



The Mining and Lands Commissioner
In the matter of The CONSERVATION AUTHORITIES Act

IN THE MATTER OF

An appeal for permission to
construct a building or structure
on part of Lot 19, Sheet 15B,
Municipal Plan 357, in the City of
Oshawa in the Regional Municipality
of Durham.

B E T W E E N :

SHELDON FISCHMAN

Appellant

- and -

THE CENTRAL LAKE ONTARIO CONSERVATION AUTHORITY

Respondent

This appeal was held at Toronto on January 13, 1975.

Mr. Sheldon Fischman appeared as counsel and as a trustee for three applicants for permission to construct a building or structure and Mr. Grant H. Armstrong appeared for the respondent, which is hereinafter referred to as "the authority".

Mr. Fischman commenced the appeal on behalf of Mr. Michael Belmonte, a real estate broker from Oshawa and his partner, Mr. Michael Montagano, who owned one of the properties, and the father of Mr. Michael Belmonte, who owned the other property which was situate immediately to the north. The lands in question form part of Lot 19, Sheet 15B, Municipal Plan Number 357. Mr. Belmonte, Jr., and his partner own parts 1 and 2 according to Reference Plan 4 OR-1621. Part 1 of this plan is a rectangular parcel of land

measuring 44 feet on its west boundary and 66.03 feet on its south boundary. Part 2 is a rectangular parcel of land measuring 44 feet by 120 feet and situate immediately to the east of part 1. Mr. Belmonte, Sr., owns four small rectangular tracts of land lying immediately to the north of parts 1 and 2. One of these tracts measures 66 feet and 1/4 inch by 96 feet and 6 1/2 inches on the west limit and, if taken with part 1 and a one-foot reserve owned by the City of Oshawa, would make a connecting link for two parts of Durham Street, a street that runs southerly from King Street, the main east-west street in Oshawa, and which is broken into two parts terminating on the north and south at the boundaries of the lands in question. Durham Street was created by subdivision plans which were registered in the fifties and by reason of the lack of participation of previous owners of the properties in the subdivisions, the street did not cross their property.

Stevenson Road South is a major artery and runs in a southerly direction from King Street at a location approximately 330 feet east of Durham Street. From 1955 until 1968 Mr. Belmonte, Sr. owned and lived with his family on a property between Stevenson Road South and the extension southerly of the westerly boundary of Durham Street. In 1958, the easterly part of this land fronting on Stevenson Road South, upon which was located a one storey frame house and a garage, was severed leaving Mr. Belmonte, Sr. with the four rectangular portions that were part of the land subject to this application.

In 1973 Michael Belmonte and Michael Montagano purchased the lands to the south lying between Stevenson Road South and the extension of the westerly boundary of Durham Street for a price of \$28,500.00. They obtained permission to sever the easterly portion of this property on which a one storey frame house

and frame shed were erected and sold this easterly portion at a price of \$33,500.00. The cost of arranging this purchase and sale exhausted the profits on the transaction. However, the end result was that the applicants held the land that would be necessary to link the two parts of Durham Street and sufficient land on which to erect two single family dwellings and one semi-detached dwelling fronting on this connecting link.

Cartier Avenue runs in an east-west direction at a location approximately 70 feet northerly of the lands in question and intersects with Durham Street. On the south side of Cartier Avenue and on the west side of Durham Street and its extensions there is a public park owned by the City of Oshawa. This park contains approximately three acres. By scale taken from Exhibit 11, a plan prepared by M. M. Dillon Limited, and filed by the respondent, it extends approximately 400 feet westerly from Durham Street and 500 feet southerly from Cartier Avenue. Taking into consideration that the lands in question have a total frontage of approximately 140 feet, the park extends southerly for a further distance of approximately 250 feet at which location a row of houses has been erected on the west side of Durham Street. Houses have been erected on the easterly sides of Durham Street. There is a concrete block building at the westerly side of the park. There are no buildings on the easterly side of the park.

Goodman Creek, a tributary of Oshawa Creek, crosses Cartier Avenue at a location approximately 300 feet by scale taken from Exhibit 11 westerly of Durham Street. Approximately 15 to 17 feet westerly of the bank of this creek there is erected

the concrete block building used as a club house that is mentioned in the immediately preceding paragraph. Directly north of the club house and on the northerly side of Cartier Avenue two substantial houses have been erected. The easterly house is located approximately 15 feet from the bank of the creek and is used as a day nursery. Extending in all four directions from this area, a total of 500 to 600 houses have been erected over the years.

