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Ontario

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 place fill on Lot 16 in Concession XI in the Township of Hungerford in the County of Hastings

B E T W E E N :

FRANCIS MAHONEY

Appellant

- and -

MOIRA RIVER CONSERVATION AUTHORITY

Respondent

The appellant, in person.
R.R. Ketcheson, for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to issue permission to place fill on part of Lot 16 in Concession XI in the Township of Hungerford in the County of Hastings. By O. Reg. 917/80, made under the Ministry of Natural Resources Act, 1972 the power and duty of hearing the appeal was assigned to the Mining and Lands Commissioner. The appeal was heard in Belleville on April 22, 1981.

In 1967 the appellant purchased a parcel of land containing approximately 4-1/2 acres and situate in Lot 16 in Concession XI in the Township of Hungerford in the County of Hastings. The parcel may be further described as fronting on the north shore of Stoco Lake and on the south side of County Road 39. The parcel was approximately 900 feet in length. Sulphide Creek flows in a southerly direction through a bridge in the county road, across the subject lands and into Stoco Lake.

At the time of purchase there was a driveway from County Road 39 onto the property. In 1980, after having

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obtained permission from the County Engineer, which permission was not produced to this tribunal, the appellant proceeded to improve the existing driveway and construct a second driveway on the opposite side of Sulphide Creek with the result that there would be a driveway on each side of the creek running in a southerly direction from the county road. The easterly driveway, which was the original, is situate approximately 15 feet to the east of the creek and the new driveway is situate approximately 30 feet west of the creek. These driveways are approximately 48 feet in length and notwithstanding the width of 10 feet shown on the application, are 23 feet in width. The depth of fill required varies from 25 feet at the edge of the county road to 5 inches at the southerly end of the driveways.

According to the appellant's evidence the old driveway was not adequate for the use that can be made of the subject lands. It was covered with grass and did not provide traction for tractors to draw a load onto the county road. In addition the existing slope was too steep for tractors although it might have been sufficient in the past for horse-drawn loads.

With reference to the amount of fill involved, the appellant had not calculated the amount of fill that has already been placed. His application requests approval for 24 cubic yards of fill which is the amount of fine gravel required to cover the larger rocks and fill that has been placed on the driveways.

The reasons given by the appellant for the construction of the driveways were that the only uses that can be made of the subject lands are the harvesting of wood for a farm house owned by him or his family and access to Stoco Lake for fishing. The driveways provide an access to the county road for tractors removing the wood and also a parking area for vehicles used in fishing from which boats can be launched

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into the creek and thence driven into the lake. The reason two driveways are required was said to be that the creek, even in the winter time, could not be crossed with a tractor and it was necessary to have access to the highway from both sides of the creek. The appellant also stated that he is a senior citizen, has limited funds and is unable to construct a bridge or other device across the creek.

The appellant gave evidence regarding the adequacy of the hearings before the conservation authority. While these matters may be relevant for an application for judicial review before the Divisional Court, this tribunal considers that its responsibility is to hear the matter de novo on the merits and that the technicalities of the procedure of a conservation authority, even if they are not adequate, would not provide an adequate basis for a reversal of a decision by a conservation authority.

The appellant referred to two areas in which filling had been permitted, one area being on the Bay of Quinte and the other being in the Town of Belleville. He had no knowledge of whether a permit had issued or the amount of fill that had been placed. Reference was also made to filling that had been done by the conservation authority around one of its buildings in Vanderwater Park at Thomasburg.

On cross-examination the witness agreed that his entire property has been flooded at some time during spring conditions. Exhibit 5 is two photographs produced by counsel for the respondent showing the property in the spring of 1971 and showing the subject lands completely inundated with flood waters. The witness acknowledged that this condition exists for as long a period as two weeks in some springs. With reference to the possibility of gaining access in the winter time to the opposite side of the property across Stoco Lake, the witness

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took the position that the ice would not be strong enough to hold a tractor. The appellant was not able to furnish any evidence as to the amount of fill that had already been placed on the subject lands. He indicated further that the length of 48 feet might require extension to complete the driveways. He further confirmed that a width of 23 feet was required. He again reasserted that the lake would not be safe for passage in the majority of occasions on which wood would be available for removal from the property.

