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

Ontario

The Mining and Lands Commissioner

In the matter of The CONSERVATION AUTHORITIES Act

AND IN THE MATTER OF

An appeal from the refusal to issue permission to place fill on part of Lot 2 in Concession IV in the Township of Thurlow in the County of Hastings.

B E T W E E N :

Leonard P. Steele
LEONARD P. STEELE

Appellant

- and -

MOIRA RIVER CONSERVATION AUTHORITY

Respondent

T.J. Lally, for the appellant
R.R. Ketcheson, for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission to place fill on part of Lot 2 in Concession IV in the Township of Thurlow in the County of Hastings under Regulation 113 of Revised Regulations of Ontario, 1970, a regulation made by the respondent under the authority of The Conservation Authorities Act. The power and duty of hearing and determining the appeal was assigned to the Mining and Lands Commissioner by Ontario Regulation 375/80 and the appeal was heard in Belleville on August 26, 1980.

The subject lands are a 13 acre part of Lot 2 in Concession IV in the Township of Thurlow bounded on the north by the unopened road allowance between concessions IV and V, on the southwest by the by-pass of Highway No. 14 and on the east by a row of houses fronting on the old right-of-way of Highway No. 14. There are houses on the east and west side

of this old highway. The Moira River lies to the east of the row of houses on the easterly side of the old highway. The parcel is a fairly flat field that was under cultivation up until four or five years ago.

The appellant who operates a funeral and ambulance service in Belleville purchased the subject lands in 1978. His purpose in purchasing the lands was to have them as a site for building in the future. One of the conditions of the sale was that a building permit would issue. Prior to closing the appellant had discussions with the township clerk who advised that there were no township by-laws prohibiting the construction of buildings. The only difficulty that was anticipated was that a permit to make an entrance onto Highway No. 14 might not be forthcoming and discussions were held with one Beare, a councillor and also an appointee to the conservation authority, respecting road access. These discussions indicated that the unopened road allowance could be opened by the appellant at his expense and if the road were improved to the necessary standard the township would take over the road. In these discussions the appellant was not advised of the requirement of complying with the regulation of the respondent. The transaction was closed in October, 1978. In 1979 the appellant caused some ten loads of fill containing approximately 120 cubic yards to be deposited on the southeasterly portion of the subject lands. An officer of the respondent called him advising of the breach of the regulation and requested him to stop. The filling operation stopped and an application was made to the respondent for permission to place fill to a depth of from two to twelve inches. The application was denied on the grounds that the subject lands are situate in the floodplain of the Moira River.

On cross-examination of the appellant a photograph was produced showing the Moira River inundated around both rows of houses and spilling over part of the subject lands. The appellant agreed that the photograph represented his

property and was probably taken in 1976, a year in which there was unusually high water during the spring runoff. The photograph was filed as Exhibit 10. No other evidence was called on behalf of the respondent.

In the submissions of counsel for the appellant it was agreed that it was not proper to continue the application for permission to place further fill and a motion was made to amend the application to permit the leveling of the existing fill. It was submitted that such would be reasonable in the circumstances, having regard to the facts that the appellant was unaware of the regulation of the respondent, the officials failed to advise him at the relevant time of the regulation, the insignificant amount of fill and the cost of removal. It was pointed out that the property is approximately 1,000 feet from the river.

Counsel for the appellant emphasized the fact that in no place other than in the office of the respondent was there any evidence of the extent of the floodplain. In this case it was apparent that only one copy of the map was in the office of the respondent and it was submitted that some information should be made available to purchasers of land either by filing a copy of the map of the floodplains in the Land Registry Office or some other public place in order that purchasers of land could be more aware of the extent of the regulation.

The submissions on behalf of the respondent were that the evidence clearly showed the subject lands to have been subject to flooding in the past and accordingly the area was within a water lot as defined in Regulation 113. Counsel for the respondent further submitted that the map in question had been used for many years as evidence of the boundaries of the jurisdiction of the respondent and that, as a matter of fact, the conclusion in respect of the evidence should be that there was no discussion of the regulation of the respondent

rather than a failure to warn the appellant.

It may be said at the outset that this tribunal has no jurisdiction to hear the appeal unless the subject lands are situate within the area over which the respondent has jurisdiction.

The purpose of The Conservation Authorities Act is to prevent the risks to property and human life that occur as a result of flooding and conservation authorities have been given power to make laws to control the erection of structures in vulnerable areas, the placing of fill in scheduled areas, and the diversion of streams. While it is normal for the conservation authority on an appeal to produce some evidence of the risks and depths of potential flooding involved in the application, no such evidence other than the photograph filed as Exhibit 10 was produced and the tribunal is left with very little scientific basis for making a decision on the matter. Needless to say, it was open for the appellant to bring his own expert evidence to establish the effect of the proposed operations and the local policy of the respondent to the extent that it is publicly known. Accordingly this tribunal is left in a very difficult position of making a decision on a highly technical matter without the benefit of any expert evidence.

It may be noted, by way of judicial notice of provincial policy although it may not appear in the evidence, that the area under the control and jurisdiction of the respondent is treated by the Conservation Authorities Branch as being an area in which the standard of the regional storm is the 100 year storm. The result of the application of this standard is that those modern policies recently developed in respect of the flood fringe and the application of the principle of permitting limited construction in the flood fringe are not applicable in the areas under the jurisdiction of conservation authorities with such standards. The evidence clearly discloses that the subject lands have been subject to actual flooding in part at least in the past and with this actual flooding in the past, this tribunal can only assume

that the problems respecting the floodplain capacity and changes in flow patterns could result from the placing of fill on the subject lands.

There was no evidence that this case falls within any recognized exception. There is no evidence to suggest that the subject lands might be made the application of the cut and fill, or in the more modern language the stage storage or incremental balance, theory. There does not appear to be any overriding public concern of a federal, provincial or municipal nature. There was no evidence that the case fell within any exceptional policy of the respondent and that the appellant had been deprived of the benefit of such policy and accordingly this tribunal has little alternative but to dismiss the appeal.

With regard to the application of counsel for the appellant to amend the application, although counsel for the respondent did not object, it has not been the practice of this tribunal to allow such amendments, particularly where objection has been made. It has been the practice to permit the local conservation authority to make a decision on the amendment and exercise its jurisdiction in the first instance. There may be some question as to whether this tribunal has jurisdiction to entertain such motions. Accordingly this tribunal is not prepared to make an order to permit the levelling of the existing fill as there is doubt that such a matter is properly before this tribunal.

With reference to the matter of publication of the regulation or the map showing the boundaries of the floodplain, there can be no question about the validity of the regulation made by the respondent. There is no legal requirement of publication and accordingly there is little this tribunal can do in this regard. The problem is well known to the provincial administrators dealing with the Act and the only comment that can be made is that even if a more expensive and more detailed system of making the law known

were required it could still be possible for purchasers of land to acquire title without becoming aware of the regulation.

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 28th day of October, 1980.

Original signed by G.H. Ferguson

G. H. Ferguson,
MINING AND LANDS COMMISSIONER.

(S E A L)