Ontario

Room 569, Fifth Floor
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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 wall and place fill on Lot 5 on Registered Plan 431 in the Township of Georgina in The Regional Municipality of York.

B E T W E E N :

VICTOR DEBBERT

Appellant

- and -

SOUTH LAKE SIMCOE CONSERVATION AUTHORITY

Respondent

R.B. Corbett, 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 grant permissio to erect a wall and place fill on Lot 5, Plan 431, in the Township of Georgina in the Regional Municipality of York. By Ontario Regulation 25/81 the power and duty of hearing and determining the appeal were assigned to the Mining and Lands Commissioner. The appeal was heard in Toronto on September 22, 1981.

Lot 5 is an irregular shaped lot fronting on a stree known as River Avenue and backing on a creek or river that flow in a westerly direction into Cook Bay of Lake Simcoe. The lot is approximately 1,000 feet upstream from the mouth of the river. The appellant and his wife acquired the lot in 1973. At that time a boathouse was erected near the river and it has

...2

been used since that time for storing a small sailboat and a cabin cruiser. For a number of years the lot had been used solely as access to the river which provided access to Lake Simcoe for the boats.

Lot 5 lies entirely within an area over which the respondent has jurisdiction in relation to the placing of fill. Exhibit 2 shows the fill lines contained in Schedule 5 to Ontario Regulation 782/74 as amended by Ontario Regulation 346/79. However, there was doubt as to whether the lot falls partially or wholly within the area subject to a regional storm. The significance of this issue is that the concerns of the respondent relate to storage capacity and storage capacity occurs only in the flood plain of the regional storm. Counsel for the appellant submitted that the lot was only partially within the flood plain as a small plan attached to zoning by-law No. 911 of the Township of Georgina shows approximately one-third of the lot in an open space category. On the other hand a plan filed as Exhibit 7 shows the lot entirely below the regional flood line and the regional flood line extending to the south of the lot a distance in excess of 100 feet. This evidence of the regional flood line was objected to by counsel for the appellant on the grounds that the plan was not prepared for the purpose of establishing the regional flood line and while it contains data respecting such line, it had been prepared for other purposes. The evidence indicated that the regional flood line had been established for the Maskinonge River, a river to the north of the river in question in this case, and in the establishment of the flood line for the Maskinonge River certain measurements were made in the vicinity of the subject lands which data indicates a preliminary determination of the regional flood line. The plan was admitted subject to weight. It was the only evidence available to the tribunal of the regional flood line and as the appellant merely

...3

produced the map attached to the by-law which was in very small detail and the history of which was not put in evidence, this tribunal can only accept Exhibit 7 as the best evidence available of the regional flood line.

Based on Exhibit 7 the regional flood elevation in the vicinity of the subject lands is 723.85 feet above sea level. The elevations of the subject lands appear to be in the vicinity of 720.5 feet with a result that part of the lot at least is subject to three feet of flooding during a regional storm.

Approximately four years ago the appellant commenced having difficulty in using his lot by reason of extremely wet conditions. About that time the owner of Lot 6, the lot on the immediate west limit, started to make changes in the building on Lot 6. A summer cottage was converted to a full time residence. Subsequently the cottage burned and an application was made for permission to construct a permanent home. This permission was granted by the respondent subject to flood-proofing conditions which required the lower floor of the residence to be above the flood plain, a non-usable crawl space and a retaining wall and fill around the basement at a level above the regional flood line to protect the building from the flows of a regional flood. The owner of Lot 6 constructed the building and the retaining wall. In addition to the fill permitted by the permission granted, the owner extended the fill to the boundary of Lot 5 and failed to provide an adequate drainage ditch which probably has either interfered with the natural drainage in a westerly direction from the subject lands or caused the surface runoff from Lot 6 to flow in an easterly direction rather than in the direction it flowed previous to the placing of the wall and the fill. Notwithstanding numerous attempts by the conservation authority the owner of Lot 6 has failed to make his property conform with the conditions imposed by the conservation authority.

