

What an Oakville dispute tells us about flood risks for thousands of Canadian landowners

Amid climate change and rampant sprawl, downstream Oakville, Ont., residents discover they may be forced to soak up the risks of expanding floodplains

MATTHEW MCCLEARN

A housing development next to the Fourteen Mile Creek upstream from Brenda Morrison's home in Oakville, Ont., on May 2, 2021.

CHRISTOPHER KATSAROV/THE GLOBE AND MAIL

Roughly 10 per cent of Canadian homes are at high risk of flooding, according to an estimate by the Insurance Bureau of Canada, but few owners know it. A \$1-billion lawsuit in Ontario's largest town, Oakville, portends what might happen as more citizens find out.

Some living along Oakville's rivers and creeks, such as the Bronte Creek, Sixteen Mile Creek, Fourteen Mile Creek and Wedgewood Creek, are furious with their mayor and other local officials after learning that their homes now lie within designated flood hazard zones. Consequently, they're restricted from building extensions, pools, garages and other amenities. They say their property values have declined, and they're suing Oakville and neighbouring municipalities to recover damages.

"Within the last 10 years, there's been a major expansion of the floodplain" in southeastern Oakville, said Gary Will of Will Davidson LLP, which represents the

plaintiffs. “Municipal authorities have not taken the steps to protect the downstream residents.”

Poor flood-risk maps, or none at all, are keeping Canadian communities in flood-prone areas

The allegations have not been proved in court; the lawsuit, known as Banfi v. Oakville et al, is before a case management judge who will determine whether it should be certified as a class action. The municipality said in a statement that it is defending the claim through its insurer “on the grounds that it has no merit and that at all times the Town has acted in good faith.”

The Banfi lawsuit nonetheless offers a test case. Untold thousands of Canadians are in the same situation as the Oakville plaintiffs, but simply haven’t realized it yet. A national survey of 2,500 Canadians living in designated flood-risk areas conducted last year by the University of Waterloo found 81 per cent of respondents hadn’t reviewed flood maps; just 6 per cent knew they lived in a flood-risk area. Possible explanations for this widespread ignorance include a lack of easily accessible flood maps in many communities and apathy or lack of awareness on the part of homeowners.

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Brenda Morrison, whose home borders on the regulatory floodplain of the Fourteen Mile Creek, stands in her home in Oakville.

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But many more rude awakenings seem likely. Governments face rising pressure to update and publish flood maps. (The latest federal budget earmarks \$63.8-million to help provinces and territories complete flood maps for high-risk areas.)

Property insurers are increasingly doing their own mapping and homeowners in high-risk areas might be slapped with higher premiums and deductibles, coverage caps or in some cases be denied coverage altogether. To protect themselves, more home buyers and realtors may start doing their own research.

“We’ve predicted that these types of lawsuits, especially class actions related to flooding in communities, will become more widespread,” said Laura Zizzo, who formerly practised law related to climate change and last year co-founded Manifest Climate, a Toronto-based consultancy.

“The trend that I see is that people are being harmed by increased flooding, and they’re looking for people to blame. And they’re looking to governments, who have big deep pockets, to help them recover from damages.”

RUDE AWAKENINGS

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The Fourteen Mile Creek is heard during storms, but not seen from Ms. Morrison's house.

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When the representative plaintiff, Erwin Banfi, purchased his home backing on Fourteen Mile Creek in 2003, he says, town officials told him he could build an addition. But his subsequent permit application was denied because the property now lay within the regulatory floodplain. A notification of this flood risk was attached to the property’s title, “which will significantly diminish the property value and carry with it a lasting stigma,” the lawsuit alleges.

Brenda Morrison and her late husband purchased a home nearby in 1984. She usually can’t see Fourteen Mile Creek from her home, but during a storm she can hear it.

“I refer to it as the Colorado River,” she said. “A good thunderstorm will do it. During a heavy storm, there’s more runoff now than there was years ago.”

Her property flooded in May, 2000. Some years later, the municipality sent her a map showing that the creek’s regulatory flood-hazard zone almost reached her back door. (A recent map shows it now fully encompasses the home.) Through conversations with neighbours, she began to realize the implications.

“It’s affected the value of the property,” Ms. Morrison said. “I would be obliged to tell a potential purchaser that it’s on a floodplain.”

An analysis by The Globe and Mail shows such problems extend well beyond Fourteen Mile Creek. In half a dozen neighbourhoods across Oakville, dozens of homes now lie within flood-hazard zones.

