File No. CA 003-94

B. Goodman	)	Thursday, the 8th day
Deputy Mining and Lands Commissioner	)	of June, 1995.

THE CONSERVATION AUTHORITIES ACT

IN THE MATTER OF

An appeal to the Minister under subsection 28(5) of the **Conservation Authorities Act** against the refusal to grant permission to construct a single family dwelling on Part of Farm Lot 21, Concession A, R.P. 7, Being Part 1 of Plan 25R997, Township of Bosanquet.

B E T W E E N :

MARILYN DICK and DOUGLAS DICK
Appellants

-and-

AUSABLE BAYFIELD CONSERVATION AUTHORITY
Respondent

ORDER

UPON hearing the appeal dated 10th day of June, 1994 and upon reading the exhibits filed;

1. THIS TRIBUNAL ORDERS that the appeal be and is hereby allowed and the appellants be and are hereby granted the permission requested in their application dated 21st day of January, 1993, subject to the proposed structure being floodproofed in accordance with the detailed construction drawings of the proposed structure drawings of the proposed work submitted with the application.

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2. THIS TRIBUNAL FURTHER ORDERS that the respondent pay to the appellants the sum of $500, which the Tribunal fixes as the costs of this appeal.

Reasons for this order are attached.

DATED this 8th day of June, 1995.

Original signed by B. Goodman

B. Goodman
DEPUTY MINING AND LANDS COMMISSIONER

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B E T W E E N :

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REASONS

This matter was heard in the Rent Control Programs Hearing Room in the City of London, in the Province of Ontario on February 28 and March 22, 1995.

Appearances:

Timothy G. Price	Counsel for the Ausable Bayfield Conservation Authority
Terri Marzo	Agent for Marilyn and Douglas Dick

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Background:

On January 21, 1993, Marilyn Dick, one of the appellants, applied to the Ausable Bayfield Conservation Authority (the "ABCA") for permission to construct a single family dwelling on property owned by her described as Part of Lot 21 Plan No. 7 Concession A in the Township of Bosanquet. On February 4, 1993, the ABCA wrote to Mrs. Dick's representative advising that the application for permission would be presented to the Board of Directors of the ABCA in the form of a hearing at its meeting scheduled for February 18, 1993. The letter (Exhibit 7, page 10) advised that the following items had been noted:

(i) The proposed structure is to be located on property which is within the Thedford Klondyke S.P.A. (Special Policy Area), however, the S.P.A. denotes that residential infilling will only be permitted on vacant lots in registered Plans of Subdivision and Registered Development Plans providing that the structures are floodproofed to an elevation of 180.75 metres G.S.C. and that safe ingress and egress can be provided.

The subject property is not within a registered plan of subdivision or a registered development plan.

(ii) The S.P.A. denotes that the "creation of new lots and non-agricultural residences will not be allowed within the floodplain". The Authority's Board of Directors clarified the policy on March 21, 1991 such that the Thedford Klondyke S.P.A. policies relating to agricultural development were clarified by stating that farm accessory or agriculture related buildings allowed in the floodplain do not include new residential dwellings.

The basis for this clarification of the policy relating to the Thedford Klondyke S.P.A. was based upon discussions with the Township of Bosanquet at a meeting held on March 19, 1991.

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The letter proceeded to advise that it would be recommended to the Board of Directors that permission be refused because the works would not meet the specific policies of the Thedford Klondyke S.P.A. as well as not meeting the objectives of floodplain management.

On February 23, 1993, the ABCA wrote to the representative of Mrs. Dick to formally advise of the decision of the Board of Directors at a hearing held on February 18, 1993. The decision was that, providing that the subject lot could be included into the existing plan of subdivision located directly to the west (the "Defore Subdivision") and have the same status as any other lot within this subdivision, then approval would be granted upon the receipt of the documentation confirming the inclusion of the lot in the existing subdivision. The Township was in the process of reviewing its Official Plan at this time. The appellants decided to apply for amendments to the Official Plan and zoning bylaw that would have the effect of allowing the proposed development. The Clerk for Bosanquet Township had written to the ABCA on February 17, 1993 advising of resolutions passed by the Township Council on February 15, 1993 that in conjunction with the Official Plan review, the Thedford Klondyke S.P.A. be reviewed and "That the Dyck (sic) property be added to the Defore Subdivision (if possible)."

The appellants, together with their solicitor, met with both Township and County officials on April 26, 1993, after applying for the amendments. They were advised that the requested amendments were unnecessary as permitted uses already included single family dwellings.

On May 5, 1993, the Township sent Mr. and Mrs. Dick a copy of a further resolution passed by the Township Council on May 3, 1993, as follows:

> WHEREAS: The Council of the Township of Bosanquet is of the opinion that the lot ... owned by the Dick's (**sic**) is in the special policy area, and/or should have been grandfathered as an existing lot when the SPA was established;
>
> THEREFORE: The Council supports the application submitted by the Dick's (**sic**) and respectfully requests the ... Authority to amend the decision with respect to the property, and allow them to build on the lot.

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Following contact by the appellants with the Office of the Mining and Lands Commissioner and the ABCA in April 1994 regarding the procedure to appeal the decision of the ABCA, the appellants were notified by the ABCA that the Board had scheduled a further hearing for May 19, 1994. The appellants attended this hearing in support of their application.

By letter dated May 26, 1994, the ABCA notified the appellants of the decision of the Board of Directors following the May 19, 1994 hearing that permission be refused. The letter advised that:

> The reasons for the decision of the Board of Directors was (**sic**) based upon the following:
>
> (i) The current policies of the Special Policy Area designation for the Thedford Klondyke (**sic**), does not permit the development of a residence outside of the existing registered Plans of Subdivision and Registered Development Plans.
>
> The Authority's Board of Directors did pass a motion that the Ministry of Municipal Affairs, the Ministry of Natural Resources, the Township of Bosanquet and any other public agencies involved are to review and make the necessary revisions to the existing Special Policy Area for the Thedford Klondyke area.

It is this decision that the appellants appealed by letter dated June 10, 1994 to the Office of the Mining and Lands Commissioner.

