr. Smith regarding the Russell proposal. At the bottom of page 4, Mr. Smith wrote that Requirement iii) of 4.2.2.G states that a new building may be permitted providing it is "not located on a valley wall". From this, he has drawn the following conclusion:

> *"This explicitly infers that a building may be located on a valley floor. The proposed house could theoretically be located entirely on the valley floor…".*

In response to Mr. Wigley's point that the VSCMP can provide only a generic description of a valley corridor and that *"it's top of bank to top of bank"*, Mr. Smith stated that he was not asking for a generic interpretation, he was "*asking for a specific interpretation for this proposal"*. (p. 192) Mr. Smith contends that the VSCMP does allow construction on a valley floor and that any flat sections on a valley slope would constitute a valley floor. (Section 4.2.2.(g)) In effect, Mr. Smith's interpretation of the VSCMP is that if it does not specifically say something, then it is allowed, such as the above example of construction being allowed on the valley floor, wherever that floor may be.

Mr. Heuchert stated his opinion for the TRCA that:

> *"In my opinion, this application is clearly for development over the top of bank on a valley wall, on a valley slope, whatever you really want to call it, the development is in the valley corridor and it's over the top of a bank."* (Tr. May 29, 2008- p. 71)
>
> "*essentially, the Valley and Stream Corridor Management Program doesn't permit development on the side slopes of the valley"*
> (Tr.- July 21, 2008 – p. 4)

Mr. Melling continued the argument about the use of the words 'valley wall' and 'valley slope' during his cross-examination of TRCA witness, Dena Lewis. Ms. Lewis was one of the authors of the VSCMP document. He referenced the following words from the report to the Executive Committee:

> *"…a proposed dwelling because if it will be constructed entirely below the top of bank (partially on a valley wall and partially on a sloping valley floor) ."* (Ex. 1a –tab 16 – p.113)

. . . . 29

In Ms. Lewis' opinion, the proposal was on a valley wall. She stated that the Executive Committee had not been told of the error regarding the statement that the building was partially on a sloping valley floor. Ms. Lewis agreed that the words were treated as synonymous for the purpose of interpreting the VSCMP. She stated that *"valley slope, valley wall, in my mind, were the same thing."* (Tr. July 22, 2008 - p. 199)

Carolyn Woodland for the TRCA, however, indicated that a wall and a floor are different *"in terms of terms"*, (Tr. July 23, 2008 – p. .50) but in the context of a big valley, everything from Glen Road and even beyond that, is part of the valley wall of the Don River corridor. In terms of the small ravine, Ms. Woodlands described it:

> *"In terms of this little ravine, which is the thumb in the valley, this proposal puts a building in here somewhere, okay? It's on the wall in the general terms of the big valley and it's on a mini-wall of this little ravine."*
> (Tr. July 23, 2008 – p. 54)

There are part slopes and part floors in a ravine and Ms. Woodland indicated that every proposal would be analyzed based on its own landform in terms of wall and floor. (p.58)

2. <u>Primary Set back line:</u>

Debate occurred between Mr. Smith and Mr. Heuchert as to the location of the line that Mr. Smith referred to as the "primary set back" line. He interpreted this line to be from the retaining wall behind 45 Binscarth, curved to the southern most point of the 121 Glen Road retaining wall. According to Mr. Smith, *"these retaining walls are inseparable from the houses they support"*. (Tr. 1- May 27, 2008 – p.166) and must be considered part of the building itself and therefore part of the primary set back line. Mr. Smith's line situates the proposed house between the top of bank and his primary set back line, which puts it below the top of bank.

Mr. Heuchert, on the other hand, utilized the rear wall of the primary buildings along the valley reach. It is relative to the top of bank and not relative to various retaining walls. In addition, according to Regulation 166/06, the Authority's regulatory line would go beyond the top of bank by 15 metres, and development is prohibited in:

> *"2. (1) (b) river or stream valleys that have depressional features associated with a river or stream, whether or not they contain a watercourse, the limits of which are determined in accordance with the following rules:*
> *(i) where the river or stream valley is apparent and has stable slopes, the valley extends from the stable top of bank, plus 15 metres, to a similar point on the opposite side."* (Reg. 166/06)

Mr. Heuchert continued, explaining that the TRCA's Regulation 166/06 puts the Russell construction well inside the regulated area and certainly below the top of bank. In addition, the set backs would not be consistent with established development in the area. All the houses surround-

ing the Russell property front onto an established street with the exception of 121 Glen Road which is behind 119 Glen Road. They all have a degree of table land and were developed long before the Authority came into existence. Any additions to these homes would require approval of the TRCA, since they would be within the regulated area.

On the other hand, the appellant's argue that the Russell lot has frontage on Glen Road in the form of the access driveway and therefore, the development meets the test of consistency within the neighbourhood.

3. <u>Relevance of building a "green house"</u>:

Although Mr. Melling suggested that the Russell proposal should be approved because it met the policies of the VSCMP and not because of the fact that an environmentally designed "green house" was to be constructed, that a Conservation Easement would be given to the TRCA or that a Ravine Stewardship Plan had been and continues to be implemented, a significant amount of evidence was put forth dealing with all three issues. Ms. Leadbeater also indicated that the later two issues were achievable, but at the cost of allowing the house itself. It was noted that this was referenced to any house, not necessarily a "green house". She put forth the view that the TRCA policy could be "massaged" to allow for this "unique" situation.

All the witnesses agreed that the proposed "green house" was a good thing and that a building of this sort would be consistent with the goals of the Conservation Authority in advancing the environmental cause. The tribunal does not intend to deal with the technical aspects of the construction process, but, because of the amount of discussion on the issue, the tribunal believes a finding is needed as to whether the method of construction is relevant to the decision or not.

4. <u>Infill/Between/Behind</u>:

The relevant portion of the Valley and Stream Corridor Management Program regarding whether the placement of the proposed house is infill or between or behind the existing homes in the Binscarth Ravine area is found in Ex. 2b – tab 26- p. 44:

> *"Where an existing lot of record small lot only, eg. single family residential is vacant and is between existing developed (urban) lots, a new structure or building may be permitted provided the new development, its construction, and any associated private servicing requirements:*
> *i) are consistent with the existing primary building setbacks within the corridor reach;*
> *ii) are not located within the Regulatory Flood Plain;"*

The TRCA, in the January 5, 2004 Staff report dealing with the Russell application presently before the tribunal, (Ex. 1b – tab 26- p. 26) states:

> *"[T]he applicant's submission was that the proposal should be classified as an "infill" development as the site is surrounded by existing lots of record. However, it was Staff's opinion that although the Binscarth Ravine is held in private ownership, this proposal was not "infill" for the following reasons:*
> *• The definition of infill within the VSCMP states that a lot must be between two existing lots of record to be classified as infill. This existing lot is not between but below existing lots of record which are mainly on tableland but whose ownership extends into the valley floor.*
> *• There are no dwellings on any other adjacent lot below the existing top of bank in this area and all dwellings are setback from the valley slope."*

Mr. Heuchert outlined that the VSCMP policy, that would allow new development between other existing developed (urban) lots <u>if</u> the ten criteria were met, as:

> *"consistently interpreted by the TRCA staff, is applicable to an existing lot of record that typically includes tableland within the valley corridor and is located next to two existing developed lots with similar characteristics."* (Ex. 5a – tab 2 – p.12 top)

Such an approval would not result in any loss of the valley landform itself. Although 119R is an existing lot of record, it is entirely below the top of bank.

