Room 569, Fifth Floor
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Toronto, Ontario M7A 1A2

Ontario

The Mining and Lands Commissioner

In the matter of The CONSERVATION AUTHORITIES Act

IN THE MATTER OF

An appeal against the refusal to issue a permit to construct an addition to a building on Lot 162 Elliot Street, in the City of Oshawa, in the Regional Municipality of Durham.

B E T W E E N :

R. G. WRIGHT

Appellant

- and -

THE CENTRAL LAKE ONTARIO CONSERVATION AUTHORITY

Respondent

The appellant in person.
R. M. Loudon, Q.C. for the respondent.

An appeal from the decision of the respondent in this matter was made to the Minister of Natural Resources and by Ontario Regulation 130/75 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 Toronto on May 14, 1975.

The appellant purchased 162 Elliot Street in the City of Oshawa on June 1, 1974 at a price of $26,500.00. Prior to purchase he did not obtain a valuation from a real estate

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valuer. He requested his solicitor to examine the offer to purchase but failed to instruct his solicitor that his intention was to build an extension to the existing building on the premises. The existing building was examined by Central Mortgage and Housing Corporation for mortgage purposes and was approved for that purpose subject to a minor adjustment.

The house on the lot is small, containing 480 square feet. In July, 1974, the appellant applied to the respondent for permission under Ontario Regulation 824/73 to construct a livingroom addition as the lot is in the flood plain of Oshawa Creek. Following a hearing by the Executive Committee of the respondent his application was rejected on the grounds that the property was subject to flooding from regional storms.

According to Exhibit 2, a contour plan prepared for the authority by James F. MacLaren Limited to illustrate the regional flood line on the part of the watershed of Oshawa Creek in which the appellant's lot is situate, the elevation of the lot is 322 feet above sea level. The regional storm contour for the creek, which flows in a southerly direction approximately 350 feet, according to scale from Exhibit 2, to the east of the appellant's property, is 338 feet above sea level, with the result that the subject property is 16 feet below the regional flood line. The subject property is the most easterly house on the north side of Elliot Street and there are no other buildings between it and the river. There is a fairly steep bank running down to the creek. The banks of the creek are 10 feet in height and in normal times, there is approximately a foot of water in the bottom of the main channel which is approximately 40 feet in width. The regional flood line is 600 feet to the west of the appellant's property and a substantial residential area has been developed in the past on this flood plain. The appellant

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cross-examined David Earl Smith, Supervisor of Conservation Services of the respondent, as to evidence of past flooding to the regional storm contour in the area and the water levels during Hurricane Hazel and the witness indicated that there was no documented evidence that the area had ever been subject to a regional storm in the past and there was no evidence of the flood levels at the time of Hurricane Hazel.

Smith was cross-examined in respect of the Midtown Plaza which is located upstream from the appellant's property and in what would appear to be the next block to the north. The witness pointed out that no permission had been granted for this construction and that an injunction had been obtained from Parker J. prohibiting the use of the property and in spite of the order of His Lordship to expedite the trial, the trial has not yet been set down.

The witness was also asked why the authority permitted hundreds or thousands of people to continue to reside in the flood plain if residence in the flood plain is a hazard to human life. The witness was unable to answer this question but the obvious answer is that such a measure can only be effected by the purchase of these properties and a substantial financial commitment would be necessary to make such purchases. The conservation authorities have no power to prevent the use of buildings existing prior to their regulations coming into effect.

The appellant through his father, submitted three arguments in support of the granting of permission. Firstly, he argued that in the absence of evidence of a previous regional storm within the meaning of the regulations affecting the property in question, it was reasonable to grant permission to extend the existing building even though the property was in the theoretical

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flood plain.

Secondly, he argued that as Dominion Stores in the Midtown Plaza had built and continue to occupy land in defiance of the regulations, it was only fair that permission should be granted to other landowners in the flood plain.

Thirdly, he argued that with the known housing problems that exist the extension would provide a livable home for a growing family.

Counsel for the respondent pointed out that any authorized construction in the area had been done under permissions issued prior to December, 1973. At that time The Conservation Authorities Act did not contain adequate sanctions to enforce the regulations that had been made. This was changed in 1973 and new regulations were filed in December of that year.

Counsel for the respondent argued that the legislative authority now clearly authorizes and permits the enforcement of Ontario Regulation 824/73 which in clause a of section 3 provides as follows:

> "3. Subject to section 4, no person shall
>
> (a) construct any building or structure or permit any building or structure to be constructed in or on a pond or swamp or in any area susceptible to flooding during a regional storm;".

He further argued that the legislation authorizes the definition of regional storms which was done in clause f of subsection 1 of the regulation and that engineering plans showing the regional storm contour had been prepared. He pointed out that this was preventative legislation and the fact that the land had not been subject to flooding by a regional storm in the past, was a

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beneficial consideration. He also contended that arguments based on water levels reached on the Oshawa Creek during Hurricane Hazel are not relevant as that storm did not centre over the Oshawa Creek but centred over the Metropolitan Toronto area.