An appeal pursuant to subsection 28(5) of the **Conservation Authorities Act**, R.S.O. 1990, c. C.27 is to the Minister of Natural Resources. The Mining and Lands Commissioner (the "tribunal") is appointed pursuant to subsection 6(1) of the **Ministry of Natural Resources Act**, R.S.O. 1990, c. M.31. By virtue of subsection 6(2) of this **Act**, a deputy commissioner is authorized to perform the duties and exercise the powers of the Commissioner. The Minister's authorities, powers and duties are assigned to the tribunal

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pursuant to subsection 6(6) of the **Ministry of Natural Resources Act.** Part VI of the **Mining Act**, R.S.O. 1990 c. M. 14 applies to the hearing of appeals, with necessary modifications.

Preliminary Matters:

Following the tribunal's opening comments, counsel for the respondent ABCA raised a preliminary objection to the proceedings. Before outlining the nature of this objection, he asked that the tribunal reserve its decision in relation to the objection until the conclusion of this proceeding. Counsel for the ABCA submitted that this proceeding was **res judicata**. In support of his submission, counsel filed a copy of an Order to Withdraw Appeal of the tribunal dated November 1, 1991. The Order, involving the same appellants, respondent and property, made reference to an appeal to the Minister of Natural Resources dated May 23, 1991. It also referred to a letter dated October 21, 1991, wherein the solicitor for the appellants advised that his clients wished to abandon their appeal. The tribunal ordered that the appeal be dismissed. Counsel for the ABCA argued that the Order disposed of the issues that were currently under appeal, and that they ought not to be relitigated. In support of his submission, counsel referred the tribunal to the decision of the Ontario Court of Appeal in **Hennig v. Northern Heights (Sault) Ltd.** [1980] 30 O.R. (2d) 346. (leave to appeal to the Supreme Court of Canada refused December 1, 1980.)

Counsel for the ABCA had regrettably failed to notify either the appellants or the tribunal in advance of the hearing of his intention to raise this objection. Counsel apologized for this oversight. The tribunal provided the appellant and her representative with an opportunity to discuss the lack of notice and preliminary issue with legal counsel, following which the appellant and her representative confirmed their intention to proceed.

Ms. Marzo submitted that **res judicata** did not apply here. It was her position that substantive changes had been made to the property before the second application to the ABCA for permission to construct was made, and on which it was based. She referred in particular to the Lazy Acres/Defore Flood Reduction Project undertaken by the ABCA in cooperation with the Township after the first application, and outlined in appendix B9 to Exhibit 8. She submitted that this significantly reduced the risk of flooding to the subject property. She also argued that the decision of the ABCA under appeal differed from its 1991 decision. This decision is found in appendix B7 to Exhibit 8.

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The tribunal notes from appendix B5 to this exhibit that the February 1991 application sought permission to erect a house, shed and boat dock, as well as to place and remove fill. The January 1993 application (appendix B11 to this exhibit) seeks permission solely to erect a new single family dwelling on a different site on the property.

The tribunal has considered the decision of the Court of Appeal in **Hennig**, and finds that the facts of that case differ significantly from the facts here. In the **Hennig** case, the court applied the doctrine of **res judicata** in upholding the dismissal of an action where a counterclaim by the plaintiff against the defendant in an earlier action was ordered dismissed as abandoned. In the course of his judgment for the court, Morden J.A. refers to the "much-quoted statement" of Wigram V.-C. in **Henderson v. Henderson** (1843), 3 Hare 100 at p. 115, 67 E.R. 313 that the plea of **res judicata** applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at that time.

Morden J. A. continues at page 355:

> In so far as this passage is relied upon as authority for not applying **res judicata** in "special circumstances" or "special cases", I think that it makes it reasonably clear that the exception is potentially applicable only with regard to the extended application of **res judicata**, i.e., to matters or points which might and should have been brought forward in the earlier proceeding, but which were not. I can quite appreciate the reason for some flexibility with respect to the "might have" kind of issue, but apart from the implicit reasoning in **Braithwaite v. Haugh** (1978), 19 O.R. (2d) 288, 84 D.L.R. (3d) 590, which I shall discuss, I am unaware of any authority countenancing the exception where what is involved in the second proceeding is the identical claim as that in the first, advanced on the basis of the same evidence and legal theory.

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> It was with respect to a situation such as this that Lord Denning M.R. in **Fidelitas Shipping Co., Ltd. v. V/O Exportchleb,** [1965] 2 All E.R. 4 at p. 8 said that there is a "**strict rule of law** that he cannot bring another action against the same party for the same cause: **Transit in rem judicatam** . . ." (emphasis added).

This last quote is the classic statement of the plea of **res judicata**.

An appeal to the Minister of Natural Resources from a refusal by a conservation authority is neither a claim nor a cause of action. Even if it were, the basis for the 1993 application to the authority and the current appeal differs from that of the 1991 application and earlier appeal, which was abandoned. The Order dated November 1, 1991 dismissing the former appeal refers to a letter dated September 23, 1991 from the solicitor for the appellants, wherein he advises that the appellants were attempting to settle the matter locally. This is consistent with the information contained in the **background** section of these reasons.

Efforts to settle these matters should not be discouraged. I find that **res judicata** does not apply here, and accordingly order that the preliminary objection be dismissed.

Policy and Regulatory Framework:

By virtue of subsection 3(1) of the **Planning Act, 1983**, the Minister of Municipal Affairs, either solely or together with any other Minister, was authorized to issue policy statements that had been approved by the Lieutenant Governor in Council on matters relating to municipal planning that in the opinion of the Minister were of provincial interest. In exercising any authority that affected any planning matter, the council of a municipality, every local board and every provincial government agency "**shall have regard to**" such policy statements.(subsection 3(5))

On October 24, 1988, the Minister of Municipal Affairs, together with the Minister of Natural Resources, issued a Provincial Policy Statement on Flood Plain Planning under the **Planning Act, 1983**. The Policy Statement had been approved by

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Cabinet on August 11, 1988. The Policy Statement contained sections dealing with the purpose of the Statement, its interpretation, the background, definitions, and the basis of the policy, before setting out the policies themselves. It contained a final section on implementation. The policies contained general provisions, set out the regulatory flood standard used to define flood plain limits, indicate the policy of the government in relation to Official Plans, and the one zone, two zone, and Special Policy Area concepts for the floodplain. The latter section provided as follows:

> **(6) Special Policy Area Concept**
>
> It is the policy of the Province of Ontario that:
>
> 6.1 Where strict adherence to policies (4) and/or (5) **(one zone and two zone concepts)** is not feasible, the concept of special policy area status is recognized as a possible option for flood prone communities or portions thereof. Municipalities may apply for special policy area status, in accordance with established procedures, and controlled development may be permitted once such status is obtained.
>
> 6.2 Municipalities delineate special policy areas in their official plans and include policies indicating the circumstances under which new development may be permitted and identifying the minimum acceptable level of protection required for new development.