Ms. Lewis stated that the Russell property

> *"119R Glen is down in behind in the actual ravine so it is not filling in the gap in the teeth, it's trying to fill in a hole in a donut"*. (Tr. July 22, 2009 – p. 119)

Carolyn Woodland described the location as:

> *"filling the hole in the donut. It's a remnant site, it's a remnant site that is left over after all the previous planning and severances have occurred from previous eras and it's left as a piece of valley land that I think quite clearly people knew was not developable for a long time.* (Tr. July 23, 2008 – p. 28)

A further caveat was added by Mr. Heuchert that even if the property is not considered "infill", it does not meet the issue of being consistent with the primary set back within the corridor reach, as discussed in Sub-Issue 2.

On the other hand, Mr. Smith's Witness Statement (Exhibit 2a - tab 5 – p. 18) disagrees with this interpretation. He submits that the present TRCA report compounded an error from its first report on the Russell application, which was approved by the Executive Committee. The *"key error is a refusal to acknowledge that the Russell's property is an "infill" development."*. His support for this position was a City of Toronto Planning Report and an OMB decision. (not referenced) and his reasoning for this opinion is summarized as follows:

> *"Firstly, the lot is an infill site because if it were not, the Russells' proposed residence would be considered to be a "house behind a house", and would require relief from the City's zoning by-law by way of a minor variance. The City has confirmed that it does not require such relief.*
>
> *Secondly, the properties front onto Glen Road sequentially from south to north……119R Glen Road is located directly between 119 and 121 Glen Road, their front lot lines are continuous and they share common side lot lines..*
>
> *Thirdly, due to the sheer size of 119R Glen Road its property lines abut not only 119 and 123 Glen Road, but also ten other private, developed residential properties."*

Mr. Smith went on to outline sections of the report dealing with the first application that he indicated should have been included in the second report. These sections were more descriptive of the landform. (p. 20 and p. 21) He referenced the VSCMP previously quoted above, stating that the proposal meets all of these requirements.

During summation, both parties included a sketch of their interpretation of infill and the words surrounding it - between, below, behind. The appellant's view is found in Exhibit 27 – p. 5 and Exhibit 24a- p. 7 outlines the respondent's position. Mr. Melling argued that the tribunal should take the ordinary meaning of the word "between" as "in or through the space that separates two things". He cites the fact that the driveway has side yards with both 119 and 123 Glen Road as its boundary, which definitely puts it "between". The lots depicted in the three examples provided (Ex. 27 – p. 6) all show direct frontage onto a road allowance.

5. <u>Influence of Size, Shape, Matrix:</u>

The two expert witnesses dealing with this sub-issue, as well as the next, were, for the appellant, Ms. Dale Leadbeater and for the respondent, Ms. Dena Lewis. While Ms. Lewis accepts the research done by Ms. Leadbeater with regard to the *"characterization of that site in terms of the plant species, the fauna species and the various disturbances and so forth that were noted on the 119R site",* she draws a different conclusion, based on the aspect of valley land loss to an urban use. More of the land base required to support a healthy natural heritage system will be lost.

The TRCA views the land base as paramount and what is left in the valley and stream corridors must be preserved in order to support the natural heritage system. The Authority realized that biodiversity was declining and that only 17% natural forest cover was left in the TRCA area, with only 13% within the City proper. The Federal government indicates there is a need for 30% forest cover in order to support biodiversity. By looking at the whole system, the TRCA has been able to develop a more "*proactive and pre-emptive*" approach towards protecting the watersheds. Ms. Lewis stated:

> *"…in fact, if we are going to protect biodiversity, if we're going to protect the health of our valley and stream corridors and the health, the ecological health and integrity of our watersheds, that we're in fact going to have to expand the system, that we're going to have to make it bigger.*
> (Tr. July 22, 2009 – p. 19)

Since the opportunities for expansion are very limited in the urban areas, the TRCA must focus on "*ensuring that we don't lose any more land base*". The development of the *Terrestrial Natural Heritage System Strategy* has provided the guidelines for this protection. Ms. Lewis enunciated three key measures, which are part of this Strategy to determine how such a larger system and its forest cover, its landscape ecology and its conservation biology should be developed.

Size: simply put by Ms. Lewis, the bigger the better. The larger the habitat patch is, the more species it can support, the more micro-habitats that can be accommodated. The bigger the patch, the less it will be affected by negative influences.

Shape: it is well accepted that habitats that are very consolidated, more round, provide more sanctuary and protection from external negative influences and *"provide more opportunities and higher ecological integrity"* than the very convoluted edged and linear habitats. Ms. Lewis noted that the later was a strong characteristic of the TRCA watersheds. (Tr. July 22, 2008 - pages 20-21)

Matrix Influence: this measure involves the influence of the surrounding lands on the habitat's function. Intensive urban uses will have a more negative influence than other higher functioning natural areas.

The TRCA developed the "Raster Analysis" which allowed staff to evaluate the entire watershed landscape in a grid format to determine a "target system", using the three measures as the guidelines, in order to determine how to "*optimize or improve the size, the shape and the matrix as well as the overall quantity of cover within the watersheds"*. (p. 21) This does not include the Russell site, since it is already part of the existing system and would not be an addition to the system. However, the analysis shows that the area within the City is in a "*poor condition"*. (p. 41)

Ms. Lewis provided further argument:

> *"Obviously the removal of part of the valley land and part of the natural heritage system here has a negative impact on the conservation of that system and the conservation of land. There's the direct loss under the footprint of the house. The house now extends down the valley slope and into the valley; it will have a new edge, if you will, associated with it. The matrix influence is now extending …the negative matrix or urban influence is now extending closer to the heart of the Binscarth Ravine and the habitats associated there."* (p. 43)

Ms. Lewis indicated that she felt that the Park Drive - Binscarth Ravines are functioning fairly well within their urban environments. *"Impairing it by removing part of it permanently for an urban use does not support the conservation of that system or the conservation of land."* (p.44) She reiterated the need to look at the Russell proposal in the context of the overall ecosystem rather than on a site-by-site basis. In summary, Ms. Lewis stated that:

> *"What we felt we needed to do and what was needed, was, in fact, that we need to expand the system, we need to make the sizes of the habitats bigger, we need to improve their shapes so they're more round and we need to reduce the influence of the matrix in terms of – particularly the urban matrix on the habitat patches."* (Tr. July 22, 2008 – pages 36-37)

Ms. Leadbeater actually agreed with this when discussing the ravine's bird population. Although stating that in her opinion, that none of the birds found in the area were at risk, she did indicate that area-sensitive birds are attracted to larger patch areas. (Tr. May 28, 2008- p. 139)

Throughout her opinion evidence, Ms. Leadbeater referred to the site as being "too small" to measure the impact. The cohort of site specific birds and animals is highly mobile throughout the whole ravine system, so that *"the removal of that footprint possibly could have been a very small impact"*. (p. 157)

The house is to be located at the "top" of the ravine, which has little impact on the connectivity of the ravines for the animal habitat. Most of the surrounding gardens have non-native plants and do not attract wildlife to any great extent. She acknowledged the matrix influence and the validity of the three key measures discussed by Ms. Lewis in developing a system with biodiversity, but continued to state that the site where the house was to be located is so badly degraded by the matrix influences as well as invasive species, that the site's removal will have very little impact on the health of the valley.