On the issue of hardship, he pointed out that the appellant had had legal advice but had neglected to adequately instruct his solicitor as to his intentions and accordingly, cannot now complain that the house he acquired is too small for his purposes or that the steps he took justify the issue of permission to construct an addition to the house as the proper legal conclusion is that he failed to take the reasonable precautions of making his purchase conditional on obtaining the necessary approvals.

He did point out however, that there are engineering studies under way and, if the recommendations of the studies are favourable and implemented, there may be some adjustment in the regional storm contour in the area of the appellant's property.

In reply the appellant, through his father, referred to the apparent ability of other landowners to make recent changes to their properties and the lack of advice received by the appellant from the housing corporation and his solicitor. He also suggested that the standard of the regulations was unreasonable as the total rainfall over the theoretical period of 48 hours was 11.21 inches. He suggested that the standard was set for "super freak" conditions and that the whole question of the flood plain and the regional storm contours should be re-evaluated on past experience.

With reference to the first point argued on behalf of the appellant and considering also the point raised in reply

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respecting the standard of safety imposed by Ontario Regulation 824/73, these points can only be construed as a criticism of the general principle of the regulation itself and not as establishing a grounds for the creation of an exception to the regulation. The regulation of the respondent, which was approved by the Lieutenant Governor in Council and duly became part of the law of the province is identical in principle with regulations of other conservation authorities in Southern Ontario. The principle, as explained by the officer of the respondent, is that the past experience of a part of the Metropolitan Toronto area during Hurricane Hazel is adopted as the standard for determining the boundaries of the area that is potentially subject to flooding. As the standard of the regulation has occurred in the area affected by Hurricane Hazel, the fact that there has been no documented evidence of similar precipitation at the location in question does not weaken or affect the validity of the standard. Further the standard is one which is part of the law of Ontario and I have no jurisdiction to change the law. Such is a matter for the legislators or in this type of situation, those bodies that through proper legislative delegation, exercise the legislative process. Accordingly, I cannot, on the basis of this argument, allow the appeal.

Turning to the second point, it is apparent to this tribunal that the respondent is applying the legal procedures available to it to require the shopping plaza in question to conform with the law as established by the regulation. It might, and I say might, have been successfully argued that if the respondent had condoned the breach of the regulation by a

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large industrial or commercial firm, that consideration should be given to a small residential extension. However, there are differences between the nature of the use of these two types of buildings and the benefits to the local economy and an appellant could in such circumstances be faced with the conclusion that two wrongs do not make a right.

The evidence in support of the third point was very sparse. The argument could relate to a local issue of scarcity of housing or the general high cost of acquiring a house. The evidence of the appellant was that after payment of the balance due on closing, the obtaining of a mortgage and the realization of his equity in a condominium, he had enough funds to pay for the proposed extension. Although he did not give evidence of the amounts involved, I am left with the impression that he might have financed a new house but was concerned with the high cost and length of time of carrying the typical financing of new houses. However, he failed to convince me that the economic advantage of the house in question with an addition outweighs the risks to his family of housing them in a home that is subject to flooding of a depth of sixteen feet. I recently dealt with the argument of a housing shortage in the case of Coe v. Credit Valley Conservation Authority, unreported, and as I held in that case, I cannot accept a housing problem as justification for creating or extending residential housing in a flood plain, particularly one of the magnitude in question.

Mention was made in the reply of large European cities that are built in river valleys. The purpose of The Conservation Authorities Act is to prevent in Ontario, the future creation of such situations or the enlargement of such situations where

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they presently exist. The existence of such cities in hazardous locations can only relate to the principle of the legislation and not create a grounds for an exception to the policy of the legislation.

Apart from the express arguments of the appellant, I have considered the case in the light of established acceptable exceptions. The appellant owns a small house, which is the closest house on his side of the street to the waterway. According to the engineering plan produced at the hearing the lot was sixteen feet below the regional storm contour. Not only the basement but the bulk of the entire proposed structure would reduce the natural storage volume of the watershed. There was no evidence that any of the recognized exceptions should apply. The cut and fill principle is inapplicable. Because of the severe risk of flooding and the nature of the proposed extension, the case is not one in which suitable conditions could be attached to a permission to reduce the risk. There was no evidence of overriding public interest. The location of the premises would create a serious precedent for the respondent in the administration of its responsibility if permission were granted.

For the foregoing reasons, I have no alternative but to dismiss the appeal but as counsel for the respondent indicated that there are engineering studies under way which may change the contour of the regional storm, if the recommendations are implemented, the dismissal is without prejudice to the appellant's

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right to reapply in the event the future program of the respondent results in a significant change in that contour.

No costs shall be payable by either of the parties.

DATED at Toronto this 27th day of May, 1975.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.