...4

Faced with this additional water the appellant applied to the respondent for permission to construct a wall which would continue the retaining wall on Lot 6 in an easterly direction across Lot 5 and to place fill above the retaining wall to an elevation equivalent to that of the fill placed on Lot 6. The appellant assured the tribunal that he had no intention of using Lot 5 for residential construction and that his sole purpose in continuing the retaining wall was to create an aesthetic continuation of the retaining wall constructed on Lot 6.

To the east of the subject lands is Lot 1, Plan 431. The evidence indicated that this lot was similar to the appellant's lot and might have been slightly higher. The evidence indicated that these lots are low lying in nature and poorly drained. The correspondence filed indicated that there were ponds of water on Lot 5 which appeared unconnected to Lot 6 and might have ponded without any change in the elevations on Lot 6. There are a number of complex drainage theories to be established in this case if the full drainage implications were to be solved. However, these matters are not the issues before this tribunal.

A.A. Timmins, the Regulations Officer for the respondent, gave evidence that he had completed the application of the appellant and according to his calculations the appellant's application would require some 7,000 cubic feet of fill. He indicated however, that the effect of placing the fill in the manner requested had the result of blocking the flows of a regional storm into the flood plain to the south of the appellant's property and this blockage would create in addition to the actual loss of storage capacity on Lot 5 an additional loss of storage capacity to the extent of 9,000 cubic feet making a total loss of 16,000 cubic feet. This witness indicated that he was prepared to recommend to the respondent that permission issue for a modified type of filling which

...5

would require approximately 5,000 cubic feet of material. This proposal would exclude the wall which is the major barrier toward the storage capacity to the south of Lot 5 and would permit a saving of some 11,000 cubic feet of storage capacity.

The reasons given for the refusal to issue permission were the loss of storage capacity with the incidental increase of flooding on adjacent properties, the increased risk of erosion arising from the reduction of the flood plain which would increase the velocity of a regional flood and the precedential implications of granting the permission. On behalf of the appellant it was submitted that there had been a change in the appellant's property created by the actions of the respondent which have resulted in the appellant's property no longer being useful for the purpose for which it was originally bought and had been used. Secondly, it was submitted that the difference between the amount of fill that the respondent would permit and the amount requested would be insignificant or miniscule. With reference to the 9,000 cubic feet of storage capacity that would be lost, it was submitted that some engineering drawings could be made which would prevent this loss occurring. Lastly, it was submitted that the hardship doctrine that had been applied to Lot 6 should be applicable to the subject lands in view of the damage that had been created to Lot 5.

Counsel for the respondent relied on the loss of storage capacity, the possibility of increased erosion and the precedential implications including the cumulative effect along the watercourse if a precedent were established. It was also submitted that the application itself was vague and indefinite and on this ground should not be dealt with. In this regard it is a strange argument particularly as the application was prepared by an official of the respondent. It was submitted that even if the zoning maps were accepted as the factual boundary of the regional flood plain the retaining wall was

...6

within the regional flood plain and even, in such circumstances there would be a loss of storage capacity. Counsel also pointed out that the authority is concerned with regard to safety matters as well as the rights of other landowners. Reference was made to the potential loss of property and damage to property from increased flooding conditions and a potential loss of rights of other landowners in the event a precedent were established. It was submitted that the allegation of aesthetic improvement of the area was not established by the evidence and further that aesthetic improvements should not prevail over safety considerations.

With reference to the argument that the treatment of Lot 6 provided a precedent for the granting of the permission requested, counsel for the respondent suggested that the two cases were distinguishable in that an existing building had been destroyed on Lot 6. It was further submitted that if, and it was not admitted, the granting of permission in respect of Lot 6 had caused damages to the appellant's property, such considerations were irrelevant and should be dealt with in the proper manner. It was submitted that there was a marked difference between the two cases and the degree of hardship in connection with Lot 6 greatly exceeds that in the present case. It was also questioned whether the desire to have a wall was consistent with the expressed desire of using the property solely as access to the boathouse because the wall would create a four foot drop on the property which would interfere with access from the street to the boathouse. It was also questioned whether the difference in the amounts of fill involved were a trifling matter. It was suggested that it was improper for the tribunal to apply a de minibus principle in view of the absolute prohibitions in the regulation. It was submitted that the request as made had the effect of depriving the watershed of 16,000 square feet of storage capacity and that this quantity could not be said to be an insignificant or trifling amount.