6. <u>Invasive Species and Ravine Stewardship/Management:</u>

Ms. Leadbeater's discussion of the Gartner-Lee Limited report, entitled *An Environmental Impact Study of a Proposed Single Residence Development on 119R Glen Road Property, City of Toronto*, dated March, 2008. (Ex. 2a –tab 3) was extensive. In her opinion, the bulk of the native species found on the Russell property would not be affected by the proposal. *"There's a lot of evidence of disturbance."* (Tr. May 28, 2008 – p. 117) The area in question is/was dominated by non-native species, but has been improved with the Stewardship Plan. However, without proper management, this forest will revert to its former condition. The non-native species will return.

Ms. Leadbeater identified some features and functions of the site that provide a "snapshot" of the valley in the area of the Russell site. The existence of fresh moist soils on the site supports a potentially healthy and viable forest which bodes well for regeneration. However, erosion is appearing around the Norway maples, caused by this trees' tendency to dry or desiccate the soils. Norway maples, as well as the Manitoba maple, the London Plane tree and the Siberian elm are of the deciduous class and all are non-native and considered invasive species. There are many invasive species that are "co-dominant" with the rest of the sugar maple hardwood trees in the area. (p. 126) The Invasive species should be removed and replaced by native trees. Ms. Leadbeater expressed a strong concern about the damage done by the Norway maples and other invasive trees and shrubs.

The Butternut tree has been designated under the **Endangered Species Act.** This type of tree is common but is endangered by a fatal airborne canker disease. The tree likes sun and those on the property are in a sub-canopy position, which hinders their ability to secure a position in the sun. The existing trees are no longer producing seeds, but at least five new trees have been planted. There is a twinned tree on the property, which would have to be removed for the house construction.

The ravine is populated by urban tolerant mammals such as squirrels, white-tailed deer, and raccoons. There is a lot of food in the ravine for these animals and the loss of the footprint area would not have any significant impact. In addition, none of the existing bird population is at risk in terms of being rare. (p. 137) As more of the invasive trees and plants are removed and replaced by the native variety, the habitat's health will return. (p.155)

It was noted that most of the invasive species have been removed as part of the Stewardship Plan (agreed to during the approval of the initial Russell application.) This has started the forest renewal process. In addition, approximately 5000 small trees and shrubs have been planted. (p. 128)

Ms. Leadbeater's final conclusion dealt with the issue of valley stewardship or management. She views the Russell site as unique and stated that the Ravine Stewardship Plan is advantageous to the health of the area and the Russell's should be complimented for doing it. *"If you remove that management activity then the ravine will just revert."* (p. 160) Ms. Leadbeater indicated that the ravine is looking really good because of the Stewardship Plan, but has a long way to go and *"that site is clearly on a downward spiral"*.

On page 165 of the May 28, 2008 Transcript, Ms. Leadbeater stated her view as follows:

> *"Because those conditions are so affected by the human manipulation and the invasive species, that's the only reason that there is an opportunity if the policy can be massaged to develop a partnership with the landowner and the City to manage this site to increase biodiversity, but that comes at the cost of building a home in the area."*

She suggested that there is a need to balance the loss of a "very small footprint" that is degraded, against a potential gain. The Ravine Stewardship Plan has been operating for two years and there has been a positive outcome. If it takes giving up a small piece of land to continue to gain further positive outcomes, in her view, the Authority should agree to the proposal.

Ms. Lewis acknowledged that Ms. Leadbeater:

> *"points to a problem that is pervasive within the natural heritage system within our jurisdiction. Invasive species, non-native species are a problem throughout and not just at the 119R Glen Rd. site and not just within the City of Toronto."* (Tr. July 22, 2008 – p. 49)

. . . . 36

However, Ms. Lewis pointed out that there are lots of native species co-existing with the Norway maples further down in that ravine and within the rest of the valley system. She indicated that the Norway maple was a problem and sees a need for a specific program to deal with this problem.

She also acknowledged that ravine stewardship was needed and that the existing Plan *"should be in time a benefit for those areas*" (p.78) if it continues to be maintained, monitored and managed, but, that the need for such stewardship plans and even the absence of such stewardship plans should not be the reason for removal of any part of the scarce land base from the system in order to achieve that stewardship. She was asked if she could provide a sort of benefit analysis for a stewardship plan versus the possible negative of nature's influence on the conservation of land. She replied in the negative. (p. 51)

> *"I think that our work and our knowledge of the watershed clearly indicates that we need to protect the land base."*

Ms. Leadbeater spoke of the need to encourage ongoing management programs, but felt

> *"it's just wishful thinking that some magic fairy is going to come down and do it for us, because it's not going to happen. We have to do it ourselves or it's not going to happen at all"*. (Tr. May 28, 2008 – p 158)

In reference to the Stewardship Plan presently underway, she stated:

> *"Even though the plan has been implemented to a very large degree and it's looking really good, has still got a long way to go but its looking good. If you stop the management, if you remove the management activity, then it will just revert."*(pp. 159-160)

Ms. Lewis acknowledged that the lack of financial resources to carry out stewardship plans was a serious issue for the TRCA and every other conservation authority. However, Ms. Lewis indicated that things do and have happened in this area through the initiatives of citizen groups who appear to be, more and more, responding to environmental issues affecting their daily lives, more than in the past. Although Mr. Melling indicated that the Russell plan was only one of two such plans in the south Rosedale area (p.87), Ms. Lewis indicated that the Don Watershed is one that has secured support from the general public, as well as the residents in the Don Valley to develop stewardship programs on both private and public lands. She agreed that more could be done if more funding was available.

TRCA staff Ms. Woodland, in her Witness Statement (Ex. 5a - tab 4 - p. 4 of 7) concluded with the following:

> *"The incremental losses of natural habitat and urban canopy cannot continue at the rate it has been lost in the development boom years."*
>
> *"TRCA's Terrestrial Natural Heritage Strategy and the City of Toronto Official Plan and Natural Heritage Study all set requirements for the natural heritage system and reinforce the need for natural system enhancement through opportunities in redevelopment."*

She further stated that the Russell decision presents a planning dilemma for the TRCA in that the Stewardship Plan may not be completed, but the development does create an exception to the VSCMP policies, which could lead to others seeking similar approvals. She also indicated that the new technology proposed for the new house should be applauded, but again stated:

> *"A Green Building cannot form a holistic sustainable development when it is sited incorrectly in relation to the protected natural system."* (p. 6)

And finally, reference was made, by the appellant, to the VSCMP policies dealing with the potential for regeneration in order to indicate that the policy allows it and in fact, encourages it:

> *Section 4.2.2. F): 1) Minor additions: replacement structures and other property improvements may provide opportunities to regenerate the ecological integrity of the valley or stream corridors and to provide public access. The regeneration policies, criteria and implementation procedures within this Program shall be applicable on a site by site basis."*

The TRCA acknowledged their support of regeneration or stewardship projects, but indicated they could not approve of any such project, which would cause a loss to the natural heritage system.

