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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 for the enlargement of an existing storage building for seasonal residential purposes and for the placement of fill for a septic system on part of the south half of Lot 10 in Concession III in the Township of Innisfil in the County of Simcoe.

B E T W E E N :

VALDINO SANTOS

Appellant

- and -

NOTTAWASAGA VALLEY CONSERVATION AUTHORITY

Respondent

L.J. Pollack, for the appellant.
G.W. Luhowy, for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to issue permission for the enlargement of an existing storage building for seasonal residential purposes and for the placement of fill for a septic system on part of the south half of Lot 10 in Concession III in the Township of Innisfil in the County of Simcoe. 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 Toronto on March 8, 1983.

The subject lands contain ten acres, more or less, and are situate at the southeast corner of Lot 10 in Concession III in the Township of Innisfil. The east limit measures 461 feet, ten inches along the Tenth Sideroad. The south boundary

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along the road allowance between Concessions II and III, as widened, measures 1,043 feet, eight and one-quarter inches.

The Innisfil Creek flows in a southerly direction at a location approximately 600 feet easterly of the southeast corner of the subject lands. The regional flood elevation of the watershed of the Innisfil Creek at this location is 749.8 feet. The flood plain is approximately one mile wide at this cross-section and the subject lands are situate approximately in the centre of the flood plain. The elevations of the subject lands vary from 746.5 feet to 747 feet. The lands lying to the west of the subject lands have similar elevations indicating that the subject lands are situate in a wide, flat area.

The subject lands were acquired by the appellant in November, 1967 at a price of $13,000. Two buildings are presently situate on the subject lands. A building referred to as a barn, but appearing to be more in the nature of a driving shed, is situate in the southeast part of the subject lands. There was no evidence as to the date of construction of this building. Westerly of the barn is a storage building constructed in 1981 and 1982. There is a driveway leading from these buildings to the road allowance between Concessions II and III. The elevation of the road allowance at the end of the driveway is 748 feet.

Construction of the storage building was commenced without permission of the respondent under Regulation 173 of Revised Regulations of Ontario, 1980 or its predecessor. Following a stop work order issued by the municipality permission was obtained for the construction of a storage building measuring eighteen feet by thirty-two feet. The respondent required the appellant to raise the floor of the building above the regional flood elevation with the result that it was necessary for the appellant to erect walls around the cement slab that had been poured without permission, place fill and pour a further slab at the regional flood elevation. In the

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construction of the building the appellant enlarged the building beyond the area authorized by the permission and constructed the building with measurements of eighteen feet by forty feet. The building is used as a storage area for vegetables such as carrots, potatoes and cabbages that are grown by the appellant who lives in Toronto and travels to the subject lands on weekends and during other periods he is able to carry on market gardening activities.

In July, 1982 the appellant applied for permission to enlarge the building to 1,000 square feet and install a septic system in order that the building might be used as a seasonal cottage during the summer while the potato fields were being worked. The reason to enlarge it to 1,000 square feet was said to be that the building code requires such a minimum and the existing size of the building was 750 square feet. The application was refused and the appellant appealed to the Minister of Natural Resources.

The case for the appellant was based on the issuance of permission in respect of the property of Joseph Cestaric in Lot 9 in Concession II of the Township of Innisfil which is approximately 4,000 feet westerly of the subject lands. It was submitted that this site was within the flood plain and the respondent had set a precedent for the granting of permission for permanent residential construction in the flood plain and accordingly a request for seasonal residential construction should not be refused.

The evidence submitted on behalf of the respondent was that its policy extended to the permission of construction of accessory buildings for agricultural purposes but did not permit the construction of new residential buildings in flood plains unless the application fell within a recognized exception such as the exception created in connection with the Cestaric property. With reference to the Cestaric property the evidence indicated that the residence was constructed on the fringe of

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the flood plain and that with flood proofing and the placing of fill for a driveway to the roadway in front of the site, which was above the regional flood elevation, access to and egress from the residence would be possible even in the event of a regional flood. Accordingly, the permission granted contained conditions requiring flood proofing.

In contrast the subject site, while it could be raised above the regional flood elevation, would be totally surrounded by flood waters in the event of a regional storm to a depth of three to four feet and no access to the public road from the proposed residence could be obtained because the elevation of the public road is 1.8 feet below the elevation of the regional flood with the result that the depth of water would prevent both the determination of the location of the road and travel on the road.

The evidence for the respondent indicated that it was not concerned with the loss of storage capacity resulting from the proposed construction as there was a very wide, flat flood plain and a regional flood would not be expected to have a serious velocity. The evidence did show however that the subject lands were inundated on March 31, 1982 as a result of snow melt unaccompanied by any rainfall and that there is a serious flooding problem in connection with the subject lands not only in the event of a regional flood situation but also in lesser floods.

The concerns of the respondent were stated in argument to be fourfold, namely, the site is in a flood plain, the site is subject to flooding in circumstances other than regional storms, in the event of a regional storm ingress and egress would be impossible and the precedential implications of creating exceptions to the policy in respect of the building of residential premises in flood plains. It was submitted that the Cestaric application did not create a change in the policy of

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the respondent which would permit all residential uses in a flood plain and that the exception of the Cestaric property did not establish any precedent for the present application as matters of ingress and egress cannot be provided in the event of a regional storm as was established in the Cestaric case. It was submitted that matters of regulation of construction of buildings which do not have access in the event of regional storms and contain risks to occupants in the event of a regional storm are matters within the concept of control of flooding and are proper grounds for rejection of the application.

The tribunal is satisfied that the prevention of the construction of residential buildings which would be surrounded by three to four feet of water in the event of a regional flood falls within the jurisdiction of a conservation authority and the risks associated with such flooding, particularly to children and in night conditions are valid considerations in an application to a conservation authority.

In this case the evidence indicated that the application was outside the expressed policy of the respondent and the only argument for the appellant was that an exception had been created to that policy, in fact, by the granting of permission in the Cestaric case. However, the Cestaric case is an example of typical exceptions authorized by conservation authorities. Where flood proofing and access to and egress from a residential building can be provided to evade the risks of a regional storm exceptions are frequently granted. Usually such exceptions are coupled with a consideration of the storage capacity and discharge capacity but in this case these considerations are not applicable according to the evidence of the respondent and this third aspect is not relevant to the consideration either of the Cestaric case or the present application. The tribunal is satisfied that the principles applicable to the granting of permission in the Cestaric case

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are not applicable to the present application and cannot conclude that the Castaric case establishes any factual, as contrasted with express, policy of the respondent under which permission should be granted. The appellant has not been denied the benefit of any policy, express or implied, of the respondent and has not been denied permission in circumstances in which other landowners have been granted permission and accordingly, the appeal will be dismissed.

IT IS ORDERED that the appeal in this matter be and is hereby dismissed.

AND IT IS FURTHER ORDERED that no costs shall be payable by either of the parties to the matter.

DATED this 8th day of April, 1993.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.