Special Policy Area is defined in the Statement to mean:

an area within a community that has historically existed in the flood plain and where strict adherence to certain

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> Province-wide policies concerning new development would result in social and economic hardships for the community. As a result, site specific policies are formulated and applied within the defined limits of the special policy area.

The Policy Statement also contains sections dealing with floodproofing and public safety.

On December 24, 1980, the Minister of Municipal Affairs, on the recommendation of the Minister of Natural Resources, approved Amendment 6 to the Official Plan for the Bosanquet Planning Area. In his letter advising of the approval (Exhibit 26), the Minister of Municipal Affairs indicated that the amendment met the requirements for a Special Policy Area within the meaning of the then provincial floodplain management strategy. Among those persons copied on the letter was the then Resources Manager of the ABCA. It is likely that the ABCA was consulted by the township prior to the proposed amendment being sent forward.

The amendment, referred to as the "Cut Area Secondary Plan" provides in paragraph 1.1 that the policies applying to the lands set out in Schedule A affected by the plan are designed to achieve three main goals:

> a) the prevention of inappropriate development on lands that could be adversely affected by an environmental hazard or constraint;
>
> b) the management of land use and land development to ensure that environmental hazards or sensitivities are not aggravated; and
>
> c) the preservation and protection of the unique agricultural resources of the Thedford Bog area.
>
> Some lands affected by this amendment are subject to flooding. It is provincial policy that development should not occur in areas that are flood susceptible. However, where strict application of this policy is not feasible, the concept of special policy areas within floodplains is recognized.

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Lands shown as "Residential Environmental Protection" and "Rural Environmental Protection" constitute a Special Policy Area within the meaning of the provincial policy for floodplain management. Notwithstanding their location in the floodplain, lands within the Special Policy Area may be developed in accordance with the policies set forth in this amendment as well as the relevant policies of the official plan.

Paragraph 2, headed "RESIDENTIAL DESIGNATIONS" provides as follows:

2.1 Residential Environmental Protection

2.1.1 Land designated as Residential Environmental Protection is shown on Schedule 'B', Land Use Plan. This designation applies to land that is fully or partially developed for residential purposes, the level of which is below the level of the regional storm flood elevation. The designation of additional land as Residential Environmental Protection is not permitted.

It is intended that this designation apply only to existing registered plans and R.D. plans that are fully or partially developed.

2.1.2 Permitted Land Uses

Land designated as Residential Environmental Protection is intended for use for single family residences...

2.1.3 Development Criteria

2.1.3.1 The implementing Restricted Area (Zoning) By-law shall provide that no opening in a habitable building or structure shall be at a level less than 180.6 metres C.G.D ...

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Completed dwellings in existence on the day of passing of the implementing Zoning By-Law may be recognized as permitted uses ...

. . . .

2.1.3.3 The Township Council supports the enforcement of Fill and Construction Regulations by the Ausable- Bayfield Conservation Authority for the area affected by this amendment and will require the developer to obtain a Fill Construction and Waterways Alteration permit as provided by section 27 of the Conservation Authorities Act from the Authority prior to the issuance of a building permit for lands subject to the regulations ...

Paragraph 4 deals with the "RURAL ENVIRONMENTAL PROTECTION" designation:

4.1 The lands designated as Rural Environmental Protection on Schedule 'B' are those lands below the regional storm flood level that are now used for or have high potential for farming, and in particular those lands used for or having potential for vegetable farming...

4.2 Permitted Land Uses

Lands designated as Rural Environmental Protection are intended for use for agricultural, including accessory farm dwellings, and accessory farm buildings or structures. Existing non-farm residences are also permitted.

4.3 Development Criteria

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4.3.2 Existing residences and farm buildings and structures will be recognized as permitted uses in the Restricted Area (Zoning) By-law.

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Paragraph 6 addresses "IMPLEMENTATION.":

6.1 Restricted Area (Zoning) By-law

In addition to the provisions of the Bosanquet Official Plan the specific requirements for the Restricted Area (Zoning) By-law called for in this Amendment shall be incorporated in the said By-law.

6.2 Fill, Construction and Waterways Alteration Regulations

The Township Council supports the registration and enforcement of Fill, Construction and Waterways Alteration Regulations on lands affected by this Amendment by the Ausable-Bayfield Conservation Authority. The Township will require a developer to obtain written evidence in the form of a certificate or letter from the Conservation Authority that the said regulations have been complied with.

Paragraph 6.3 contains the land division provisions respecting the different land designations.

The Township has passed a Zoning By-Law (BL 32/80) which reflects the uses permitted in amendment 6 to the Official Plan. Paragraph 6.4 addresses the Rural Environmental Protection 1 (AEP.1) Zone:

6.4.1 Permitted Uses

No land, building or structure shall be used or erected in any Rural Environmental Protection 1 (AEP.1) Zone except for the following purposes:

a) agriculture including not more than two (2) dwelling units accessory thereto.

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b) a home occupation
passive recreation

c) buildings, structures or uses accessory to a permitted use.

By virtue of clause 28(1)(e) of the **Conservation Authorities Act** R.S.O. 1990 C.27, an authority is empowered, subject to the approval of the Lieutenant Governor in Council, to make regulations applicable in the area under its jurisdiction:

> (e) prohibiting or regulating or requiring the permission of the authority for the construction of any building or structure in ... any area susceptible to flooding during a regional storm, and defining regional storms for the purposes of the regulations;

Clause (b) similarly permits an authority to make regulations in relation to the diversion of a watercourse, while clause (f) provides a like authority concerning the placing or dumping of fill.