7. <u>Compensatory Banking and Stewardship Agreements:</u>

The *Terrestrial Natural Heritage System Strategy* was approved by the TRCA in 2007 and was developed *"at the regional scale with a single focus – terrestrial biodiversity"*. (Ex. 5a-tab 5- p.4) The Strategy has resulted from many years of study and experience. The Policy states:

> *"Despite the increase in awareness of conservation issues in the Toronto region, there continues to be incremental losses of habitat while the quality of remaining habitat continues to decline."* (p.12)

It further stated that this trend is expected to continue as urbanization expands with the watersheds. The concept of working towards a given minimum amount of natural cover to *"achieve specific conservation objectives"* is receiving more acceptance by both the public and government. (p.15)

The policy has a goal that is relevant to the Hearing:

> *"To work with all stakeholders to identify and, protect the land base comprised of 'existing' and 'potential' natural cover and to fully secure and restore a target terrestrial natural system by 2100 that will both protect and restore native biodiversity."* (p.16)

The appellants submitted that *Section 5.2 Implementation Actions and Methods - Compensation Banking* and *Section 5.2.6 Private Land Stewardship* are relevant to the Russell's proposal.

Compensation Banking is described in the policy as an option when the target system land base cannot be secured initially through the normal planning process.

. . . . 38

> *"Compensation, sometimes referred to as mitigation banking, allows a landowner to compensate for losses to the target system by providing funds toward the TNHS implementation. Credits may be banked from a number of sites, to be used toward achieving the same ecological results in a different location. TRCA will always advocate first for the protection, securement and stewardship of the target system as identified on Map 4, or modified through other processes (e.g. official plans, watershed plans) but banking, which has been used in other regions (South Florida WMD, 2004; California DFG, 1996), offers a creative alternative for achieving the system where flexibility may be required. Criteria will be developed to determine appropriate situations and processes for the use of compensation banking as well as the values to be assigned."* (p.35)

The section regarding Private Land Stewardship allows for the possible implementation of the TNHSS through voluntary stewardship with the TRCA assisting landowners "both technically and, where possible, financially in habitat restoration. Two of the initiatives that are relevant to the Russell proposal are:

- *approach landowners for participation and, using the TNHSS, continue to encourage residents to voluntarily naturalize any available portions of their properties, including backyards within the Built-up Area.*
- *Encourage private owners undertaking naturalization and other restorative initiatives to adopt elements of the Natural Heritage Restoration Plan requirements Appendix G"* (p.39)

It is these sections of the Terrestrial Natural Heritage System Strategy that Mr. Melling advocates involves the Russell proposal, at least in the case of the first application.

Mr. Melling asked Ms. Leadbeater to provide an opinion as a biologist, about the TRCA witnesses' comments, which he summarized, as being that the Ravine Stewardship Program is a good thing, but,

> *"you can't use it or ought not to be able to use it as compensation against negative impacts, however small or large, as compensation against negative impacts caused by the introduction of the new house on the property, and the loss of the footprint. You can't trade the one off against the other"*. (Tr. May 28, 2008- p.158)

Ms. Leadbeater's response is repeated here, as it continues to be relevant to this sub-issue:

> *"Because those conditions are so affected by the human manipulation and the invasive species, that's the only reason that there is an opportunity if the policy can be massaged to develop a partnership with the landowner and the City to manage this site to increase biodiversity, but that comes at the cost of building a home in the area."* (Tr. May 28, 2008 - p 165 - emphasis added.)

Ms. Leadbeater believes that the project should proceed and would have a positive result due to the continuing Stewardship Plan and the proposed "Conservation Easement. The invasive species would be removed and a management plan would be in place. Due to the fact that the site is so "*degraded*", it is a "unique thing". (p.180) The Policy, in her view, is meant to guide thinking and provide a framework for making decisions resulting in positive outcomes. When this happens, massaging the policy is the way to proceed. A partnership between the Russells and the TRCA could provide nothing but positive results and should be dealt with as a unique project.

The suggestion that the VSCMP could be massaged in order to allow the Russell development elicited strong reaction from the TRCA witnesses. Mr. Heuchert indicated that the Policy could not/should not be massaged:

> "*No, I don't think so. The policy is very clear, no development on a valley slope and the objectives of the Conservation Authority are very clear, that there should be no new development within the valley corridor. I don't think it's a matter of massaging. I believe it's a matter of basically negating that policy"* (Tr. July 21, 2008 - p. 56)

Mr. Heuchert expressed his view that the application in itself is commendable with the green roofs and energy efficiencies built in as well as the Stewardship activities that have taken place. However, he questioned how the Authority could write policy to allow for each site specific project – what is the compensation program, how much compensation is needed and, what is it worth? There could not be any consistency in how each applicant was dealt with and it would detract from the TRCA's main goal: *"that valley system as a whole really needs to be preserved as a whole system'.* (p. 54)

All three TRCA witnesses spoke to the point wherein the Authority had to stop allowing cumulative intrusions into the valley based on a compensatory regime. Mr. Heuchert expressed it as follows:

> *"For many, many years that was the philosophy to development within valleys, is to allow development to take place and then compensate for that elsewhere, whatever that compensation may be. We cannot do that anymore."* (p.54)

Ms. Woodland's supported this position:

> "*However, as a public agency when we're dealing with thousands of applications and we're dealing with the kind of impacts and development that we see on a daily basis, we have to have some sort of basic rules or policies that set the common denominator and the foundation for how we approach development and the review of applications in a fair and consistent way."* (Tr. July 23, 2008 – p. 13-14)

The original proposal provided for both the Ravine Stewardship Plan with the Toronto Urban Forestry section and a Conservation Easement over the majority of the property in favour of the TRCA. The easement document has not been drafted to date, so the specifics were not discussed. However, the question of the value of such documents was addressed by Mr. Melling with Ms. Lewis. Although, the TRCA has policies that encourage and allow for such Easements, Ms. Lewis appears not to be supportive of these agreements.

> *"I think that setting aside lands to be conserved is great. I have had personally less than stellar experience with conservation easements in the fullness of time. And I have found that they haven't worked all that well through subsequent ownership …"* (Tr. July 22, 2008 – p.89)

She cited examples of these easements in Caledon and Richmond Hill, which were put in place many years ago. Requests from the owners to change the terms constantly appear on her desk. She acknowledged, however, that these requests would not be there if the Easements were not in place, so there is some control remaining, despite the fact that landowners take action often without requesting approval.

Mr. Heuchert's conclusion regarding this sub-issue is found in Exhibit 24a - page 32:

> *"As I mentioned the green building technologies and the stewardship program are excellent, however as a compensatory measure to removing the valley landforms is very difficult to ensure that those will continue in perpetuity…..Certainly we could put a legal framework in place that might reduce their ability to do that, however those are typically very difficult to enforce. Who is actually going to have the resources to constantly be monitoring all of these compensatory facilities over time?"*

Ms. Woodlands summed up the argument by submitting:

> *"In a very real sense, this application is like all others that the Authority has faced and continues to face – a claim that this application is unique; there is very minor or immeasurable impact and an offer to do something for the Authority. That approach simply erodes the existing natural heritage system-"* (Tr. July 23, 2008 – p. 19)

8. <u>Impact of Cumulative Loss of Valley Land:</u>

The Glossary of the VSCMP provides an understanding of what" cumulative effects" means:

> *"The combined effects of all activities in an area over time and the incremental effects associated with individual projects in an area over time."* (p.69)

Ms. Leadbeater submitted that the footprint for the house is very small and of very poor quality and its loss would have no impact on the conservation of land. In fact the potential gain far outweighs any loss to the valley system and its health (Ex. 25a – p. 26-67 (d)). In effect, the impact of cumulative loss is so insignificant, it is not an issue.