In 1965 by Ontario Regulation 148/65, the authority made a regulation requiring permission for the construction of buildings and the placing of fill. This regulation was made under the regulation-making authority contained in The Conservation Authorities Act which authorized such regulations in respect of ponds, swamps or areas below the high-water mark of a lake, river, creek or stream. At that time the authority had been provided with a rudimentary plan of the flood plain of Goodman Creek. However, it appeared that this plan was based on aerial photography as it showed the subdivision and general build-up of the area during the fifties superimposed over marsh areas. In 1971 The Conservation Authorities Act was amended to change the regulation-making power of the conservation authorities. Clause e of subsection 1 of section 27 of The Conservation Authorities Act was amended to read as follows:

"(e) prohibiting or regulating the construction of any building or structure in or on a pond or swamp or in any area susceptible to flooding during a regional storm, and defining regional storms for the purposes of such regulation."

Pursuant to the amendment of the legislation, the authority engaged M. M. Dillon Limited to prepare a map showing the flood plain of Goodman Creek or the area affected by a regional storm. On receipt of this information, the regulation was remade by Ontario Regulation 824/73 which continues to

require the obtaining of permission from the authority and defines a regional storm. The parties agreed that the lands in question fell within the flood plain of Goodman Creek and the owners were bound by the regulation.

Mr. David Earl Smith, the supervisor of the Conservation Service of the authority gave evidence that the policy of the authority prior to the 1973 regulation was somewhat equivocal by reason of doubt as to the territorial limits of the jurisdiction of the authority. He referred to the rudimentary plan of the flood plain and doubts arising from this plan. Under the policy then applied, the authority issued a permit on September 13th, 1972, to Valdemar Markevski for the premises municipally known as 180 Stevenson Road South. These premises were the northerly part of the lands severed by Mr. Belmonte, Sr., in 1958 and adjoin the lands that are the subject matter of the present application. This application was granted subject to the condition that there should be no openings in any buildings below contour 346 feet, C.G.D.

On October 4, 1971, permission was issued for eight houses on the west side of Durham Street at the south end of the park. This row of houses commences approximately 250 feet south of the lands of the applicant and is situate on the opposite side of Durham Street. At this location the creek meanders to the east with the result that the houses are erected less than 100 feet from the east bank of the creek. These permits contained a condition similar to the condition in the permit for the property known as 180 Stevenson Road South.

Following the amendment of the regulation in 1973 for the purpose of conforming with the new regulation-making power and clearly defining the jurisdiction of the authority, the

authority adopted a firm policy of refusing to issue permits for habitable structures within the flood plain. The only permits that have been issued under the new policy have been permits for two single detached automobile garages and one combination veranda and fruit cellar. These exceptions were granted on the basis that the probability of habitation of such structures was remote.

Mr. Smith outlined the flood problem in the area. The part of the watershed of Goodman Creek lying north of King Street is virtually undeveloped. One of the concerns in connection with developing land in this area was that such developments would enhance the possibility of floods in the area south of King Street. M. M. Dillon Limited have been engaged to determine the remedial works required for the area. The pre-engineering study in respect of remedial works is expected in February of this year. The flood elevation determined pursuant to the regulation and the Dillon Report in this area is approximately 345 to 346 feet C.G.D. The built-up areas have been filled and the lands of the applicants are currently some four feet below the other lands in the area.

Following the acquisition of the southerly property the two owners applied for permission of the Land Division Committee of the Regional Municipality of Durham to sever the property. The authority was consulted in regard to this application and recommended that it be deferred as the land may be required in connection with the re-channelization of the creek. Notwithstanding the objections of the authority, the Committee issued the permission to sever the property and in its judgment made the following comments in respect of the representations of the authority:

" The Committee also reviewed the comments of the Conservation Authority and whereas this land was to be separated in the future by a road allowance from the Goodman Creek, and whereas land to the immediate south is developed by relatively new residential housing, there was not substantial reason for refusing the remaining infilling development in this area.

On the basis that this application was infilling development, and that the applicant would be complying with necessary conditions to properly develop the land, the Committee was of the opinion that the application had merit."

Following severance, the owners applied to the authority for permission to construct and were refused on the grounds that the location was entirely within the flood plain and that the buildings on the location would be an encroachment on the flood storage area. That decision was appealed to the Minister of Natural Resources pursuant to a 1973 amendment of The Conservation Authorities Act. By Ontario Regulation 795/74 the responsibility of hearing the appeal was assigned to this tribunal.