Subsection 28(3) requires an authority to hold a hearing before refusing permission required under clause (1)(b), (e) or (f), while subsection 28(4) requires that an authority give written reasons for its refusal to the applicant. Subsection 28(5), referred to earlier in this decision, provides for the right of appeal to the Minister of Natural Resources by an applicant who has been refused permission. The ABCA has passed a regulation under subsection 28(1) of the **Conservation Authorities Act** (Ontario Regulation 544/84) entitled "Fill, Construction and Alteration to Waterways." This regulation is now R.R.O 1990 142. Section 3 of the regulation provides that:

> Subject to section 4, no person shall,
>
> (a) construct any building or structure... in any area susceptible to flooding during a regional storm;

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"Regional storm" is defined in section 1 of the regulation.

Section 4 provides that the authority may permit in writing the construction of any building or structure ... to which section 3 applies if in the opinion of the authority, the site of the building or structure ... will not affect the control of flooding ... or the conservation of land.

Section 5 prohibits a person from commencing to construct any building or structure ... in any area to which section 3 applies before permission to do so has been obtained under section 4. Section 6 sets out the requirements for an application for permission to construct a building or structure. There is a schedule attached to the regulation which describes the areas, in which in the opinion of the authority, the control of flooding ... or the conservation of land may be affected by the placing or dumping of fill.

In 1990, ABCA staff prepared a "Policy and Procedures Manual" to provide guidance to staff in reviewing applications for permission, and to attempt to ensure that a consistent approach was followed. The Manual was based in part upon a previous document prepared in 1980, entitled "Proposals for Special Policy Designations for Floodpath Areas." (Exhibit 29). Pages 92 and 93 of the 1990 Manual are found near the end of Exhibit 4. On page 92 under the heading "Special Policy Areas" and the subheading "2) Thedford Klondyke Area", the following appears:

> (c) Residential infilling will be permitted on vacant lots in Registered Plans of Subdivision and Registered Development Plans providing that the structures are floodproofed to an elevation of 180.75 m. G.S.C. and safe ingress and egress can be provided.
>
> (d) Creation of new lots and non-agricultural residences will not be allowed within the floodplain.
>
> Refer also to the Thedford Klondyke Floodplain Delineation Study.

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The ABCA Floodplain Management Policy provides, in part:

- That the Klondyke Area of ... Bosanquet Townships including the ... Thedford Marshes be subject to a special policy designation for the area within the yet to be determined Regional Storm floodline.

- That the Authority adopt a general floodplain management policy based upon the Regional Storm, flood levels and that it declare Special Policy Areas where these criteria do not apply to local conditions.

Facts:

The part lot currently owned by the appellants, for which permission to construct a single family residence is sought, was created by severance of a farm lot in 1974. The Reference Plan (25 R997) describing the part lot was deposited on title under Part II of the **Registry Act** at that time. The appellants acquired the property in November 1988. The previous owners had obtained a building permit for the construction of a 960 square foot residence in 1979, and had also obtained approval for a sewage system and had installed well and sewage facilities. The tribunal notes that the current application for permission is for a substantially larger residence of 1,560 square feet. The proposed residence will have no basement. The previous owners did not build a residence, but did construct a concrete boat ramp with a winch, and an accessory building. The part lot owned by the appellants is a treed lot, is not really suitable for farming, and is not being used for that purpose. The proposed residence will not be used for agriculture, and there are no current plans for it to be used for a home occupation or passive recreation, or for an accessory use. The remainder of the lot (i.e. the other part lot) to the north is farmland.

In October 1988, Mr. J. Philip Walden, the solicitor acting for the appellants on the purchase of the property, was advised by the Zoning Administrator for the Township in response to his inquiry, that the property was zoned AEP.1, which permitted a single family dwelling.

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Mr. Walden, who was called as a witness before the tribunal, testified that he had concluded, based on the response to his inquiry to the Township, and his examination of the Official Plan and Zoning By-law, that a single family residence was a permitted use for the property. He had also reviewed the Township's proposals for special policy designation for floodplain areas, including the Klondyke, which permitted "residential infilling in existing R.P's and R.D.'s to Authority prescribed floodproofing standards: thereto also apply to additions or re-constructions.". The subject property was included on a Reference Plan. Mr. Walden also was of the opinion that the building permit issued by the Township to the prior owners in 1979 was still valid, and could be acted upon by the appellants. He conceded that he had not made inquiries of the ABCA, although he knew that it administered a regulation requiring persons wishing to construct in the area covered by the regulation to apply for permission from the ABCA. In fact, Mr. Walden was aware of other landowners that were in areas designated Rural Environmental Protection in the official plan and zoning by-law who had received permission from the ABCA to construct a residence, although he was unsure whether the proposed residences were within the floodplain.

Mr. Donald G. Welton was also called as a witness for the appellants. Mr. Welton is the Chief Building Official for the now Town of Bosanquet, and is responsible for the overall management of the town's Building and Inspection Department, which includes land use planning functions of the municipality. Mr. Welton testified that the use proposed by the appellants meets the town's zoning requirements, and that the Town Council supports the application. A building permit was obtained by the previous owners, and he considers the property to be partially developed, because a well and septic system had been installed, and hydro had been provided.

When he so advised staff of the ABCA, he was told that he would have to interpret his jurisdiction as he saw fit. Mr. Welton conceded that the Town Council had not passed a resolution supporting this appeal. Nor could he point to specific wording in the zoning by-law that would permit the proposed use, although he indicated that there would be nothing to prevent someone for obtaining a building permit and subsequently having a home occupation within the meaning of 6.4.1 b) of the zoning by-law. He stated his opinion that the ABCA was standing in the way of this development; it should recognize that a building permit had been obtained by the previous owners and partial development had taken place, prior to the regulation made by the ABCA requiring that permission be obtained.