Mr. Melling, reiterated this view in the appellant's Reply Submission (Ex. 27) He stated that the Russell's accept that cumulative impact and incremental loss have been dealt with in many appeals under the **Conservation Authorities Act.** He maintains:

> *"that any negative impact is far outweighed by the environmental benefits of the proposal."*

and further*:*

> *"However, the incremental loss and its contribution to cumulative impact cannot be so miniscule that it is immeasurable, as in this case. There is an obligation on the TRCA, when alleging an incremental loss that exacerbates cumulative impact, to bring some evidence that this is so,"*

The appellant also has submitted that previous tribunal decisions regarding cumulative loss have chiefly dealt with extensive fill and construction in a floodplain where it is easier to determine the impact. They have not demonstrated any impact with respect to the very small "thumb" that is the footprint for the Russell house. (p.8) Mr. Melling stated:

> *"If the TRCA is right and the loss of any land, however immeasurable, is sufficient to demonstrate unacceptable cumulative impact, then no application could ever meet the test of impact on the conservation of land."* (p.9)

It is noted that the footprint of the building is 230 square metres or 2,475 square feet. The TRCA actually includes the driveway and other hard features as well as the cantilevered areas (roof) for an additional 139 square metres. This brings the total footprint to 369 square metres or 3,964 square feet. (Ex. 24a- p.24)

The TRCA's interpretation, on the other hand, is that the policies promote "both protection and rehabilitation of the natural heritage.

> *"This Authority's view is that healthy ecosystems and the ability to create healthy ecosystems depend upon protecting the amount of currently available valley land within its jurisdiction."* (Ex. 24a – p.3)

The respondent believes that allowing the construction of this house would mean reverting to the actions of the past where incremental loss was dealt with in a different manner. The Authority's position was strongly stated in Argument (Ex. 24a – p. 4):

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> *"The Mining and Lands Commissioner ("MLC") is being asked to fundamentally shift the principle of no incremental loss and cumulative loss (i.e. the protective element of the policy) to one where incremental and cumulative loss is a virtue where it is coupled with ecological improvement of some sort (i.e. the rehabilitative element of the policy). The "mitigation" being seemingly offered in this case is the stewardship program in return for the right to permanently remove a piece of valley land for development of a luxury home. If adopted, this approach has the potential to turn "conservation of land" into a system of negotiating the amount of development in the valley with the corresponding mitigation. By virtue of the fact that the MLC is a provincial tribunal superior to all Conservation Authorities and given the commonality of the regulations administered by Conservation Authorities, this approach would then apply to all of the Province's valleys. It will be a short step for those who wish to develop in a valley to move from providing stewardship and mitigation on site to simply contributing money for stewardship elsewhere in return for permission to build."*

Findings:

Section 1.3 VISION of the Valley and Stream Corridor Management Program (Ex.2b – p. 7) outlines why this document was developed and approved by the MTRCA in 1994.

> *"The development of the Valley and Stream Corridor Management Program has been guided by a new vision and understanding of the ecology of these resources and the need to recognize the relationship between their landform, features and functions.*
>
> *"The VISION begins with the retention of watercourses and their valley and stream corridors as open, natural landforms, from the headwaters to the river mouth marshes."*

The eight sub-issues all have some relevance for the tribunal, each having greater or lesser significance. The following provides the findings of the tribunal dealing with each sub-issue followed by a general overall finding with regard to Issue 5.

Sub-Issue 1 - Valley wall, valley slope and valley floor in relationship to the top of bank policies and the allowability of residential construction on a valley floor:

This sub-issue deals with two points:

1. What is meant by valley wall/valley slope/valley floor? and
2. Is residential construction allowed on a valley floor?

Both parties agreed that the property in question is located in a valley corridor and is below the top of bank. There the agreement ends.

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Mr. Smith believes that the VSCMP should be read in such a way as to allow for residential construction on the floor of the valley, even though it is below the top of bank, because it does not provide definitions of the words valley wall, valley slope or valley floor. He believes that valley floors exist throughout the corridor on the valley slope/wall in areas that level off to provide what can be described as "plateaus". If these plateaus are large enough, construction could occur. He believes the Russell footprint is this kind of plateau or valley floor.

Conversely, the TRCA policy document graphically depicts the cross section of a valley corridor being from the crest of the slope or top of bank to the toe of the slope which then becomes the valley floor and/or floodplain, and continuing on up the other slope, again to the top of bank. (Figure 3 and 5 – Ex. 2b – tab 26) The corridor is from crest to crest.

The valley wall, as described by Mr. Smith takes on an architectural significance like a building with various floors extending inward from the wall. In the case of the valley, he appears to see the floors as extending outward. The valley wall as described by the TRCA is part of a landform, not a building, and it exhibits various degrees of slope, as well as flat sections, as the slope travels downwards to the floor of the valley where there may or may not be a watercourse.

The tribunal cannot accept Mr. Smith's view of what constitutes a valley. The tribunal agrees that a valley is a natural geographic landform that exhibits various characteristics of wall, slope and floor, no matter how large or small it is. This "thumb in the valley" is an offshoot to another valley which ultimately arrives at the Don River floodplain….all of which are below the top of bank. That is the point. As stated earlier and in this case, it does not matter what the words are, either on a valley wall or valley slope, the VSCMP's Figures 3 and 5 tell the story.

In addition, the tribunal finds that the TRCA's Regulations clearly place the top of bank as the common guide line, beyond which no <u>new</u> development will be allowed. It is in the regulated extra 15 metres of land beyond the top of bank that the VSCMP's flexibility comes into play, Although acknowledging the appellant's argument regarding the fact that the Policy does not directly deny development in the valley, the premise that table land exists in the valley does not make sense to the tribunal nor does the point that because the policy does not speak to development on the valley floor, that somehow it is allowed. The tribunal believes the Policy is clear that only additions to existing buildings will be allowed, but no new development.

The tribunal concludes that the debate about valley wall and/or valley slope is not of value in making a decision regarding the Russell proposal. Further, the tribunal is satisfied that the proposal is below the top of bank and would be considered "new development" and therefore, is within the purview of the TRCA's Regulations to deny approval.

Sub-Issue 2: <u>Primary Set back line</u>:

The tribunal cannot accept the appellant's location of the primary set back line, since it is actually located below the top of bank. Whether the line should use the backs of the houses (TRCA) or the retaining walls (appellant) is not material to the decision. The tribunal continues to be persuaded by the fact that the proposal is below the top of bank, and that the primary set back line is relative to that line.

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The point that the Russell proposal exhibited consistency within the neighbourhood was interesting. The appellant argued that the Russell's frontage was the driveway entrance on Glen Road. If that was the case, and consistency existed, then the Glen Road frontage would have to be characterized as only being driveway entrances. Of course, except for one property, the houses themselves front on the street. The proposed Russell house itself, in the view of the tribunal, would not front directly onto Glen Road. Consistency within the neighbourhood would not be achieved.

Sub-Issue 3: Relevance of building a "green house":

The issue before the tribunal is whether to allow a house to be built within the valley corridor or not. The type of house is not relevant to the tribunal's findings, but the tribunal echoes the plaudits regarding the potential for the development of "green houses" within the province. Support for such initiatives, however, cannot come at the expense of fairly fundamental underlying principles which form the basis of the legislation and, in particular, should not be traded off in highly urbanized areas which see considerable development pressure.

Sub-Issue 4: Infill/Between/Behind:

The review of Mr. Smith's reasons for saying that the Russell property is infill are not supported by the tribunal.