Counsel for the applicants argued that the action of the authority was arbitrary and discriminatory because the general area is, with the exception of the applicants' land and the municipal park, completely built up and the applicants have been denied a permit subject to conditions that had been granted to other land owners. There was a possibility also that a post office had been erected without a permit and this was argued to be discriminatory. It was also argued that there was no evidence of flooding since 1955. This evidence was given by the applicant, Michael Belmonte. However, while he lived on the property for many years, he came after Hurricane Hazel which was the recent case of flooding in this area. He also argued that he was prepared to take the risk of whatever flooding might occur.

In dealing with the argument that the authority was arbitrary, the definition of arbitrary in Black's Law Dictionary, 3rd Edition, is "not supported by fair, solid and substantial cause, and without reason given". Normally the Court will require that objectionable conduct be categorized as "capricious, insufficient or unreasonable" or that there is not a fair and reasonable ground for the decision, see Cornish v. Boles (1914) 31 O.L.R. 505. Mr. Fischman based his argument in this regard on the well known legal maxim that justice not only must be done but appear to be done. I find that the authority has clearly demonstrated a bona fide decision in this matter based on its responsibility and there is no evidence to support an allegation that the conduct of the authority was capricious or of a light nature.

With reference to the argument of discrimination, there is evidence that, without the explanation of the authority provided in this case, would appear to indicate that the applicants were being discriminated against in the sense that they were not receiving the benefit of exceptions to the general policy of prohibiting construction in the flood plain that had been made in respect of other landowners in the area. The most significant case of apparent discrimination is the granting of permission in respect of eight houses that were erected on the westerly side of Durham Street and southerly of the municipal park. These houses were erected less than one hundred feet from the east bank of the creek. The most southerly house fronted the creek on two sides. The creek makes a right-angled turn at a location approximately one hundred feet from the south-west corner of this house with the result the westerly and southerly walls of the house are quite close to the creek. The officer of the authority explained the granting of these permissions on the legal concern of the

authority as to the validity of its prior regulation and that it issued the permit with conditions rather than have its jurisdiction put in issue as this would appear to have provided some measure of protection to the future purchasers of the houses even though it undoubtedly increased the risk of flooding to the buildings previously erected.

This explanation could not apply to the cases of the fruit cellar and the garages. The officer of the authority indicated that these exceptions were created because the buildings were not places of habitation and because the fruit cellar was small. I accept this evidence of absence of habitation as grounds for distinguishing these applications from the application under appeal. The post office was cited as a further example of a discriminatory application of the regulations. There was some question as to the date of erection of the post office but there has developed a well established exception of permitting public buildings in flood plains for the purposes of serving existing subdivisions on which houses and other premises have been erected in the flood plain prior to the construction of the service building. It would be rare that there would be residential habitation in service buildings.

I cannot accept the undertaking of the applicants to accept the responsibility of any future floods. No one can foresee the date of a hundred year storm or a regional storm and there is no legal way that a builder or developer could be made liable to the owner of some fifty or a hundred years hence for losses resulting from such storms. Many of the losses that have arisen in such storms are not legally compensatable. I think of deaths of children and young people who have no dependants. The results of flooding do not always constitute a breach of a

legal responsibility and I cannot place any reliance on this approach.

Two matters regarding the actions of the applicants stand out in my consideration of this matter. Firstly, the applicants originally had access to the property in question via Stevenson Road South and the property in question became land locked through severances that they initiated. Secondly, at the time of severance, the owners of the southerly property were made aware of the need to comply with the regulation of the authority and were aware that the authority would not look favourably on such an application.

I am not without sympathy for the applicants. However, the authority is currently awaiting its pre-engineering report which is necessary before it can develop a scheme for the part of the watercourse in question. Such schemes take considerable time to plan and develop. I also find it incongruous that the Committee of Adjustments would make a decision on a matter within the jurisdiction of the authority. I refer particularly to the comment in their report that concluded that the risk in the area would be met by the separation of the proposed houses by a road allowance.

Accordingly the appeal is dismissed but there shall be no costs payable by the applicants. The dismissal is without prejudice to the right of the applicants to renew their application or apply again for permission subsequent to a period of one year after the receipt of the pre-engineering report in preparation by M. M. Dillon Limited. This period will permit the authority and the city to assess their positions

with regard to the land. If the matter comes before me again, it would be helpful if evidence were presented on the net storage volume of the watercourse and the quantum of the fill proposed to be used.

DATED at Toronto this 29th day of January, 1975.

Original signed by G. H. Ferguson

MINING AND LANDS COMMISSIONER.