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Town Councillor David Pugh also testified for the appellants. He agreed with the evidence of Mr. Welton, and indicated that both the Town Council and the Board of Directors of the ABCA supported the granting of permission. He was in attendance at various meetings in 1993 between town and ABCA officials to attempt to resolve this matter. He said that Council was of the view that the property was in a Special Policy Area, and should have been "grandfathered," and that it accordingly asked the ABCA to amend its earlier decision denying permission to the appellants. Mr. Pugh, who has served on Council for four years, did not know why Council did not "grandfather" this property when amendment 6 to the Official Plan was submitted for approval. The town is currently considering drafts of a new official plan, which may well deal with the Special Policy Area.

It is conceded by the appellants that their property is subject to the authority of the ABCA, under the **Conservation Authorities Act** and the Fill, Construction and Alteration to Waterways regulation. It is also agreed that the property is within the lands affected by amendment 6 to the town's official plan. The property is situated to the north of the Ausable River Cut. The Cut, according to the evidence of Mr. Alec M. Scott, Water Planning Manager for the ABCA, is approximately 30 metres wide at the location of the subject property, and is about 2-3 metres deep under normal conditions in May or June.

As noted in Exhibit 3, the Ausable River derived its name from the sand dunes lying on the shores of Lake Huron, south of Grand Bend. The original Ausable River rose in the swamps, gravel terraces and clay plains north and east of the Town of Exeter and followed a winding path through the deep gorges of the Wyoming Moraine around Arkona, into the Thedford marsh and northward through the low lying swamps of the Klondyke area to Grand Bend. At this point the river turned through 360 degrees to flow southward parallel to the shore of Lake Huron to its outlet at Port Franks.

In 1875 a canal was cut through from the Thedford flats area to Lake Huron at Port Franks. This allowed the direct drainage of a large portion of very productive farmland in the Thedford marsh area. The "short circuiting" of the stream left a dry channel between the Thedford flats and the "Devil's Elbow," the confluence of the Parkhill Creek and Ptsebe Creek with the old Ausable River. Another short canal was excavated in 1893 within the Village of Grand Bend to allow the Parkhill and Ptsebe Creeks drainage basins to flow down the old Ausable River channel and out into Lake Huron.

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The result of these two "cuts" was the creation of the two separate river drainage systems. To the south is the Ausable River drainage basin upstream of the Thedford flats draining into Lake Huron at Port Franks, while north of this at Grand Bend, the Parkhill, Ptsebe and Old Ausable watersheds drain into Lake Huron through the Parkhill Creek System.

The Ausable River through its 177 km. length drains approximately 1176 sq. km. of Southern Ontario farmland. The river outlets to Lake Huron at Port Franks through a man-made canal called "The Cut" constructed from its original course to Highway 21. From Highway 21 to Lake Huron, the river flows in a combination of original channel and a further man-made channel called "The Authority Cut", which was constructed in 1949-50. The total outflow into Lake Huron from the Ausable River system is controlled by the headwater elevation attainable in the Thedford marsh.

The appellants' property is located to the east and across the Concession A-B road from a residential development known as " Defore Acres", for which a plan of survey was deposited under Part II of the **Registry Act** on June 22, 1970 as RD 225. According to Mr. Walden, who required the plan of survey to be deposited, RD denotes "reference deposit". There is no registered plan of subdivision for Defore Acres, because the **Registry Act** at the time did not require this.

According to Mr. Walden, the reference deposit was a **de facto** plan of subdivision, subject to obtaining the cooperation of the township. When amendment 6 to the official plan for the township was put forward in 1980, Defore Acres was partially developed for residential purposes. Consequently, the town included the development in its Land Use Plan within the lands designated as Residential Environmental Protection. The town has provided water, sewer, and garbage disposal services to Defore Acres, as well as road maintenance. It has also established an emergency response plan, to which reference will be made later, to evacuate residents of the development in the event of a flood.

About half of the lots in Defore Acres have been developed. Since 1988 the ABCA has granted permission to a number of owners of lots in Defore Acres for the construction of residences, additions and accessory buildings. Having received permission from the ABCA, the landowner would be given a building permit on application to the township.

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In its Fill, Construction and Alteration to Waterways Regulation, the ABCA has established the 100 year flood as its regulatory standard to define flood plain limits for the area in which the appellants' property and Defore Acres are situated. According to the government's 1988 Policy Statement on Floodplain Planning, 100 year flood means that flood, based on an analysis of precipitation, snow melt, or a combination thereof, having a return period of 100 years on average, or having a 1% chance of occurring or being exceeded in any given year.

In 1988, MacLaren Engineering was retained by the ABCA to conduct a flood plain delineation study for the Thedford/Klondyke. Its resulting report was sent to the ABCA in December 1988. The report notes that the purpose of the study was to derive a defensible regulatory flood datum for the area. It observes that the area is a natural flood storage area having two outlets, one at Grand Bend and the other at Port Franks. At both of these outlets, the flow is dependent upon the head available, i.e. the difference in water level between the marshes and Lake Huron, although as the water level in the two marsh areas increases, the importance of lake level decreases. MacLaren Engineering concluded that the flood elevations within the study area under major runoff conditions could not be determined by back-water modelling, as the area is essentially a large natural reservoir. Therefore these elevations are a function of runoff volume, and the period of time over which the runoff occurs. The report proceeds to describe the methodology used for the analysis carried out in the study. Submitted with the report was a flood risk map for the area, showing the flood elevation for the area as 180.65 metres, the elevation for the approximate location of the appellants' property as 180.5 metres, and for the approximate location of Defore Acres as 180 metres. The study did not identify any specific remedial measures that were required. The report recommended that existing flood plain management policies be continued, with the regulatory flood established at an elevation of 180.75 metres to provide a free board allowance of 0.1 m. The report also recommended that the ABCA and the planning authority establish defined areas in which development could proceed subject to complying with, in part, Conservation Authority Regulations.

The regulatory flood for the area was determined by the ABCA to be 180.65 metres. The site plan filed by the appellants with their January 1993 application for permission to the ABCA indicates that the average grade elevation for the proposed residence is 180.55 metres. Consequently, although the site of the proposed residence is
within the floodplain, it is only so by 0.1 metre or 4 inches.