Mr. Smith's first reason is really a negative trying to become a positive…*"the lot is infill because if it were not, the Russell's proposed residence would be considered to be a "house behind a house"*. This is followed by a reference to the City's Zoning By-Law which apparently says it is not classified as such. It is clear to the tribunal that it is not the City's By-laws that are an issue here, but the policy within the VSCMP.

The TRCA's interpretation of the VSCMP is that the lot is not infill. It is not a lot between two existing lots of record, but is actually below the existing lots of record, which for the most part, have the residential construction on table land. The TRCA states:

> *"There are no dwellings on any other adjacent lot below the existing top of bank in this area and all dwellings are setback from the valley slope."*

The TRCA submitted that it consistently interpreted the VSCMP as applicable to new development on land which includes both tableland and valley land.

Both parties submitted examples of lots that are between other lots. The tribunal notes that all of these examples show lots fronting directly onto a roadway. The houses themselves would front on these streets. The only frontage that would not allow this would be 119R Glen Road (and by default 121 Glen Road). Its frontage is a laneway. As previously noted, the tribunal does not find that the development is "consistent with the neighbourhood" because of this factor.

His second reason deals with this frontage issue on Glen Road. The tribunal believes Mr. Smith and Mr. Melling were saying that 119R Glen Road is between two lots -119 and 123 (although 121 was stated) by reason of this access laneway.

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The property itself was created by a severance of the rear portion of a property fronting on Binscarth Road. It was not established per se as a lot with a frontage on a street and as such, became a remnant parcel which was given some status as a lot of record at some point in time. It bears the designation of "R" which means rear …a lot behind other lots. 121 Glen Road was also created by a severance of the original coach house from the lot at 119 Glen Road. It also has the same access or "frontage" as 119R Glen Road via the laneway.

The tribunal understands that the laneway was established to provide rear yard access for 119, 123 and 125 Glen Road, as well as several properties on Binscarth Road, to one of which the Russell property was originally attached. The laneway was not developed to provide access to the severed Russell property. As a result, the tribunal finds that, although the laneway may now be the "legal" frontage for 119R Glen Road, it does not provide a frontage whereby the house would actually front on a street like all the other homes in the area, (except for 121 Glen Road).

Mr. Smith's third reason to classify the Russell property as "infill" is because of it size …*"due to the sheer size …its property lines abut not only 119 and 123 Glen Road but also ten other private developed residential properties"*. That certainly is true, but the tribunal notes that the Russell house would face the rear of all the residential units located on these properties. The tribunal's conclusion is that the Russell house would be behind and below the other properties, not between. As such, it would not meet the VSCMP policy.

Be that as it may, the tribunal understands that the TRCA is of the opinion that this debate was not really necessary, since the proposal cannot meet the VSCMP policy simply because it is below the top of bank.

Sub-Issue #5: Size/Shape/Matrix Influence Impacts:

It is this issue that the tribunal sees as one of the most relevant to the concept of conservation of land.

Ms. Leadbeater's testimony was, at first blush, very compelling. There is no question that the larger the "patch" areas, the better it is for animals and birds as well as for the forest growth, but, the property affected is very small….too small, in Ms. Leadbeater's view, to be able to measure the impact. Due to the location of the site, its value for connectivity also is minor. Her testimony regarding the matrix influence and the presence of so many invasive species indicated the degraded nature of the area. What does it matter if this small piece of land is taken out of the forest class into an urbanized class? After all, the Stewardship Plan has made it better and that would not have happened had there not been an initial approval of the residence by the TRCA. It is that question that the decision rests on.

The tribunal noted, with interest, the evidence that the remaining forest cover within the City boundaries covers only 13% of the area and 17% within the whole TRCA area, while the Federal Government indicates the need for 30%. In order to even come close to that figure, there is a need to expand the system, not make it smaller but qualitatively "better".

A review of the *Terrestrial Natural Heritage System Strategy* has convinced the tribunal of the merit of the guidelines outlined in that document. It was developed over many years based on the experience of the Authority since its formation in 1957. The analysis that was carried out, which included consultation with stakeholders, determined that, as Ms. Lewis stated, *"business as usual had not resulted in the protection of the ecological function and biodiversity"*.

As stated in Exhibit 26a on page 12:

> *"As our communities continue to grow, it is important to plan comprehensively for a sustainable natural heritage system for the region. The regional terrestrial natural heritage system defined in the Strategy is designed to protect and improve biodiversity by increasing the quality and amount of forest and wetland habitats by building upon the existing terrestrial system and optimizing the opportunities for native species diversity."*

The expansion of the Natural Heritage system will be a very difficult goal to attain but one which the TRCA is attempting. The loss, therefore, of a piece of the existing system to further urban (matrix) influences, no matter how minor the impact is on the size or the shape or what the matrix influence is, becomes an on going issue for the TRCA and cannot be supported by them. The TRCA's paramount focus is on keeping what land base is left in the valley and stream corridors, as well as attempting to expand it.

The tribunal does accept that the previous Stewardship Plan on the Russell property is in keeping with *"a fundamental goal of the TNHSS"* (Ex.25a – p.33) which is the restoration of species and vegetative communities. However, the TRCA does not see this goal being implemented through the loss of land to the natural heritage system.

The tribunal finds that it accepts the "*paramount focus*" of retaining valley land, no matter how minor the impacts are of size, shape and matrix influence.

Sub-Issue #6: <u>Invasive Species and Ravine Stewardship/Management</u>

Ms. Leadbeater's testimony also was compelling regarding this sub-issue. Without proper management of the replanted forest, the non-native species, especially the Norway maple will return. The TRCA acknowledged this as a *"pervasive problem"* within the natural heritage system, especially within the city. Ms. Lewis suggested a removal program through the Urban Forestry Department of the City would be a worthwhile endeavour. However, she also pointed out that further down the ravine there were many native species co-existing with these Norway maples.

Although acknowledged by both parties, as well as the tribunal, that the existing Ravine Stewardship Plan has been beneficial for the area and that unless the management continues, the valley land could revert, the tribunal understands that the present proposal does not involve the existing Ravine Stewardship Plan (nor any new plan was discussed). The policies of the TRCA certainly can be seen as supporting such plans and much more could be accomplished if funding was available, but it is also clear that the TRCA cannot support such plans as an alternative to maintaining the land base, despite the impact of invasive species.

The tribunal is concerned that the existing Stewardship Plan may not be completed if approval is withheld. However, the tribunal cannot make its decision based on something that might or might not happen with a different project. The Russells have not persuaded the tribunal that they should be granted approval because they have commenced a comprehensive and expensive Stewardship Plan. That the need for stewardship exists is acknowledged, but as stated in Sub-issue #5, the retention of or loss of the valley land to the system is what drives this decision.

Sub-Issue #7: Compensatory Banking and Stewardship Agreements:

There is no question that the *Terrestrial Natural Heritage System Strategy* advances compensation banking and stewardship agreements as methods for implementation of the Strategy. However, the policy does not advocate these strategies when they result in a loss of a piece of the existing land base. The policy has been outlined but of note is the sentence which states that the *"TRCA will always advocate first for the protection, securement and stewardship of the target system…"*(Ex 5a-tab 5-p. 35)

The tribunal accepts that the policies are meant to encourage landowners to participate in naturalization and restorative programs on a voluntary basis. The purpose is not to allow either method to be used as a carrot by the landowner to get something they want from the Authority.

The tribunal views Ms. Leadbeater's submission as, basically, just that. She stated that the policy should be *"massaged"* by developing a partnership with the Russells, the City and the TRCA to manage the site, but the approval for the house is the quid pro quo. The Authority cannot accept this as being mandated by the existing policies and the tribunal finds itself in agreement with this overarching approach.

