

**NOTICE OF DECISION**

Pursuant to a hearing of an appeal submitted to the Minister under subsection 28(5) of the Conservation Authorities Act, R.S.O. 1980, Chapter 85.

W. Dennis Tieman ) July 29, 30, 1991  
Mining and Lands Commissioner ) August 1, 8, 9, 1991

IN THE MATTER OF THE CONSERVATION AUTHORITIES ACT

AND IN THE MATTER OF

An appeal to the Minister under subsection 28(5) of the Conservation Authorities Act against the refusal to permit construction of a residential structure at the premises known municipally as 215 Canboro Street, in the Town of Smithville, in the Township of West Lincoln in the Regional Municipality of Niagara.

B E T W E E N :

WILLIAM VANDEN BRINK and MARIANNE VANDEN BRINK  
Appellants

- and -

NIAGARA PENINSULA CONSERVATION AUTHORITY  
Respondent

William G. Charlton, Q.C., solicitor for the appellants.  
John Olah, solicitor for the respondent.

The appellants filed an appeal to the Minister of Natural Resources from the refusal of the respondent to grant permission to construct a new single family residential dwelling on Lot 3, Registered Plan M-87; Part of Lot 7, Concession IX,

Township of West Lincoln on the south side of Twenty Mile Creek at 215 Canboro Road, Smithville.

The appeal to the Minister was heard in Toronto pursuant to Ontario Regulation 364/82 which assigns to the Mining and Lands Commissioner, the power and duty of the Minister to hear and determine such appeals.

### **SOME BACKGROUND**

On May 2, 1990 the Township of West Lincoln issued a municipal building permit to William Vanden Brink to erect a single family dwelling on the subject property. This permit was issued pursuant to the Building Code Act. From evidence submitted at the hearing, both the appellants and the Township had reason to know that the proposed building site was located within a regulated flood plain and that any construction on that site required the prior approval and permission of the Niagara Peninsula Conservation Authority pursuant to subsection 28(1) of the Conservation Authorities Act.

On July 24, 1990 the Conservation Authority posted a "Notice of Violation" on the partially constructed building. This was confirmed in a registered letter to the appellant from the Conservation Authority dated July 31, 1990.

On August 16, 1990 the appellants filed with the respondent an "application for fill, construction and alteration to waterways" permit pursuant to subsection 28(1) of the Conservation Authorities Act.

On November 7, 1990 the Niagara Peninsula Conservation Authority passed resolution No. FA-223-90 to deny permission to Mr. William Vanden Brink "to construct a new residential dwelling within the 100 year flood plain of Twenty Mile Creek for the following reasons":

- 1) The subject property is subject to flooding under 1:100 year flood conditions, thereby posing an unacceptable risk to life and property damage.
- 2) The construction and filling will result in a loss of flood plain storage in Twenty Mile Creek. The impacts of such activities will immediately and cumulatively affect other lands.

On November 21, 1990 the full Authority passed another resolution No. FA-236-90 which stated that "Authority staff be authorized to initiate legal proceedings under Ontario Regulation 82/86 against Mr. William Vanden Brink for building or permitting the construction of the dwelling in the flood plain and request an order for removal of said building."

On December 18, 1990 Mr. Brian Duxbury then counsel for the appellants, filed a notice of appeal to the Minister on behalf of William and Marianne Vanden Brink pursuant to subsection 28(5) of the Conservation Authorities Act.

## **SOME FACTS**

The following facts were agreed upon by both parties upon examination of those expert witnesses who appeared at the hearing of this appeal:

- 1) The one in one hundred year flood elevation in this area is 183.68 metres and the building site is below that elevation.
- 2) The building and associated fill will increase the level of Twenty Mile Creek during a one in one hundred year flood in the Smithville area by an estimated 0.5 to 1.0 centimetres.
- 3) The one in one hundred year flood plain elevation is approximately 8 feet lower than the Regional flood plain elevation originally established by the Conservation Authority for purposes of regulation. It was also agreed that the reach of Twenty Mile Creek in the Smithville area is one of the most vulnerable to flooding in the entire watershed.

## **ISSUES**

The following issues were relevant in the hearing of this appeal.

It was argued by counsel for the appellants that section 4 of Ontario Regulation 82/86 provides for some discretion on the part of the respondent because it states in part "the Authority may permit". That Regulation was approved by

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the Ontario government in 1986. It provides the Niagara Peninsula Conservation Authority with the responsibility and authority to regulate construction in any area susceptible to flooding during a regional storm.

Part 4, which must be read as a whole, states as follows:

Subject to the Ontario Water Resources Act or to any private interest, the Authority may permit in writing the construction of any building or structure, or the placing or dumping of fill, or the straightening, changing, diverting or interfering with the existing channel of a river, creek, stream or watercourse to which section 3 applies if, in the opinion of the Authority, the site of the building or structure or the placing or dumping and the method of construction or placing or dumping, or the straightening, changing, diverting or interfering with the existing channel will not affect the control of flooding or pollution or the conservation of land.

Evidence presented at the hearing clearly indicates some effect of the structure on the control of flooding in the Smithville reach of Twenty Mile Creek. Therefore the respondent lacks the discretion sought by the appellants under section 4 of the Regulation.

It was also argued by the appellants that the Two Zone Concept should have been considered by the respondent in the application of Ontario Regulation 82/86 to the property and to the building site.

The Two Zone Concept is set out in some detail on Pages 9 and 10 of the Policy Statement on Flood Plain Planning approved on August 11, 1988 by the Ontario Government pursuant to Section 3 of the Planning Act. Under that Act or any other policy, the Province does not allow the application of the Two Zone Concept in flood plains which are regulated at the minimum acceptable regulatory standard which is defined in the Policy statement as being the level of the 100 year flood. Nor can the Two Zone Concept be applied on a site by site basis.

Because the entire Twenty Mile Creek flood plain is regulated at the minimum acceptable standard, the Two Zone policy could not be considered or applied to this site. Nor were any exceptions cited.

Another important issue in the hearing was the principle of "cumulative effect". This principle can not be examined in isolation from an important principle of this Tribunal: that all owners of land within a regulated flood plain must be treated fairly and equitably.

A more important test for this Tribunal is not the level of cumulative effect but whether or not there is evidence to indicate any negative effect on other land owners in the flood plain, either upstream or downstream from the property in question. On this test the application to build a structure on this site fails.

A number of options for remedial works were brought forward by an expert witness for the appellants in a new report dated July 25, 1991. In this regard, it should be noted that the Tribunal, at the hearing of an appeal is not prepared to take into consideration any new or technical options not previously reviewed by the other party or considered at a local hearing before the Board or the Executive Committee of a Conservation Authority.

## CONCLUSION

Based on all of the evidence presented and considered at this hearing, it is the opinion of this Tribunal that the appellants were treated fairly and legally by both the staff and the board of the Niagara Peninsula Conservation Authority under Ontario Regulation 82/86 and the control of flooding and policies of that Authority.

The appeal is hereby dismissed.

In the matter of costs it was recommended by both parties and agreed that the question of costs should be deferred. Therefore this matter will be heard and decided by the Deputy Mining and Lands Commissioner at a date to be set upon receipt of a motion from either party. If no motion for costs is received by this Tribunal before December 31, 1991, no costs will be considered and the appeal will have been dismissed without costs.

DATED this 22nd day of November, 1991.

Original signed by W. Dennis Tieman

W. Dennis Tieman  
MINING AND LANDS COMMISSIONER.