



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 twenty-unit apartment building on caissons, at 73 Mill Street in the City of Oshawa in The Regional Municipality of Durham.

B E T W E E N :

J. IHNAT

Appellant

- and -

THE CENTRAL LAKE ONTARIO CONSERVATION AUTHORITY

Respondent

S. M. Zubkavich for the appellant.
J. R. Willms for the respondents.

The appellant appealed the refusal of the respondent to issue permission under O.Reg. 824/73 to erect a twenty unit apartment building on the property municipally known as 73 Mill Street in the City of Oshawa.

By O.Reg. 613/78 the power and duty of the Minister of Natural Resources to hear and determine the appeal was assigned to the Mining and Lands Commissioner. Following a number of adjournments the appeal was heard in Toronto on July 23, 1979.

The subject lands have a frontage of approximately 91.71 feet on the southeast side of Mill Street which crosses the Oshawa Creek in a general northeasterly direction. The length of the subject lands is 250.8 feet on the shorter side. They contain 27,163 square feet.

At the present time there is situate on the subject lands

the remnants of a building known as the Oshawa Bakery. This building has been partially demolished for some time with only the foundation and some of the walls, if any, remaining. There was no evidence to indicate the date of the last use of the building which from the plans and the evidence of the witness R. W. Messervey appeared to have a floor area of 2,800 square feet.

It was proposed to erect on the subject lands a three storey twenty-unit apartment building erected on caissons and a foundation wall along the north of the building which would by scaling on the plans, measure approximately fifty feet. Staircases would lead from a ground level parking area under the building and thirty-two caissons measuring one and one-half feet in diameter and nine feet in height would be used to support the building. The plans had been prepared by John George Ihnat, Junior, a son of the appellant, who has obtained a Bachelor of Arts degree in architecture from the University of Toronto. He stated in evidence that he had consulted with engineers but the evidence did not indicate the class of engineer consulted with and no report of an engineer, particularly one specializing in hydraulics, was presented to assist in establishing the structural stability of the proposal, assuming that such a report should be admitted without cross-examination of the engineer. This witness estimated that the displacement of the flood storage capacity would be in the vicinity of 2,000 cubic feet and hence would be less than ten per cent of the displacement of the building that once stood on the subject lands.

Apparently the proposed building conforms with the existing zoning by-laws of the City of Oshawa, but, according to the evidence of the witness Messervey, is contrary to the official plan of the Regional Municipality of Durham and of the City of Oshawa.

There are several objections of the respondent to the proposal according to the evidence of the witness Messervey. Firstly, the subject lands are susceptible to nine feet of flooding in the event of a regional storm. Secondly, the subject lands are situate within the floodway of the Oshawa Creek

being susceptible to flooding in the 100 year storm and probably in the 50 year storm. Thirdly, the proposed building would effect the stage storage and stage discharge capacity of the floodplain. With regard to the former the comparison was being made in respect of the existing condition and not in respect of the condition at the time the bakery was in existence. With reference to the discharge capacity the north wall of the building would create an impediment to the flow equivalent to or greater than the bakery.

Fourthly, the witness gave evidence that it was the policy of the respondent and of the Conservation Authorities Branch of the Ministry of Natural Resources that there should be some restriction in respect of parking areas in floodplains. The policy is that overnight parking is not allowed in flood prone areas. Where only daytime parking is allowed the policy permits the construction of such parking areas where the depth of flooding will not exceed eighteen inches or the velocity of the flow will not exceed two feet per second under regional storm conditions. The evidence of Messervey in this regard was that the velocity of a regional storm would be eight feet per second and that in the 100 year storm there would be three feet of flooding with velocities of three to four feet per second.

Fifthly, the respondent was concerned that the granting of permission in this instance would create a precedent which would lead to similar applications in respect of similar properties. The proposal was considered a visual and physical intrusion into the valley of the Oshawa Creek and lastly the proposed use was contrary to the official plan of the two municipalities involved.

In cross-examination it was brought out that the City of Oshawa is proposing to change the alignment of Mill Street including the bridge and raising the height of the bridge. The plans have been filed with the respondent and the proposal would create an increase in the height of the 100 year storm of 3.3 feet and in the regional storm of 0.3 feet in the areas upstream

of Mill Street. The subject lands are south of Mill Street and the respondent had not been provided with any evidence to show that the flood elevation south of the street would be effected notwithstanding the increased passage of water through the new bridge. The reconstruction of Hwy. 401 involves the lengthening of the existing culvert and the studies indicate that there would be only a marginal increase in the effect of this reconstruction. It was suggested on cross-examination to the witness that the 1975 up-dating of the floodline mapping created a significant increase in the elevation of the regional storm. However, there was no evidence produced to this tribunal that would permit a finding of fact on this issue.

While there was no evidence as to the maximum flood elevation that had been reached in the last century, I find as question of fact that the proposed building is situate within the floodway. However, at this time there has been no policy developed by the Province in respect of areas above the floodway but within the regional storm floodplain and assuming such policies are developed they would not be applicable to the present application by reason of its location below what is becoming known as the floodfringe.