...7

In reply, it was suggested that steps could be placed in the wall which would provide access to the boathouse.

As mentioned above and dealing with the facts of this case this tribunal adopts the plan filed as Exhibit 7 as the best evidence of the regional flood line and accordingly the proposal as submitted involves a loss of storage capacity of some 16,000 cubic feet. Undoubtedly the position of the respondent in respect of loss of storage capacity and other flood-related concerns arising from the narrowing of the channel of the flows of a regional storm are valid. Associated with the latter are the matters of erosion and additional upstream flooding.

This is the first occasion on which this tribunal has heard it argued that a policy which permits the rebuilding of destroyed residential structures creates a precedent for the placing of fill on adjacent properties. Necessarily associated with the former are the implications of flood proofing of the proposed buildings, and the placing of fill in connection with such exceptions does not, in the opinion of this tribunal, constitute a precedent for the granting of fill on adjacent properties. The granting of fill in the hardship cases is a necessary condition of the exception that it created based on the hardship and where the objective on an adjacent property is the amendment of a natural condition by the placing of fill it does not follow that there is any precedential value in the granting of permission to rebuild residential buildings.

This tribunal has considerable difficulty in understanding the need for the building of a retaining wall on the subject lands. The only reasons given were aesthetics and a continuation of the appearance that was created on Lot 6. The purpose for the wall on Lot 6 being a flood-proofing device in connection with that particular property, the argument that its continuation has an aesthetic purpose is difficult to accept. Its purpose was not aesthetic and it cannot be said that its

...8

continuation would be for aesthetic purposes.

This tribunal is of the opinion that the application at this time is untimely if not premature. The tribunal is well aware of the frustration of the appellant with the development that has taken place on Lot 6 and the failure of the respondent to enforce the conditions that it imposed as a part of the permission granted for such development. On the other hand the appellant has instituted no serious legal negotiations or any legal proceedings on his own behalf to prevent the interference with his property, which interference is said to be the sole reason for the present application. It would seem that until such time as the steps recommended by the respondent on Lot 6 are taken that it would be pointless for the appellant to go to expenditures in respect of his property if such conditions would adequately maintain the drainage patterns as they existed prior to the development on Lot 6.

Even if this tribunal were satisfied that it is appropriate at this time for some action to be taken on the subject lands, this tribunal is not satisfied that the proposal outlined in the application is the best program for the property. The representative of the respondent indicated that he was prepared to recommend the placing of fill to the extent of 5,000 cubic feet which would not interfere with the storage capacity to the south of the appellant's property. Although counsel for the appellant argued that some engineering device could retain this area as a storage basin he failed to produce any evidence of the nature of such a device and in the absence of any such evidence, this tribunal cannot conclude that such an approach would be feasible.

A further reason for considering the application of the appellant to be untimely is the absence of any clear establishment of the regional flood line. While this study is normally done by a conservation authority there is sufficient

...9

evidence in this case to indicate that there is an involvement with the flood plain and in such circumstances if the appellant wishes to proceed with the development of his property prior to the availibility of public funds for the purpose of such a study, it is surely the responsibility of the appellant to establish the extent that the property is within the flood plain in order that effective control measures or the implications of the proposed development may be assessed.

In conclusion, as the proposal of the representative of the respondent would clearly meet the needs of the appellant as expressed by the appellant and as there are matters of flood control involved with the proposal contained in the application, this tribunal is of the opinion that there is no alternative but to dismiss the appeal.

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 matter.

DATED this 2nd day of November, 1981.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.