Box 330
24th floor, 700 Bay Street
Toronto, Ontario
M5G 1Z6

The Mining and Lands Commissioner

In the matter of The CONSERVATION AUTHORITIES Act

G.H. Ferguson, Q.C.) Thursday, the 12th day of
Mining and Lands Commissioner) February, 1987.

AND IN THE MATTER OF

An appeal against the refusal to issue permission to place fill and construct a tennis court on Lot 13 in Concession XIII in the Township of Huntingdon in the County of Hastings.

B E T W E E N :

RON BINCH

Appellant

- and -

MOIRA RIVER CONSERVATION AUTHORITY

Respondent

The appellant, in person.
W. Fairbrother, for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to issue permission to place fill and construct a tennis court of part of Lot 13 in Concession XIII in the Township of Huntingdon in the County of Hastings. By 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 Belleville on February 5, 1987.

The appellant owns part of Lot 10, Plan 1072, which appears to be a subdivision of part of Lot 13 in Concession XIII. Exhibit 5 is a copy of a plan of survey dated June 27, 1979 which was filed as Plan 21R-4687 and shows three parts. On Part I a frame cottage and a frame garage are shown.

The lands of the appellant lie on the west side of Moira Lake. The flood risk map, filed as Exhibit 2, shows the elevations of the one in one hundred year flood and also shows a dotted line which is proposed for use as a fill line. The elevation of the regional flood for the lake is 156.2 metres. The elevation of the appellant's lands is 154.9 metres. To the east of the appellant's lands there is a parcel owned by his

mother which is in the flood plain of the one in one hundred year storm. To the east of his mother's parcel there is an area that is used by a commercial tourist camp as a trailer park. To the east and to the north of these three tracts of land there is an insular shaped parcel of land which is above the regional flood elevation. A restaurant and other buildings of the tourist camp are situate on the southerly end of this insular area which by scale extends approximately 500 metres in a north-south direction. The area between the insular parcel and the land to the west above the regional storm elevation is approximately 200 metres in width and is composed of marshy or swampy land. Two causeways have been constructed across the marshy area. The southerly causeway provides access along the north side of the subject lands. The northerly causeway provides access to the northerly end of the insular parcel and continues northerly providing access to buildings situate on that part of the lake.

The evidence of the appellant was that in the past he had obtained permission from the respondent to place fill for the support of the frame garage which is situate northerly of the cottage and he proposed to fill an area to the north of the existing fill which would continue at a similar elevation and would provide a site for a tennis court which he considered would be attractive in maintaining the interest of his children in the summer cottage property. He stated that he proposed to leave a shield of trees which would protect the view from the causeway and also leave a fringe of trees along the shore. The trees referred to were said to be soft or red maples approximately twenty feet in height which are quick growing and can be cut down with new trees of a more aesthetic appearance being developed from the suckers that grow up.

In his application to the respondent, the appellant requested permission to place fill on an area measuring forty feet by seventy feet to a depth of five feet. With a mistaken understanding of the policy of the respondent regarding floodproofing conditions, the appellant proposed at the appeal that the area to be filled be increased to seventy-five feet by seventy-five feet and that the depth of fill be reduced to three

..... 3

feet. The volume of the original proposal was 14,000 cubic feet. The volume of the amendment would be 16,875 cubic feet, an increase of approximately twenty per cent. The respondent reserved the right to object to an amendment being made, particularly as the volume of proposed fill was substantially increased.

Although the appellant is engaged in the landscaping business he had not taken any elevations of his land or the site of the proposed fill. He had not made any test holes to check the nature of the soil on which the fill would be placed. He indicated that during his ownership in the area the tree growth was extending northerly through the low area. His proposal was to place clean fill which would be obtained from road construction or excavation jobs and place gravel on the surface of the part used for the tennis court and top soil on the sides of the filled areas.

The appellant indicated that the subject lands were unusable in the spring and it is only in the summer months that a person can walk on the proposed site. He has been familiar with the area for many years and built the cottage in 1977. In his experience there has been no problem in connection with high water. He indicated that the trailers on the trailer camp to the east remain on the site on a year-round basis. Although this site is presently below the regional flood elevation, some fill was placed ten or fifteen years ago. This fill was a by-product from a talc quarry and has become solid. He submitted that he felt that there would be no serious problem in a flood condition because his proposal did not include the construction of a building or structure.

It was pointed out that in a staff presentation on the hearing by the respondent the staff had indicated that the quantum of fill would have a negligible impact on the storage capacity. However, the witness for the respondent, D.C. King, who is the general manager and secretary-treasurer of the respondent, indicated that he would have concerns if the amount of fill were increased by twenty per cent. He outlined the policy of the respondent which was contained in a guideline filed

..... 4

as Exhibit 4. Section 1 of this policy statement sets forth six types of uses that will be considered as exceptions to the prohibitions contained in Regulation 155 of Revised Regulations of Ontario, 1980, which is the regulation made by the respondent under the Conservation Authorities Act. Although an exception is made for boathouses, minor landscaping or beach areas the proposal of the appellant does not fall within the exceptions. It would be most unreasonable to construe "minor landscaping" as including the construction of a double tennis court.

The policy statement goes further and sets out qualifications respecting the exceptions. Section 2 sets out a requirement for floodproofing in accordance with Appendix A. It also indicates that an application, although it falls within an exception would be rejected if there would be any "likely effect of increasing flood damages, pollution in the watershed or be otherwise contrary to the objects of the Authority".