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In the month of February in both 1984 and 1985 there was severe flooding in the Ausable River Cut floodplain caused by a combination of ice jams and high flows. Agricultural and residential flood damage occurred, as well as increased feelings of insecurity when access roads were washed out and normal vehicular access prevented. Exhibit 3 to the ABCA's submission (Exhibit 10) is a series of 4 aerial photographs of the appellants' property and Defore Acres taken at the time showing the severity of the flooding. The concession road serving Defore Acres, another residential development known as Lazy Acres, and the appellants' property was completely inundated for 3 to 5 days. Mr. Alec M. Scott was called as a witness by the ABCA at this hearing. He was the Water Resources Manager for the ABCA at the time of this flooding, and has served as Water Planning Manager since January 1995. Mr. Scott testified that, following this flooding, the Township and the ABCA decided to investigate options to alleviate the risk of flooding. The ABCA retained Paragon Engineering Limited in February 1986 to investigate methods to alleviate flooding and erosion problems in the floodplain and banks adjacent to the Ausable River Cut. The study was to pay particular attention to ice jams and their prevention; the continued erosion of the adjacent banks and floodplains by ice and water; and the localized problems of access and egress from the subdivisions adjacent to the Ausable River Cut that became impassable due to flooding. The resulting report was transmitted to the ABCA in December 1986. (Exhibit 2) The report recommended a number of remedial measures to reduce ice jam occurrence and minimize effects of high water should they occur. Following their review of the report, the ABCA and the township proposed works that would involve removing natural constrictions in the river channel which increase the risk of ice jam formation, and the raising of localized depressions in the banks along the Cut to prevent flood waters from overflowing the main channel area. Works ultimately undertaken included removal of the channel constriction downstream of the subdivisions and berming of all areas within the subdivisions, and including the subject property, to an elevation of 181.0 metres G.S.C. The majority of the work that had been undertaken was completed by mid-November 1991. Exhibit 25, prepared by Paragon, shows the Ausable River Cut Flood Reduction Works undertaken in Areas 5 to 8, including the berming etc. on the appellants' property. (in Area 7)

Following the 1985 flooding, the township developed a flood contingency plan to address the access and egress problem for the area. This included the purchase of a hovercraft by the township, that was stored on a nearby property owned by a former township employee.

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Donald Peter Hegler was called as a witness by the appellants. Mr. Hegler, who is an engineer, has been the Commissioner of Works for the Town since 1990. As such, he co-ordinates activities between all works departments, and oversees the operation of Town surface water, drainage, and pumps systems. Mr. Hegler testified that, with the flood reduction works, including the berming on the appellants' property, the risk of flooding was reduced. Any problem of access or egress during a period of flooding in the area was addressed by the town's emergency response plan. The town's pumping system can pump up to 90 million gallons a day, which Mr. Hegler felt was sufficient. The proposed structure would have no immediate effect on the risk of flooding to adjacent properties, since the house would only be 4 to 6 inches below the regulatory flood elevation. According to Mr. Hegler, this would have a negligible effect on flooding and would not place an undue strain on municipal services. Mr. Hegler supports the application for permission, which he believes is reasonable.

Mr. Scott, who was called by the ABCA, testified that the flood reduction works, and in particular berming, would lessen the risk of flooding caused by an ice-jam, but that the elevation of a regulatory flood would still be the same: 180.65 metres. The key factor used by MacLaren Engineers in their 1988 Flood Plain Delineation Study for the ABCA was the staged storage area, since this area was like a reservoir. Mr. Scott testified that the proposed residence was confirmed by this study to be within the floodplain, and that it is within that part of the Special Policy Area designated Rural Environmental Protection. In reference to page 92, Mr. Scott stated that he knew that there was no such thing as a "Registered Development Plan", but that was his guess as to what "R.D." stood for in paragraph 2.1.1 of amendment 6 to the Official Plan. He also conceded that Defore Acres was not a Registered Plan of Subdivision. He has drawn his oversights in this regard to the attention of the ABCA. Mr. Scott was also concerned that the access road was lower than the 180.5 metres G.S.C. recommended in the MacLaren report, and accordingly the proposed development would not meet the requirements of the new Official Plan under discussion. Mr. Scott also conceded that the ABCA had given permission to landowners in Defore Acres to build residences on sites that were at a greater risk of flooding than the site proposed by the appellants. It was Mr. Scott's position that, if the ABCA were to have granted permission to the applicants, it would have served as a precedent, and would make it difficult to refuse permission to other landowners who might wish to build a home in an area designated Rural Environmental Protection.

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In her evidence for the appellants, Ms. Marzo referred to a number of other cases, some of which had been referred to by Mr. Walden, where she understood that other landowners in the areas zoned AEP.1 received permission from the ABCA to build homes. In one case, it was clarified through the evidence of Mr. Scott, that the ABCA had not opposed an application for a severance, rather than having granted permission for new construction. In fact, the original lot had two existing residences, and the proposed severance would have presented no increased risk of flooding. Evidence in relation to other cases was provided by Ms. Pamela Hunter, Regulations Officer for the ABCA. The Adams case, was another example of the ABCA not opposing a severance of an original lot with an existing residence on one part and a storage facility on the other. In fact, the ABCA had written to the Adams advising that any proposal for new construction would require an application to the ABCA for permission. In two other cases, the proposed residences were to be built above the floodplain elevation, and it was concluded that there were no problems of access and egress. In yet another case, the application was for permission of a farm operated residence, which was floodproofed.

It was Ms. Hunter's evidence that, in considering applications for permission, staff first determines whether the proposed residence will be within the floodplain, i.e. below the regulatory flood. If it is determined that the residence is to be built below this elevation, staff would then look to the zoning uses designated in the Special Policy Area provisions of the zoning by-law. According to Ms. Hunter, the main focus of the ABCA is the risk of flooding and whether there is safe access and egress in the event of flooding. In the case at hand, there was both concern for flooding and safe access and egress.