The submissions on behalf of the appellant were that the application of the mathematical rules respecting the regional storm should be tempered with reason and justice. It was said that the proposal of erecting the building on caissons would remove all hazards from flooding other than hazards associated with the parking of automobiles and with an adequate warning system, particularly where there would be multiple occupation, there would be little risk to automobiles on the subject lands in the event of a regional storm. It was submitted that the proposal removed all risk of personal injury and restricted to a reasonable degree the risks of damage to personal property.

With reference to storage it was suggested that there would be a considerable reduction in the loss of storage capacity compared with the bakery that once existed on the subject

lands. In this regard it is appreciated that there is a considerable reduction based on that comparison but compared with other permitted uses under the official plans there may be very little if any improvement of the storage capacity. Also it is significant that the proposed building contains an impediment to the flow equally detrimental to the impediment that existed with the bakery.

Counsel for the respondent pointed out that the application contained no supporting engineering base in respect of the hydraulic implications of the proposal. In referring to the impediment of the flow in respect of the discharge capacities of this portion of the Oshawa Creek watershed, counsel questioned the appropriateness of comparing the proposal with the risks associated with the bakery. It was pointed out that one of the hazards resulting from automobiles is the risk of automobiles floating downstream and blocking the culvert in Hwy. 401 causing extensive flooding. Reference was also made to the visual impact on the valley, official plan designations and the implications of precedent.

This tribunal is not aware of any policy of the Ministry of Natural Resources of the Province of Ontario whereunder residential buildings are permitted in floodplains. The tribunal is aware that some conservation authorities, particularly those with extensive floodplains and extensive floodfringes permit residential construction subject to conditions and the construction of protective devices. There was no evidence that the respondent either had or should have had such a policy and in the absence of the existence of such a policy this tribunal is not prepared to require a conservation authority to adopt such a policy particularly where the floodplain may not be extensive as appears to be the case in this instance. Further, where such policies do exist the policies are not applied in the floodway portion of the floodplain and a decision allowing this appeal would be contrary to the policies that are applied by some conservation authorities, even assuming

they were applicable to the watershed of the Oshawa Creek.

This tribunal is not satisfied that the proposal can be said to remove all hazards respecting personal injury or loss of life. Where residential structures have been permitted in the upper parts of floodplains the building usually is constructed in part at a site where access to land above the regional flood elevation is available from the building itself. In this proposal access is dependant upon a ramp to and the continuance of Mill Street. No part of the subject lands appears to abut or form part of land above the regional floodline and it cannot be asserted that all the risks of this nature are eliminated particularly keeping in mind that in a regional flood the building would be surrounded with nine feet of floodwater having a velocity of eight feet per second. Even if the ramp remained intact there would be a serious risk as the elevation of Mill Street, as presently constructed, is 315 feet and with a regional flood of 320 feet, the street would be under five feet of floodwater. The risks of personal injury and death in such a flood are not removed. Access to or from the building would be impossible. More fundamentally, there was no evidence on which this tribunal could be satisfied that the caissons and other supporting structures could withstand the flows of a regional flood.

This tribunal does not consider it appropriate to compare proposals with buildings that are abandoned or derelict particularly where the date of abandonment is unknown. Such abandonment is consistent with the application of the principles respecting safety of human beings and property contained in The Conservation Authorities Act and regulations made thereunder and does not afford any justification for repetition of an error of the past. Any new construction or interference with the floodplain should be assessed on the merits of the new proposal and should not be based on a comparison with a building or structure that once existed and has been abandoned.

This tribunal is also appreciative of the validity of

of the argument of counsel for the respondent respecting precedent and accordingly the appeal in this matter will be dismissed.

Counsel for the respondent requested that the respondent be awarded its costs of this appeal. Reliance was made on the absence of production of scientific evidence to establish the implications or the lack of implications of the proposed building and the public expense incurred in defending appeals in which no significant base has been established to support the proposal. Reference was made to the delays in processing the appeal by the appellant. On the other hand counsel for the appellant made representations respecting the financial difficulty of the mortgagee whose life savings had been invested in the property and on whose behalf the application had been brought.

In the opinion of this tribunal the power of the Mining and Lands Commissioner to award costs should be implemented only in limited circumstances. Although the practice of referring appeals to this tribunal is fairly well established in connection with appeals under The Conservation Authorities Act it may not be reasonable for a proposed appellant who appeals to the Minister of Natural Resources, who has no power to award costs, to expect his case to be tried by a tribunal with such powers. However, where the appellant is familiar with the procedure and may have every reason to expect that costs would be requested, consideration might be given to the awarding of costs, but, in the opinion of this tribunal this case does not warrant an order for costs.

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

IT IS FURTHER ORDERED that no costs shall be payable by either of the parties to this matter.

DATED this 27th day of July, 1979.

Original signed by G.H. Ferbuson

MINING AND LANDS COMMISSIONER.