In the minimum standards for floodproofing there are two qualifications in respect of the extent of the exceptions. The two principles are that consideration will not be afforded where the velocity exceeds one metre per second or the depth of floodwater is in excess of one metre. It was this provision that the appellant appeared to be attempting to meet in changing the application because he felt that with three feet of fill there would be less than one metre of floodwaters in the event of a regional flood. However, it is clear to the tribunal that the intention relates to the condition prior to the placing of the fill rather than the situation following the placing of the fill and consequently it is apparent to the tribunal that the proposal of the appellant does not fall within any of the exceptions provided in the express policy and, assuming it did, the restriction of the one metre principle would prevent consideration of the application.

This policy had been established following a concentrated study of the relevant part of the Moira watershed and the guidelines were adopted on August 8, 1985. The evidence was that the policy was applied uniformly and no evidence was drawn to the attention of the tribunal of the issue of permission

inconsistent with the policy since its establishment. It was evidenced that the objects of the respondent were to regulate the land use in the flood plain on a watershed basis and that, while the interference in an individual case might be negligible or difficult to determine, regarded from a watershed basis the precedential implications are taken into account. By way of illustration, reference was made to the possibility of subsequent applications to fill the entire area to the north and the west of the subject lands.

A further aspect was raised in the evidence of the respondent, namely, that once the proposed fill was in place, the subject lands would be outside the flood plain. This tribunal is not satisfied that such a filled area could be said not to be susceptible to flooding, but the tribunal is not aware of any legal authority on the point. This may well be a valid concern of the respondent.

In his submissions the appellant stated that the decision of the respondent interfered with the use of his cottage property to the fullest extent reducing the element of happiness derived therefrom and that such should be regarded rather than an application of the policy of the respondent.

The submissions on behalf of the respondent related to the responsibility of the respondent to administer within the provisions of the Conservation Authorities Act the watershed of the Moira River and submitted that it was appropriate to establish the guidelines which should be followed and failing to so follow the guidelines the argument of precedent would destroy the function to be served by the respondent.

In addition to the matter of precedent, reference was made to the loss of control over the specific lands. It was submitted that the onus was on the appellant to establish that the application would not create any pollution and that he had not produced any expert evidence which would establish the prevention of siltation. Further, there was no evidence of the effect of the loss of storage capacity that would result from the placing of the fill. It was suggested that the placing of three

feet of fill might not achieve the result that the appellant wished and hence there was an absence of technical data on which a decision could be based. Reference was made to the swamp-like nature of the subject lands and it was argued that this aspect, which was established by the appellant's evidence, should be met and that the appellant had failed to do so. It was submitted that the appeal should be dismissed as the respondent was acting in accordance with its policy which was a good watershed policy and the respondent had not applied that policy in an inconsistent manner.

With reference to the submissions of the appellant, the purpose of the Conservation Authorities Act is to identify the lands that are susceptible to flooding in regional storms and the use of which would affect the control of flooding and ultimately increase the elevations and the velocities of regional floods. The approach of the legislation and the regulations made thereunder is to identify lands that have this negative quality and to control and restrict the use thereof. Such lands cannot be regarded as having the same capabilities of use as lands not situate in flood plains of regional storms and the purpose of the Act and regulations is to limit the use of lands in flood plains because of the inherent lack of capability thereof for unlimited use.

The tribunal is not aware of any principle of flood plain management which would justify the issue of permission in this case. The respondent has established its policy including a number of exceptions and qualifications of these exceptions. It is clear to the tribunal that the proposed application does not fall within the exceptions and, assuming it did, would be excluded by the qualifications of these exceptions contained in the written policy of the respondent.

Regarding the application from the principles generally applicable to flood plain management the applicant did not fall within any of the recognized exceptions. There is no possibility of the applicability of the stage storage doctrine which is a

recognized principle for offsetting the effects of loss of storage capacity.

There was no evidence of any overriding provincial, federal or municipal concerns that would justify the reversal of the decision of the respondent. The evidence indicates that the respondent has, within the last two years, established and applied the policy that was adopted in this case. There was some suggestion of an inconsistent application but there were no details to establish the basis of that one instance. The tribunal is satisfied that the appellant has not been deprived of any policy of the respondent under which permission is granted in similar circumstances and that the granting of permission in such circumstances would create a serious precedent, particularly in the immediate area of the subject lands.

The tribunal has noted, although it was not argued or supported with evidence, that the case involves some interesting aspects of swamp management or the conservation of land. It is noted however that Regulation 155 has not been updated to expressly include this concept.

For the foregoing reasons the tribunal is satisfied that the decision of the respondent should not be changed either in respect of the application as it was originally made or sought to be varied at the appeal. The increased volume of the proposed amendment indicates a greater loss of storage capacity and illustrates the precedential concerns expressed by the witness for the respondent. If the storage capacity of the watershed can be reduced without consideration of its precedential implications there can be no control of flooding which is a matter over which the respondent has jurisdiction.

1. THIS TRIBUNAL ORDERS that the appeal is dismissed.

2. THIS TRIBUNAL ORDERS that no costs shall be payable by either party to the appeal.

SIGNED this 12th day of February, 1987.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.