The appellant's case was supported by John Genore, the Reeve of the Township of Hungerford who has held that office for three years and has resided in the area all his life. He took the position that the appellant, as a landowner, was entitled to access from the county road and the proposed fill would provide such access. He advised that parking on the highway would be dangerous because there is a bridge across Sulphide Creek and the property is on a curve. He has pointed out to the appellant that he could obtain no permits to build from the township unless the conservation authority issued permission but that the township was supporting his application to permit him to complete the existing driveways. He pointed out that the township agrees with the policy of the conservation authority to prevent the filling of the flood plain but is of the opinion that the need of a landowner for access should create an exception to this policy. He suggested that it would be foolish to expect the payment of taxes on such property and yet prevent the landowner from having use of the property through the prevention of access thereto.

On cross-examination the witness admitted that a substantial quantity of fill had been placed on the property already. When asked if he felt that 100 truck loads would be a reasonable estimate of the amount he did not seriously object

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but felt that an estimate of between 50 and 100 loads would be more accurate. He stated that some of the fill had been placed on the subject lands by township trucks as part of a project of the township in cleaning up a ditch. He also confirmed that he had seen the permission of the county for access to the highway at the two locations.

Edward A. Courneya, a long time resident of the area who had a cottage approximately one quarter of a mile from the subject lands until seven years ago supported the appellant's position. He indicated that the varieties of trees growing on the subject lands are maple, ash and basswood. He confirmed the position of the appellant that the crossing of the creek which was springfed and the ice in the bay would be dangerous and there is a need for two driveways. On cross-examination, this witness indicated that the entire land had been inundated on many occasions to the extent of approximately one foot and that this complete flooding of the property occurs almost every year.

L.H. Christl, the Conservation Authorities Project Engineer of the Regional Office of the Ministry of Natural Resources gave evidence on behalf of the respondent. He is a professional engineer with a B. Sc. degree, from the University of Guelph, specializing in water resources and membership in the Association of Professional Engineers of Ontario. Prior to his present position, he was employed by two firms in private practice providing consultative services to conservation authorities.

The witness established through photographic evidence that the subject lands are in the regional flood plain of the Moira River, including Stoco Lake, although the flood mapping has not been done. Photographic evidence on file in the Ministry shows them to have been under water in a 1971 flood that was a major event but not of the magnitude of a one in 100 year storm.

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On cross-examination by the appellant, the witness agreed that it would not be unexpected that no erosion occurred to the fill that had been placed because no opinion should be based on a two-year period. He stated that, assuming access to the subject lands should be permitted, a second driveway is unnecessary as adequate access for the purposes of the appellant could be achieved by building a stone or rip rap ramp across the creek and further there are more appropriate locations for the driveway on the subject lands.

In discussions with the Bench it was apparent that the significant issue is the loss of storage capacity and keeping in mind that the County of Hastings had bridged Sulphide Creek, the issues of backwater effect and upstream flooding from the driveways are of minimal concern. In a regional flood, the backwater effect from the increased height of Stoco Lake negatives or equates with any backwater effect from the driveways, with the result that loss of storage capacity is the matter to be considered.

Brian Arthur Watson, the secretary-treasurer of the respondent, gave evidence to the effect that no application had been made and no permit has been issued in respect of the two cases of filling raised by the appellant. With reference to the filling on the property of the respondent, this filling was done above the regional flood line. On questioning from the Bench, it appears that some filling has been permitted on Stoco Lake by the respondent for the purpose of construction of retaining walls and filling behind the retaining walls. However, there was no evidence available as to the amount of the fill required and the basis of the creation of the exception was the protection of existing buildings.

In his reply evidence, the appellant merely suggested that there must be evidence of fill permits having

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been granted and the amounts involved but he did not request an adjournment for the purpose of producing this evidence.

The major submission on behalf of the appellant was that an exception should be created on the basis of the need of two access points. Access was required, it was submitted, on two points by reason of the lack of freezing of Sulphide Creek and Stoco Lake. Further the financial position of the appellant did not warrant other more costly structures.

On behalf of the respondent, it was submitted that the placing of fill without the granting of permission or acquiescence of the respondent could not establish precedence. It was submitted that the onus was on the appellant to establish that the decision of the conservation authority was in error and in the absence of evidence of such matters, it was submitted that the evidence of permitted filling did not warrant the substantial amount of filling that was done on the subject lands. The case of the respondent rested on the loss of storage capacity and it was submitted that the placing of 50 to 100 truck loads of fill was a sufficiently significant amount of fill to require the present situation to be dealt with on a different basis from those permissions already granted.