IN HARM’S WAY

An analysis by The Globe identified a handful of neighbourhoods where dozens of homes lie within Conservation Halton’s latest flood hazard zone. Using ArcGIS Pro, a geographical information system, we overlaid that flood zone with Microsoft’s Building Footprints and identified 681 buildings (mostly homes) in Oakville at risk. Most are located between the Queen Elizabeth Way (QEW) and Lake Ontario, or immediately north of the highway.

Burnhamthorpe Rd W

Many affected residents remain unaware that their homes are now within regulatory floodplains, Mr. Will says. Conservation Halton, a provincial body that manages watersheds and forests in Oakville and surrounding areas, began publishing flood maps online in 2016, and says the onus lies with citizens to consult them.

ASSIGNING BLAME

Many experts warn the warming climate will produce increasingly frequent, sudden downpours. But the Banfi lawsuit points to another culprit: rapid sprawling development.

Like other municipalities near Toronto, Oakville (population: 216,000) has grown rapidly. Nearly one-third of its dwellings have been built since the turn of the century. Mr. Will contends in the statement of claim the town and its neighbours and co-defendants (among them the Town of Milton, the Regional Municipality of Halton and Conservation Halton) issued development approvals “unabated and unreasonably”: Developers tore out thousands of acres of green space. Golf courses became neighbourhoods. With each new asphalt street and rooftop, more rainwater and melting snow ran off into creeks and streams that would otherwise have percolated into soils, causing them to swell dangerously during heavy rainfall.

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That upstream development can raise flood risks for those living downstream has been understood for decades. A 2011 letter by Conservation Ontario (an umbrella group representing the province's 36 conservation authorities) to the provincial government noted that many of its members were expanding their flood-hazard limits, partly in response to increased development.

Conservation Ontario knew this spelled trouble. “This creates obvious difficulties in explaining to downstream landowners and municipalities that their lands have been

‘relocated’ into the floodplain with all of the attendant restrictions on the use of those lands,” the letter warned.

Responsibility for managing flood risk largely falls to municipalities. They maintain storm sewers to handle heavy rainfall. They determine which new developments get approved, and which land can be used for what purposes. Such choices affect who gets flooded, and who doesn’t.

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But flooding experts warn that local officials face perverse incentives. Developers want to build high-priced properties near lakes, rivers and the sea. Elsewhere, they’d prefer to build unmolested by onerous and expensive flood mitigation measures. Should a municipality impose harsher flooding regulations, swaths of land may remain undeveloped; grant permits, on the other hand, and significant one-time development fees and ongoing tax revenues flow.

The Banfi lawsuit places past development choices under a legal microscope. That it’s happening in Ontario is perhaps ironic: Its conservation authorities, established after 1954’s deadly and destructive Hurricane Hazel, effectively took much of the authority for flood-related decisions out of municipalities’ hands. Unique to Ontario, they’re often cited as a reason why the province has fewer citizens residing within floodplains than elsewhere.

Mr. Will doesn’t dispute that contention, but he says Conservation Halton came up short. “Clearly, some conservation authorities have done a much better job protecting

their residents than Conservation Halton has done,” he said. (Citing the ongoing litigation, Conservation Halton declined to comment.)

A FLOOD OF LITIGATION?

Even if the Banfi lawsuit fails, it puts all municipalities on notice, University of Waterloo head says.

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Though observers expect lawsuits similar to the Banfi action in the years ahead, they are hardly slam dunks. Municipalities enjoy formidable legal protections, notably something called “the doctrine of Crown immunity.” Historically, courts have been loath to expose small local governments to endless claims they can neither afford nor insure against. Municipalities have considerable latitude to make policy decisions even when they harm citizens; some judges have left it to voters to punish reckless officials at the ballot box.

There have been a few examples of Canadians suing municipalities over flood-related damages, with mixed outcomes. Ms. Zizzo added that while there have been some precedents for certification of class actions relating to flooding, others have failed or been dropped.

Some municipalities might seek to avoid such lawsuits using a head-in-the-sand approach, by suppressing flood-risk maps and neglecting to update them. But Blair Feltmate, head of the University of Waterloo’s Intact Centre on Climate Adaptation, said that even if the Banfi lawsuit fails, it puts all municipalities on notice.

“With the new knowledge we have on the threat that climate change presents relative to flood risk, any future authorities that allow building that is in harm’s way of flooding will most probably be found culpable.”