Submissions:

Ms. Marzo submitted that, while it is necessary to have policies, these are not law. Policies may be modified, taking into account individual circumstances. The facts here are unique; the subject property is the last partially developed lot outside of the Defore subdivision. A building permit was issued to the previous owners, and other services and facilities were provided. The ABCA does not dispute that the proposed residence can be suitably floodproofed. The application here is reasonable, and requires a flexible approach. Because of the uniqeness of the situation, the granting of permission need not serve as a precedent. Ms. Marzo referred to the decision of the Deputy Mining and Lands Commissioner in **Junker v. Grand River Conservation Authority**, CA 12-91,

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where an appeal was allowed and permission granted where the Junkers owned the last serviced building lot on the street, in a policy area in which new residential development was not permitted.

Additional submissions were made by the appellants in the attachment to their letter of August 12, 1994 to the Office of the Mining and Lands Commissioner.

Mr. Price submitted that this case is about "line drawing". He referred to sections 3 and 6 of the **Planning Act, 1983** and the Provincial Policy Statement on Floodplain Planning issued in 1988, particularly policies (4) and (6). He argued that the Town can solve the appellants' problem by redrawing the line in the Special Policy Area described in amendment 6 to the official plan and by amending the zoning by-law to include the appellants' property in those lands with a residential environmental protection designation and use. While the property may well be partially developed and described in an R.D. plan (he conceded there was no registered plan for Defore Acres) it was still within those lands designated in amendment 6 to the official plan and the zoning by-law as rural environmental protection.

The key to solving the problem, in Mr. Price's submission, was to have a further amendment to the SPA amendment and a rezoning to accomplish this. The Town was currently working on amendments to its official plan, and this problem could be addressed. Mr. Price referred to amendment 6, and in particular to paragraphs 1.4, 2.1.1, 2.1.3.3, 4.1 and 6.2. He argued that the ABCA has no legal authority to amend the town's official plan. Mr. Price submitted that the **Junker** decision of the Deputy Commissioner was a bad decision, because subsection 3(5) of the **Planning Act** requires that those organizations and persons specified "shall have regard" to policy statements issued under subsection (1), which would include the policy statement on floodplain planning. He suggested that the ABCA would have acted irresponsibly here if it disregarded this policy statement.

The tribunal has also considered the submissions of the ABCA in the "ISSUES" and "SUMMARY" sections of its letter of September 21, 1994 to the Office of the Mining and Lands Commissioner. In particular, the tribunal has considered the following submissions:

> III) The ABCA does not refute that the structure that Mr. and Mrs. Dick are proposing to construct cannot be suitably floodproofed.

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Quite simply, according to the SPA a residential structure outside of subdivided areas is not permitted.

IV) The ABCA's position is that regardless of the language of the policy, when the SPA was set up it was intended that continued development could take place on those areas already partially developed. The policy has been consistently applied by the ABCA since the regulation came into effect in 1984.

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SUMMARY

The intent of the SPA for the Thedford Klondyke was that additional development would be allowed to occur on those lands colloquially called " Defore Subdivision " which lie to the west of the access road into the Defore Subdivision. It is not the opinion of the ABCA that the subject lot has the same 'status' as the lots within the Defore Subdivision.

Findings:

Elevations

The tribunal finds that the average grade elevation for the proposed residence is 180.55 metres, and that the regulatory storm elevation is 180.65 metres. As such, the proposed residence is only marginally below the flood elevation.

Provincial and Municipal Policy

The tribunal further finds that the "Special Policy Area Concept" of the Provincial Policy Statement on Flood Plain Planning applies here, and that the subject property is located within those lands designated in amendment 6 (Cut Area Secondary Plan) to the town's Official Plan as "Rural Environmental Protection". The property is zoned AEP.1.

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Potential Use of Property

The tribunal finds that the property is partially developed, and does not have a high potential for farming. The potential use of the property is as a building lot.

Risk of Flooding

The tribunal is satisfied that the Ausable River Cut Flood Reduction Works undertaken have significantly reduced the risk of flooding, particularly due to ice jams, to the subject property and the Concession Road. The risk of flooding does not differ materially from the risk to residences within Defore Acres across the road. It is not disputed that the proposed residence will be satisfactorily floodproofed. Construction of the proposed residence will have a negligible effect on the risk of flooding to other properties and on the control of flooding. The tribunal is also satisfied that any potential problem of access and egress in the event of the flooding of the property and Concession Road may be addressed in a manner similar to Defore Acres in the town's flood contingency plan.

ABCA Policy

The ABCA has developed and implemented a policy to assist it in its administration of regulation 142, its Fill, Construction and Alteration to Waterways regulation. The relevant part of the policy here prohibits non-agricultural residences within the floodplain. Residential infilling is permitted on vacant lots in Registered Plans of Subdivision and Registered Development Plans providing that the structures are flood-proofed to an elevation of 180.75 m. G.S.C. and safe access and egress can be provided. The policy is an attempt to reflect the uses designated in the Special Policy Area provisions of Amendment 6 to the town's official plan and its zoning by-law.

It is in the public interest that conservation authorities have policies for the administration of their regulations, and publicize them. This not only provides guidance to staff and officers of the authorities and promotes consistency of decision-making; it is also helpful to applicants seeking permission, since it provides useful information about the criteria it will apply.

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The Supreme Court of Canada has considered the validity of a decision based upon a policy statement rather than statute or regulation in **Capital Cities Communications Inc. v. Canada (Canadian Radio-television & Telecommunications Commission)** [1978] 2 S.C.R. 141, where the late Chief Justice Laskin stated at p. 171:

> In my opinion, having regard to the embracive objects committed to the Commission under s. 15 of the Act, objects which extend to the supervision of "all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of the Act", it was eminently proper that it lay down guidelines from time to time as it did in respect of cable television ... An overall policy is demanded in the interests of prospective licensees and of the public under such a regulatory regime as is set up by the **Broadcasting Act.** Although one could mature as a result of a succession of applications, there is merit in having it known in advance.

The same could have equally been said of conservation authorities under the regime set up under the **Conservation Authorities Act**.