It was submitted that there was no proper evidence on which a decision could be made that the appellant cannot make use of his property without the type of access which he has constructed and proposes to complete. It was submitted that it may be more difficult but there could be access without the placing of the fill that has been placed.

Counsel also submitted that it may not be economically feasible for the subject lands to be used as a woodlot. Accordingly the hazards associated with the proposal are not warranted in the light of this approach to the use of the subject lands.

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In reply it was submitted that other permits must have issued in the area and that access to the property across four miles of lake for the purpose of cutting wood in the winter time was not acceptable.

In the absence of precise evidence of the amount of fill that has been placed on the subject lands, it is difficult to come to any conclusion as to the issue of fact of whether the amount of fill should be characterized as significant or otherwise. Even assuming, in the appellant's favour, that the amount of fill is insignificant in relation to the entire storage capacity of the watershed, the approach to this argument was dealt with in the case of Van Gelder v. The Rideau River Conservation Authority where is was said...

> Perhaps the best way of illustrating to applicants that the law requires consideration to be given to matters which individually would appear to be insignificant would be to point out the fact that the subject matter of the consideration by the conservation authority in determining whether permission should be granted is the matter of the control of flooding. The standard is not whether the particular application would affect or have a serious effect on flooding. The test is the effect on the control of flooding. Where the hazard, though not in itself significant, is representative of the hazard to other property in the flood plain it is essential in establishing approaches to consider the precedential implications even though there may not be a significant change in the risk by particular proposals. The obligation of the conservation authority is to establish a program to control flooding and the significant consideration is the effect on the control program rather than an attempt to measure the percentage of the storage capacity involved in the particular case. In order that all landowners can be treated equally it is essential in granting exceptions that there be an assessment of the effect on the control program and in such an assessment the issue of precedent becomes vital. Unless it can be shown to this tribunal that a valid exception can be made to the program it is essential that no principle be established that would detract from the overall approach of the program.

Accordingly, in the present case it is necessary to establish some acceptable or recognized exception to the above general principle of prohibition of infilling. As the entire subject lands are wholly within the flood plain there is no

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application of the stage storage doctrine. Also as the regional flood plain is established on the one in 100 year storm, there is no room for consideration of principles related to flood fringe.

With reference to policies of the respondent that may not have been applied to the appellant's case it appeared that the respondent has permitted some filling on Stoco Lake on the basis of protection of existing buildings which it must be concluded have prior thereto been erected in the flood plain whether or not there was a regulation in effect at the time of construction.

A novel argument was put forward in this case, namely, that access to the subject lands for purposes consistent with flood plain management was being denied. Such uses were access and parking for fishing purposes and woodlot management. Counsel for the respondent submitted that there was no evidence that the latter was an economic use of the subject lands. Whether it be economic or not, it does appear to be a use and no other alternative uses being apparent, it is difficult to criticize use for such purpose.

In the view of this tribunal access to property for uses that are consistent with good management of a flood plain is equally deserving of consideration as protection of building that in the light of such management principles ought not to have been erected, if such were the case. However, this tribunal was not impressed with the need for two means of access. The witness, Christl, indicated that access should have been provided in a better location and that access across the creek could be provided by means of a ramp structure without the creation of a duplication of the amount of fill.

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The appellant emphasized that he is a senior citizen and does not have funds for expensive construction. While our society to-day makes considerable allowances for senior citizens, the allowances are made on a temporary basis. The placement of fill cannot be regarded as a temporary situation that would terminate with the death of the owner or the sale by the owner of the subject lands. The harm to society of permitting infilling of flood plains continues in perpetuity and decisions respecting such matters cannot turn on the financial position of a current owner. The considerations in this type of application must have regard to the long term results of the proposal and not the difficulties of the short term position related to the inability of the present owner to make changes in a proper manner.

Accordingly, upon submission of proof that the fill placed on the westerly side of the creek has been removed on or before the 30th day of September, 1981 an order will issue granting permission to complete the surfacing of the easterly driveway in accordance with the application. If such steps are not taken by that date the respondent may apply for an order dismissing the appeal.

DATED this 13th day of May, 1981.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.