The tribunal also accepts that some stewardship agreements ultimately work the way they are supposed to, but it notes that according to TRCA staff, problems often arise during the course of these agreements whereby the existing owners or new owners want to change the terms of the agreement in order to expand the uses allowed on the property. In the *"fullness of time"*, Ms. Lewis has experienced negative results with conservation easements.

In any case, the proposal before the tribunal has not offered up the use of compensatory banking (nor a stewardship agreement). As a result, the tribunal does not find any relevance with regard to these issues in making its decision.

Sub-Issue #8: Impact of Cumulative Loss of Valley Land:

Much has been written in many conservation authority decisions regarding cumulative loss, relating, in particular, to the loss of floodplain storage. However, the issue itself applies to any proposal within a valley corridor that would cause a loss of the natural heritage system land base.

On the one hand, the appellant views the loss through the Russell proposal as miniscule in the overall valley system and that the environmental benefits outweigh the cumulative impact. Mr. Melling submitted that the TRCA has an obligation to provide evidence of cumulative loss especially where it is basically, immeasurable.

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Whether the loss is 2,475 square feet or 3,964 square feet, the Authority sees it as one more piece lost to the system and a return to the past system. The tribunal found the appellant's argument, as outlined in the final argument, compelling. Cumulative loss remains a major issue and should not be looked upon as *"a virtue where it is coupled with ecological improvement of some sort"*. (Ex. 24a-p.4)

Just as the TRCA requires policies that allow it to deal with development proposals in a consistent manner, so must the tribunal deal with its decisions in a consistent manner. The tribunal found in *Hope v. Rideau Valley Conservation Authority*, January 18, 2006, (unreported):

> *"Consistency also applies to a decision regarding the issue of cumulative impacts with respect to flood control and pollution as well as the conservation of land."* (Ex. 24c- tab 3 –p. 30)

The Authority faces ongoing challenges to approve development within valley land and therefore is constantly faced with the question of cumulative loss. In addition, while this program focuses on valley and stream corridor management, it is recognized that the cumulative effects of decisions made anywhere within each of the watersheds has an impact on the whole natural heritage ecosystem. The tribunal finds that it supports the TRCA position, that every piece of land lost to the system, no matter the size, adds to cumulative loss.

Summary

The eight sub-issues were examined against the policies outlined in the VSCMP and the Terrestrial Natural Heritage Strategy as well against decisions previously made by the Mining and Lands Commissioner. The tribunal is firmly supportive of the respondent's positions with regard to these issues. The main issue connected to the VSCMP is the fact that the proposal cannot meet the guidelines in that it is located below the top of bank.

The other issue became that of the retention of valley land, no matter how minor the impacts are. The tribunal was convinced of the need to accept this "*primary focus"* of the TRCA and support the goal of the Terrestrial Natural Heritage Strategy to strive for an increase in the natural forest cover in the GTA. An approval of this application would add to the cumulative loss that has taken place over the years.

ISSUE 6:
WOULD AN APPROVAL OF THIS APPLICATION BY THE TRIBUNAL BE A NEGATIVE PRECEDENT FOR THE TRCA AND THE OTHER PROVINCIAL CONSERVATION AUTHORITIES?

Summary
This issue has been before the tribunal on numerous occasions in the past. Whenever an approval is granted that is beyond the approved policies of any public body, the risk is present that the decision will be used by another development proposal to secure the same sort of approval. This then becomes a serious issue for both the approving body as well as any appellate body. This tribunal accepts that this risk exists in the Russell appeal and finds that the risk is unacceptable.

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Evidence

Mr. Smith, for the appellant, believes that it was established that there was no risk to life or property from flooding, erosion or slope instability in the Russell proposal. He also believes that the project complies with the TRCA policies and should be approved for reasons previously discussed, in particular that it is an *"important example of responsible sustainable development"* that will serve as a catalyst for valley rehabilitation and sets an example of *"proactive land stewardship.* (Tr. May 27, 2008 p. 173-174)

Ms. Leadbeater agreed with this opinion. She viewed the Norway maple as a significant threat to the quality of this ravine and all the ravines in Toronto. She viewed this proposal as an opportunity to help *"turn the tide"* and reduce the impact of invasive species. (Tr. May 28, 2008 – p. 152) In her opinion, the Russells have done everything they can to be part of this process through the Ravine Stewardship Plan, as well as agreeing to a Conservation Easement. She believed that the tribunal should view the policy as a framework and that the approval of the Russell proposal would have positive consequences. (p. 178) She would not see approval as a precedence since, in her view, the proposal is unique and not systemic. The issue of "precedence" is not used by the TRCA staff and in her experience, each application *"is assessed uniquely"*. (p. 182) and added that the issue appears only within a hearing before the Commissioner.

Mr. Melling invited the tribunal to find that the TRCA had not demonstrated that other proposals of a similar nature actually exist to warrant a refusal of the Russell project on the basis of precedent. He stated:

> *"…it is of paramount importance that the Tribunal recognize that the TRCA is not bound to approve other development proposals simply because a fill permit is issued for 119R Glen Road. Mr. Heuchert admitted this on cross-examination.*
>
> *Mr. Heuchert also agreed that future applications will not be approved arbitrarily simply because the Russells' proposal is approved. He admitted that each application for permission will be diligently evaluated on its merits by TRCA staff, the Executive Committee, and this Tribunal, if necessary."*
> (Ex. 25a –p. 66)

Moving to the respondent's views on the issue of precedent, Mr. Heuchert outlined his reasons for not supporting a "tit for tat" approach, advocated by the appellants.

> *"The fourth and final reason is that the proposal, in my mind, sets a very dangerous precedent that will move us back to the times when deals were made to allow development in the valley for a perceived gain somewhere else in the valley.*
>
> *There are lots of other sites where this type of development can happen and this type of development approach can be implemented. And I feel that if we continue to sort of nibble away at the valley systems that we are going to create a very dangerous precedent by allowing this to go ahead."* (Tr. May 29, 2008 – p. 75)

Mr. Heuchert also stated a concern about the impacts on future applications, both within the TRCA's jurisdiction and throughout the province:

> *"our jurisdiction is very large; we have numerous watersheds and there were development pressures throughout those watersheds and of course, conservation authorities themselves extend throughout Ontario and although different conservation authorities have different policies, we all operate under the same regulation.*
>
> *So, in my view, a Mining and Lands Commissioner decision in favour of this development could also open up a bit of a precedent for other jurisdictions outside of the Toronto and Region Conservation Authority where similar policies apply under the same regulations."* (Tr. July 21, 2008 – p. 47)

Ms. Lewis explained the pressure on the TRCA staff regarding development into the ravine system:

> *"On almost every application, I think that when we deal with development and permits that it is….that initially there is a lot of pressure to have some development within the valley and stream corridor, to have amenities within the valley and stream corridor, to constrain the valley and stream corridor in some fashion. Typically…that is kind of a typical starting point for most proponents, quite frankly"* (Tr. July 23, 2008 – p. 52)

Ms. Woodlands agreed with Mr. Heuchert's view regarding the impact of a positive decision for the appellant. She mentioned Mr. Melling's reference to the precedent issue being a "*boogeyman*" and concluded:

> *"He and I both know that every time I have an application that comes forward, I have to address the issue of precedent or consistency or what's done on the site next to me."*

and further:

> *"So although we may look at it in a flip way that everyone is afraid of the boogeyman, the fact is, in planning terms the issue of context and how previous planning approvals in a similar situation have been dealt with, particularly when an application might be more recent, we do have to consider some of these issues"* (Tr. July 23, 2008 – p. 30)

In summation, Mr. Wigley submitted:

> *"that many of TRCA's valleys and streams are in similar conditions to that of the Binscarth Ravine; ie they contain invasive species, steep slopes and are otherwise accessible. In fact, the Park Drive Ravine seems to be functioning reasonably well in that context. This proposal will become a clear precedent for an argument to allow development anywhere in TRCA's valleys outside the issues of floodplain development. A favourable decision will simply increase the development pressure on those valleys and result in loss of natural heritage, size, shape and decrease bio-diversity.*
>
> *This application represents a very negative precedent to the conservation of land if approved."* (Ex. 24a – p. 36)

Mr. Wigley's Reply statement addressed Mr. Melling's opinion that a precedent would not be set if approved, since the Authority must review each application on an individual basis. He noted that this was done but that *"a consistent approach is taken based on a policy of no development below the top of bank"*.

> *"One has to assume that if this application is approved and a similar case comes before the MLC then the MLC will rule in a consistent manner. Therefore, developers' advisors will simply adjust their applications accordingly with the result that there will be more pressure and more applications for development over the top of bank. It would be naïve to assume that subsequent fill permit applicants would not point to the decisions of the MLC when pleading their cases before the Authority."* (Ex.26a – p. 22)

Findings

The appellant's evidence suggested that "precedent" was usually not an issue during the TRCA staff review of development proposals. It only appears if there is a refusal or an appeal to the Mining and Lands Commissioner. The tribunal, however, accepts the evidence of the Authority with regard to the pressure that would be placed on the staff to recognize past approvals either by the Authority or the Commissioner.

As early as 1979, the Mining and Lands Commissioner consistently viewed 'precedent' as an issue of significant concern and importance in deciding appeals.

Commissioner Ferguson stated in *Nagy vs. MTRCA* , March 19, 1979:

> *" In addition, serious emphasis was placed on the precedential effect of granting permission. The final words in section 4 of the regulation illustrate that in the granting of permission under section 4 the significant consideration is not the prevention of flooding but the broader concept of an interference with the control of flooding. It is in this broader concept that issues of precedent become significant. While the individual case may not cause significant flooding the consideration of the application must relate to the broader concept of control of flooding and whether the granting of permission would create a precedent that could not be distinguished on its merits in subsequent applications. It is proper for a conservation authority to consider the doctrine of precedent because of its relation to the "control of the prevention" of flooding as contrasted with mere prevention of flooding."*

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And further, in *Gies v.. Grand River Conservation Authority*, July 14, 2000 (unreported) the tribunal stated:

> *"If this application was to be approved, the tribunal accepts that the GRCA would have difficulty in reviewing subsequent applications which might either intrude into a Provincially Significant Wetland or not have safe access, due to the potential for flooding. Such a decision certainly would be used by other applicants in attempting to demonstrate precedent."* (Ex. 24c – tab 2- p60)

In *Hope v. Rideau Valley Conservation Authority*, January 18, 2006, (unreported) the tribunal referenced Precedent on page 30 (Ex. 24c):

> *"The issue of precedent setting is a common, but important, reason given by Conservation Authorities both in reviewing and deciding an application. The tribunal accepts that a consistent policy is required in making decisions. If this is not done, it becomes extremely difficult to refuse any application, no matter the size or location. The precedent of inconsistency would be set. Local policies would basically become unenforceable."*

Finally, this tribunal references *Robbins v. Rideau Valley Conservation Authority*, January 31, 2001, (unreported):

> *"The tribunal is concerned with precedent setting. It is important that a regulatory body such as the Rideau Valley Conservation Authority, reaches a decision based on the merits of each case. It is equally important that the body review and keep previous decisions in perspective with regard to consistency in applying the regulations. It is known that applicants review past decisions and use those decisions in ways that could help further their applications. Therefore, former decisions that are determined to be consistent with water management philosophy and regulations, can place the Conservation Authorities in a position where further approvals, in effect, will follow or cause "precedence".*
> (Ex. 24c-tab 6 – p. 23)

The Oxford Dictionary (Seventh Edition) describes *'precedent'* as a *"previous case taken as example for subsequent cases or as justification"*. The tribunal notes that all the case files cited were dealt with on the basis of this definition. This tribunal continues to uphold and adhere to that definition and the previous positions taken by the Commissioner or Deputy Commissioner.

Ms. Leadbeater's point that the Russell project is a unique situation is not accepted by the tribunal, despite the acknowledgement of the good things that have come from the previous Ravine Stewardship Plan and the proposal for an environmentally advanced residential building proposal. Rather, the tribunal accepts the TRCA's position that every application has unique characteristics. That is certainly true of all the appeals that have come before the Mining and Lands Commissioner.

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Mr. Melling's point that the TRCA has not demonstrated that there are a plethora of applications waiting for the Russell decision and that the tribunal should a acknowledge this, is also not accepted. The TRCA produced evidence of some possible examples of development in the valley systems, but there is no way the TRCA can "guess" which development applications will come forward in the future. They can only use their past experience to guide their actions.

The tribunal certainly understands that the TRCA must deal with each application on its own merits, but also accepts that this must be done in a consistent manner and not on an *ad hoc* basis. The recent policies of the TRCA all advocate this position. Just as the TRCA needs to act consistently using their Policy guidelines, so must the Mining and Lands Commissioner. The tribunal finds Mr. Wigley's summation for the TRCA compelling.. (Ex. 26a – p. 22 and p. 26)

There is no question in the tribunal's mind that an approval of the Russell application would create a negative precedent for the TRCA and the other provincial Conservation Authorities. It does not matter that the property is very small. It does matter that another piece of the natural heritage would be lost and in this case, one that is below the top of bank.

CONCLUSIONS

As has been suggested by both the appellant and the respondent, applications before Conservation Authorities have unique characteristics. This does not mean, however, that adopted policies should be adjusted to suit each application. This would create complete chaos as no consistency could exist. Tribunals would be very busy in dealing with the results.

The major issue was stated as the refusal by the TRCA of the application on the basis of the impact on "conservation of land". The tribunal has added the location of the application to the hearing as the second major issue which must be decided.

The tribunal has accepted that the loss of a piece of the natural heritage system is not acceptable, despite its actual size. This loss has an impact on the "conservation of land" through the effect on the overall ecosystem of the valley corridor, again despite its actual size.

However, in the view of the tribunal, the most significant reason for the decision to refuse the application is the fact that the property is below the top of bank of the valley corridor and as a result, the application cannot meet the policies. This policy is one of the basic tenets of Conservation Authorities in Ontario and the approval would definitely create a precedent.

A side issue throughout the hearing was the fact that the Russell's first application was approved by the TRCA, but is under appeal. The Court's are awaiting this tribunal's decision prior to issuing their decision. It is understood that an approval to build may be given but, the tribunal is in complete agreement that such a consideration properly cannot enter into the decision being made regarding this application.

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Based on the evidence submitted, much of which has been found to be rather irrelevant and the reasons outlined in each issue section, the tribunal finds that the loss of natural heritage and the location below the top of bank take precedence. As a result, the tribunal will order that the appeal in this matter be dismissed.

The tribunal further finds that no costs shall be payable by either of the parties to this matter.