How should this tribunal treat the Provincial Flood Plain Planning Policy and the policy of the ABCA here? The issue of whether this tribunal will apply policy was discussed in the decision of the Mining and Lands Commissioner in **Strey v. Lakehead Region Conservation Authority** (unreported) April 6, 1995, File No. CA 004-94. In her Reasons, the Commissioner makes extensive reference to her Reasons in an earlier decision in **MacGregor v. Director of Mine Rehabilitation** (unreported) December 23, 1994, File No. MA 033-93, in which she refers to the decision of the Divisional Court in **Segal v. The General Manager, The Ontario Health Insurance Plan** (Gen. Div., Div. Ct.) unreported, 347/94, November 24, 1994, Hartt, Saunders and Moldaver JJ.

In that decision, Divisional Court determined that, where the General Manager of OHIP had adopted a policy as the basis for exercising his discretion, the Health Services Appeal Board was bound to consider that policy and not follow it if considered it to be unreasonable. Once it had considered and adopted a general policy

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with respect to hospital services in general, the Board need not reconsider the policy in each subsequent case unless there were special circumstances before it. The Court determined, however, that even if the Board did not find the policy to be unreasonable, it was still the duty of the Board in each case to consider whether the application of the policy was reasonable in the circumstances before it.

In its decision of **Bye v. Otonabee Region Conservation Authority**, unreported, November 19, 1993, CC.1357, the Commissioner found at page 56 that it would apply the technical provisions of the provincial policy statements in consideration of the technical issues. As was discussed in that decision at pages 53 and 54:

> The conservation authorities are not bound by the **Planning Act**, or section 3 provincial policy statements, in making their determinations under section 28 of the **Conservation Authorities Act**. However, the dual role of the authorities cannot be ignored; that of making representations and recommendations to planning authorities on official plans, plans of subdivision, consents, zoning by-laws, minor variances and the like and that of considering applications for permission for the diverting of a watercourse, construction in a pond, swamp or area susceptible to a regional storm or placing of fill in an area which may affect the control of flooding, pollution or the conservation of land.
>
> Nowhere in the **Conservation Authorities Act** are conservation authorities given authority to balance competing interests in reaching their determinations. However, in the Principles of the Floodplain (**sic**) Planning Policy (Ex. 10), at paragraph two of page six, those bodies which must have regard to the policy are required to consider local conditions in connection with applying the policy. This includes physical, environmental, economic and social conditions. While a planning body may weigh competing uses in order to arrive at the highest and best use of a tract of land, conservation authorities do not consider, nor do they have the power to consider, the relative merits of competing uses. Their mandate is to determine the impact of a proposal on the very limited

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capacity of the land within their jurisdiction and based upon the degree of severity to allow or refuse permission.

Is the policy of the ABCA at issue here reasonable? I have concluded that it is not. It has already been conceded that there is no such thing as a "Registered Development Plan" under current legislation. The policy of the ABCA means that, unless a landowner can persuade the ABCA that his or her property is within some registered development plan, they will be denied permission to construct a non-agricultural residence. This is so regardless of the state of development of the property, the risk of flooding, and whether the proposed construction will affect the control of flooding or the conservation of land. That this is so is confirmed by the decision of the Board of Directors of the ABCA in its letter of May 26, 1994 to the appellants. It is also confirmed by the earlier notification from the ABCA on February 23, 1993, that, provided that the lot could be included in the Defore subdivision, approval would be granted. As a consequence, the appellants applied for appropriate amendments to the official plan and zoning by-law, only to be told by township officials that they did not consider this necessary. The appellants have been caught up in a veritable bureaucratic nightmare, being batted like a pingpong ball between the ABCA and the town. The ABCA says it is only implementing the Special Policy Area provisions of the town's Official Plan and zoning by-law, and the appellants must obtain appropriate amendments to these documents before it will consider granting permission. The town, on the other hand supports the application. Apart from the designation and zoning of the subject property, there is virtually nothing to distinguish it from properties within Defore Acres for which permission was granted when considering site factors such as elevation, proposed floodproofing and access and egress. One can only sympathize with the sense of frustration of the appellants. The tribunal finds the position of the ABCA in this regard to be simply untenable. This is more than simply a case of line-drawing.

The tribunal has concluded that the appellants have already waited far too long for the permission that they deserve. The appeal will be allowed.

The tribunal wishes to note that it has not relied on the decision of the Deputy Mining and Lands Commissioner in **Junker**. The application in that case was dismissed on consent of the parties by the Divisional Court on March 21, 1994.

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The tribunal also wishes to make it clear that it has reached its decision within the existing provincial and municipal regulatory and policy framework; including the fact that this area merits Special Policy Area status.

This tribunal is not empowered to devise policies for Conservation Authorities to assist them in administering their regulations, nor is it appropriate that anyone other than the Conservation Authorities themselves perform this role. The tribunal recognizes, however, that it will be necessary for the ABCA to revise its policy on applications for permission in a Special Policy Area in light of the tribunal's finding that the policy here was unreasonable. In an effort to be helpful, the tribunal proposes that the policy have regard to the factors set out in regulation 142, and in particular sections 3 and 4. Regard should also be had to the relevant provisions of the provincial Policy Statement on Flood Plain Planning and the Implementation Guidelines.

Costs:

Prior to the conclusion of this hearing, Ms. Marzo indicated her intention to make a submission in relation to costs. The tribunal decided to allow post-hearing submissions in this regard, and notified the representatives of the parties accordingly. The appellants' submission, consisting of a statement of expenses for themselves and Ms. Marzo was sent on April 13, 1995. A supplementary submission was sent on April 27, 1995, consisting of an invoice for services rendered by town personnel in connection with this appeal. Mr. Price's submission on behalf of the ABCA was sent on April 26, 1995. In his submission, Mr. Price concedes the authority of this tribunal to award costs. The tribunal is authorized, in its discretion, to award costs to any party, and may direct that such costs be assessed by an assessment officer or may order that a lump sum be paid in lieu of assessed costs. (see sections 126-128 of the **Mining Act** R.S.O.1990 c. M. 14.)

Having considered the submissions on costs, the tribunal has decided to award a lump sum of $500 in costs to the appellants, to be paid by the ABCA. No part of this award is for services rendered in connection with this appeal by town personnel, all of whom are public servants.