



The Mining and Lands Commissioner
In the matter of The CONSERVATION AUTHORITIES Act

AND IN THE MATTER OF

An appeal against the refusal to issue permission to construct a dwelling on Lots 1 and 2, Bascom's Plan, in the Township of Uxbridge in the Regional Municipality of Durham.

B E T W E E N :

PETER WALLEY

Appellant

- and -

SOUTH LAKE SIMCOE
CONSERVATION AUTHORITY

Respondent

E. Iglar, for the appellant.
K.C. Hill, for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to issue permission to construct a dwelling on part of Lots 1 and 2, Bascom's Plan, in the Township of Uxbridge in the Regional Municipality of Durham. Under Ontario Regulation 364/82 the power and duty of hearing and determining such appeals were assigned to the Mining and Lands Commissioner. The appeal was heard in Toronto on April 25, 1983.

The appellant owns parts of Lots 1 and 2 on the westerly side of Bascom Street in the downtown part of the Township of Uxbridge. A one-storey frame house is situated in the southerly part of the lands. The appellant has incurred expenses in renovations of this house and was hoping to sell the northerly part of his lands to pay for the renovations. Accordingly, he applied for permission to sever the northerly sixteen metres of Lot 2. After a number of issues were dealt

with this permission was granted subject to the following condition among others:

that the appellant satisfy the requirements of South Lake Simcoe Conservation Authority.

For the purpose of complying with this condition the appellant applied for permission to construct a residential building on the part of Lot 2 to be severed.

The Uxbridge Creek flows in a northerly direction along the westerly side of the appellant's lands. The elevation of the creek is 264 metres above sea level. The elevation of Bascom Street in front of the subject lands is somewhere between 268.4 metres and 266.7 metres. The 268 metre contour, according to flood mapping prepared by Marshall, Macklin, Monaghan Limited, filed as Exhibit 3, crosses Bascom Street in front of the subject lands. The contours at the proposed building site are 266 and 267 metres. According to this flood mapping the regional storm elevation at the subject lands is 269.4 metres. This would mean that, in the event of a regional flood, there would be 1.4 metres of flood waters on Bascom Street immediately in front of the subject lands and this depth of water would increase on the part of the street to the south of this point. In addition there would be depths of flooding from one to three metres on the subject lands which, transposed to feet, would result in there being approximately nine or ten feet of flooding at the westerly edge of the proposed building. The evidence indicated that this flood mapping had not been approved by the Ministry of Natural Resources.

However, the conservation authority has engaged Cumming-Cockburn & Associates Limited to prepare a specialized

study of the downtown area to determine whether remedial works could be taken to reduce the degree of flooding from a regional storm. The criteria for this study was approved by the Ministry of Natural Resources but the Ministry has not yet had an opportunity of approving this study or dealing with funding in the event the local municipality decides to proceed with a project. The study considered three alternatives and the result of the most effective survey would be that the regional storm elevation, which according to this study is 268.4 metres in the present circumstances, would be reduced to 267 metres. With the reduced elevation of the regional storm the amount of flooding on the proposed building site would vary from 1.4 to 2.4 metres or slightly less than five to eight feet and in the event the remedial works were undertaken the highest part of the proposed site would be at the elevation of the regional flood line but the lower side of the building would still be subject to three feet of flooding. There is no assurance at this time that such remedial works will be undertaken and accordingly, the decision at this time should not assume that such works can be funded and even if funded would be undertaken.

The appellant brought no expert evidence to bear on the implications of his proposal. He relied on the precedential implications of several properties. Firstly, he relied on permission given in respect of the Mariano property which was situate at a lower elevation than the appellant's land. However, this property was an extension of an existing building and the use to be made of the building was commercial. In addition the respondent was dealing with an almost accomplished fact as the building had proceeded to a considerable degree by the time the matter came to the attention of the respondent. In addition unusual flood proofing conditions were required by reason of the risk of flooding.

Reference was made to two other properties, both of which according to the evidence of A.A. Timmins, the Regulations

Officer of the respondent, were above the regional flood elevation and accordingly are of no assistance in this appeal. The last property mentioned was a block of townhouses erected in 1981 at a location approximately two properties to the north of the subject lands. Prior to the building of the townhouses, a commercial building and a garage had been constructed on the site and these were removed. At the time permission for the townhouses was requested the Marshall, Macklin, Monaghan Limited flood plain mapping had not been received and an estimate was made of the regional flood elevation. The builders were required to flood proof to this elevation but on the subsequent receipt of the flood mapping it appeared that the estimates were in error and the building would be subject to flooding in storms of less than a regional storm magnitude.

Timmins indicated that the concerns of the respondent in refusing the permission were the potential damage to the building itself, the potential loss of life to occupants of the building, the effect on the flows of flood waters which would be restricted in the event of a regional storm with the result that there would be increased flooding of the properties that are subject to flooding and the properties that would not otherwise be subject to flooding might be flooded and the precedential implications that would be set in respect of other potential building sites in the flood plain.

The evidence indicated that there are approximately six or seven other sites in the flood plain in the area which, on the basis of precedent, might be justified in applying for permission if the present appeal were allowed.

The tribunal does not consider that the Mariano case provides any precedent for the present appeal. The considerations respecting residential premises are always more

strict than those respecting commercial premises by reason of the risk to human life. One can imagine the risks to which an average adult as contrasted with a child or an aged person would be subject if flood waters to the extent of nine or ten feet rose along one side of a residential building and the front of the building was subject to three feet of flooding. In addition the Mariano case involved an almost complete extension as a result of the error of the owner in not applying at the proper time and significant changes to the proposed building were required.

With reference to the townhouses, sometimes referred to as the Ward property, the evidence indicates and it is accepted that the approach of the respondent in granting permission was that the building would be flood proofed. Also the case involved the replacement of buildings which were used for commercial or industrial purposes and were situate in a residential area. The usual provision in regard to flood proofing is that there be no opening or services below an elevation of one-half metre above the elevation of a regional storm. If one were to apply such principles to the present building site, one would have a residence with solid walls approximately four feet above ground level at the front of the building and approximately seven or eight feet at the rear of the building, even if the revised elevations of the regional storm are accepted. Such a building may not be suitable for the applicant or for the Building Department in a residential area from the point of view of aesthetics or utility and apart from the matter of risks from flooding the tribunal has considerable doubt that a decision which required such flood proofing would be meaningful.

In addition permissions based on flood proofing are usually granted only if there is access to a public street that is above the regional storm elevation. With the revised

elevation these would be approximately one and one-half feet of flooding on Gascon Street in a regional flood and the occupants of the proposed residence would be completely isolated as well as surrounded by the aforementioned depths of flood water.

The significant thrust of the analogy to the townhouse properties is that an error was made by the respondent in issuing permission and where the basis of the appeal is strictly precedent, the role of this tribunal cannot be seen as requiring a conservation authority to perpetuate errors of the past.

The tribunal appreciates that the applicant is under economic pressure to proceed immediately with the severance and disposition of the subject lands. However, there is a considerable amount of prematurity in the application and the use, if there is to be a use of the subject lands as a residential site, could much better be dealt with after a decision is made respecting remedial work. Keeping in mind the risks of flooding to occupants of the building, the building itself and other properties in the area in the event of a regional storm the appeal will be dismissed.

1. IT IS ORDERED that the appeal in this matter be and is hereby dismissed.

2. AND IT IS FURTHER ORDERED that no costs shall be payable by either of the parties.

DATED this 28th day of April, 1983.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.