Room 569, Fifth Floor
Mowat Block, Queen's Park
Toronto, Ontario M7A 1A2

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 semi-detached or single family dwelling on Part Block "A", Plan 85 in the Town of Newmarket in The Regional Municipality of York.

B E T W E E N :

BEPPINO BISARO

Appellant

- and -

SOUTH LAKE SIMCOE CONSERVATION AUTHORITY

Respondent

T.O. Gorrie, Q.C., for the appellant.
S.N.M. Plamondon, for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission to construct a single family or semi-detached dwelling on Part of Block "A", Plan 85, in the Town of Newmarket. By Ontario Regulation 448/81 the power and duty to hear and determine the appeal were assigned to the Mining and Lands Commissioner and the appeal was heard in Toronto on September 23, 1981.

In 1956 the appellant purchased a parcel of land on the north side of Gorham Street in the Town of Newmarket. The frontage was 75 feet and the depth was 130 feet. The southwest corner of the parcel measuring 25 feet on Gorham Street by a depth of 27 feet was expropriated by the municipality subsequently for the purpose of building an enlarged culvert for the passage of the waters of a creek which flows in a northerly direction into Lake Simcoe.

The creek lies to the west of the subject lands. The evidence indicates that the westerly ten feet of the subject lands form part of the bed of the creek. The entire subject

lands are contained in the regional flood plain of the creek. The elevation of the regional flood in the area is 785 feet above sea level. The elevation of the easterly side of the subject lands is 782.5 feet. At the centre the elevation is 780 feet and the westerly quarter of the subject lands is 775.5 feet with the result that in a regional flood the subject lands would be flooded with flood flows varying from 2-1/2 to 7-1/2 feet in depth.

The appellant purchased the land as a site for his future home. He is a carpenter and anticipates that he will be able to build his own home when he has gathered sufficient funds for this purpose. After paying taxes since the time of acquisition, he applied for a building permit in 1980. He subsequently learned that it was necessary to obtain permission from the respondent and upon application for permission such was refused.

The plans filed at the hearing indicate that there are a number of buildings in the flood plain. However, the evidence indicates that these buildings are of considerable age and have been there for some time. It is further evident that the culvert through Gorham Street is not of sufficient size to pass the flows of a regional flood and there is a significant constriction problem in the area. The property of the appellant occupies approximately 1/4 the width of the cross section of the flood plain with the further result that any building erected thereon would create a substantial constriction in the flood plain, particularly if the culvert in Gorham Street were to wash out or the street were to be overtopped.

None of the evidence before this tribunal indicated that there was a policy of the conservation authority to permit the construction of dwellings in flood plains. A property at the corner of Yonge and Eagle Streets was mentioned but the evidence of the Regulation Officer of the respondent was that this site was outside the flood plain.

The reasons given by the respondent for refusing the permission were the reduction of storage capacity, the effect of constriction both on upstream and downstream properties, the precedential implications of issuing such permission, it not being the policy of the authority at this time to permit residential construction in flood plains, and the potential loss of life that could result from the construction of a residence in an area that was subject to seven feet of flooding in a regional storm. In the opinion of this tribunal all factors were established by the evidence produced and were not discredited by the evidence of the appellant. This statement is made without reference to any question of onus of proof in appeals of this nature.

It was argued on behalf of the appellant that the appellant had incurred a substantial investment in the property including the original purchase price in 1956 and the subsequent annual payment of taxes which currently are $471.27. Reference was made to the existing buildings in the flood plain. This submission cannot be sustained because the evidence indicates that the buildings are of considerable age and should not form any precedent for creating an exception to the general principle. It was also submitted on behalf of the appellant that he would comply with any flood-proofing conditions that the tribunal might see fit to impose. It was also submitted that there was some responsibility on behalf of the authority to acquire the appellant's land if they were not prepared to permit him to use his land for the purpose for which it had been acquired and held for over 20 years. In this regard, it must be said that such matters are matters of policy and are not matters with reference to which this tribunal has any jurisdiction. Such an approach would be very costly if it were of universal application across the entire Province and the adoption of such a policy is a matter for the particular conservation authority

...4

and the Province particularly having regard to the availability of funds for such purposes and the priorities that may be awarded to projects of the authority.

On behalf of the respondent it was submitted that the appellant had not met the onus of proof that would lie on an appellant and had not shown that the granting of permission would not effect the control of flooding, pollution or conservation of land. This tribunal does not regard these matters from the point of view of onus but attempts to come to a decision based on all of the evidence that it made available to it. On the merits counsel for the respondent referred to the risks associated with the construction of a residential dwelling in an area subject to seven feet of flooding in a regional flood including the risk of property damage, the potential loss of life, the loss of storage capacity with the increased exposure of other properties to flooding and the increased velocities and backwater effects resulting from constriction of the flood plain that would occur if a significant constriction were placed in a fairly narrow flood plain. It was further submitted that the fact that there are existing dwellings in the flood plain is more consistent with the utmost protection being extended to these houses than with the increasing of the flood levels by the reduction of storage capacity or the implications from constriction.

Counsel met the argument of the appellant that the enactment of the regulations constituted injurious affection by submitting that the regulation was the equivalent of a zoning by-law in respect of which no landowner has a cause of action. In addition to that submission, the argument of counsel for the respondent can be put on a much firmer grounds. The regulations that are made under the <u>Conservation Authorities Act</u> are related to the inherent incapacities of the lands in flood plains for

...5

building purposes and in this regard are related primarily to safety and protection of the public from floods. The purpose of the regulations is not a policy decision made for the benefit of all landowners as a whole, but, is a designation of lands which should not be used, not by reason of any policy decision but by reason of their own inherent weaknesses, for the purposes prohibited by the regulations. Accordingly, this tribunal cannot adopt any principle that the making of a regulation constitutes injurious affection to the lands affected thereby.

In considering this case, this tribunal is satisfied that the appellant has not been deprived of any policy of the respondent under which he would have been entitled to permission to construct a residential dwelling on the subject lands. The tribunal has also considered whether there are any other policies of a provincial or broader nature which would justify the issue of permission. There is no evidence to support the creation of an exception on the stage storage doctrine. Even if this doctrine were applicable the amount of constriction in the narrow flood plain would warrant some consideration as to whether such a principle should be applied.

It is evident to this tribunal that the permission requested would have a serious effect on the control of flooding and in the absence of the applicability of any acceptable exception 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 to this appeal.

DATED this 10th day of November, 1981.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.