



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

G.H. Ferguson, Q.C.) Monday the 10th day
Mining and Lands Commissioner) of April, 1989.

AND IN THE MATTER OF

An appeal against the refusal to grant permission to place fill and construct a residential structure on Lot 2, Plan 766, in the Township of Rideau (formerly North Gower), in the Regional Municipality of Ottawa-Carleton.

B E T W E E N :

VERNA COOK

Appellant

- and -

THE RIDEAU VALLEY CONSERVATION
AUTHORITY

Respondent

O R D E R

W.H. Sullivan, agent for the appellant.
H. Brodmann, for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission to place fill and construct a residential structure on Lot 2, Plan 766 in the Township of Rideau, formerly North Gower, in the Regional Municipality of Ottawa-Carleton. 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 Ottawa on November 23, 1988.

Plan 766 was prepared in 1962 prior to the establishment of the jurisdiction of the respondent in the area. It subdivides an area of land on the westerly side of the Rideau River. Lot 2 on the plan has one hundred feet of frontage on the river and a street known as Upsilon David or Wildlife Way runs parallel to the river at the rear of the lot. The appellant acquired Lot 2 in 1972 for the purpose of constructing a building thereon.

This was the third appeal that the appellant has brought in connection with the construction of residential premises on the subject lands. With reference to the present application the

evidence indicated that the plans had been prepared by a qualified engineer in accordance with standards laid down by Central Mortgage and Housing Corporation for the construction of buildings in flood plains. The respondent had no objection to the plans insofar as the principles of flood-proofing relating to the construction of the building were concerned. The respondent also admitted that the appellant had taken every possible step to reduce the amount of interference with the flood plain storage capacity of the subject lands and the reduction of interference with the flow of a regional storm.

The position put forward on behalf of the appellant was that the building would be constructed in accordance with the standards set by Central Mortgage and Housing Corporation for buildings in flood plains, the appellant had owned the property prior to the enactment of the regulation under which the respondent administers jurisdiction over the subject lands, the registration of the registered plan indicated that there had been public consideration of the risks associated with the lands in the plan and there was no significant risk in the issue of the permission requested. In respect of the last point, reference was made to the existing use of adjoining lands for residential purposes.

The appellant brought as a witness the owner of a neighbouring property who occupies his lot as his permanent residence. He indicated that he was concerned regarding the lack of use of the subject lands particularly as he takes steps to maintain the condition of the subject lands as a lawn for the purpose of preventing the growth of weeds, the infestation of insects and the provision of habitat for rodents. Three interesting things about the neighbour's property are that the first floor of the property is constructed of concrete block walls, no living quarters are situate on the first floor and all living quarters are located on the second floor of the building. In addition a berm has been constructed around his house and the berm reduced flooding in the 1976 flood.

On the other hand the evidence of the respondent showed

that the elevation of the regional flood, which is the one in one hundred year flood, is 87.6 metres. The elevation at the site of the proposed building is 86.2 metres, with the result that in a regional flood the site would be subjected to 1.4 metres or in excess of four feet of flooding. The flood plain map which was filed as Exhibit 15 shows that the lands to the west of the subject lands which are separated by the Wildlife Way are within the flood plain. Although the Wildlife Way would appear from the flood plain map to have been raised to an elevation above the regional flood plain the plans prepared by A.J. Graham on behalf of the appellant show that the elevation of this roadway was 87.3 metres. The result of this measurement is that in a regional flood there would be approximately one foot of water over the access to the property which depths of water would effectively prevent access to or from the proposed building.

Photographic evidence produced by the respondent indicated that the entire property was flooded in the flood of March 29, 1976 which flood was estimated to be a one in twenty-five year storm. In addition photographic evidence showed flooding of part of the subject lands in 1978. The evidence of the respondent indicated that it has a policy of permitting residential construction in regional flood plains in certain circumstances, provided the building is flood-proofed and access is provided to the building. Notwithstanding the evidence of flood-proofing the respondent refused permission on the grounds of the failure to provide access.

With reference to the flooding of the Wildlife Way the respondent was concerned not only with the risk to the occupants but the risk to the public officials who might be providing services to the proposed building in the event of a regional storm.

The evidence of the respondent referred to the precedential implications of granting permission in the present case. A copy of the plan of subdivision was filed as Exhibit 16. There are twelve lots and two blocks within the part of the plan that is within the flood plain. Permanent residences have

been built on four of the lots and cottages have been built on two lots and one block. In addition to the appellant's property on the river there is a block lettered "A" that is vacant. On the westerly side of Wildlife Way there are five vacant lots and the greater part of each lot is within the flood plain. In addition the precedential implications would extend beyond the boundaries of the plan of subdivision.

Cross-examination of the expert witness of the respondent failed to bring forth any situation in which permission had been granted in cases analogous to the present case. Accordingly the tribunal can only conclude that the appellant has been treated in accordance with the same policies as other landowners in the area and that the respondent has not denied the appellant the benefit of any policies, expressed or implied, that have been the basis of the granting of permission in respect of other properties.

The tribunal is satisfied also that the decision of the respondent was made in accordance with recognized flood plain management principles. The proposal of the appellant fails to come within any recognized exception to those principles. Keeping in mind that the site would be subject to an excess of four feet of water in the natural condition during a regional storm and that any persons in the area beyond any fill brought onto the site would be subject to considerable risk of loss of life, this tribunal has no alternative but to support the position taken by the respondent in the matter. The principles raised on behalf of the appellant are not principles of flood plain management. They do not relate to the risks of danger to life, assuming that the risk to the proposed building is eliminated. The difficulty with the creation of an island in the midst of a regional flood is well recognized. The lack of access both to and from the property creates a risk to the occupants in that services may not be provided to them or they are unable to leave the property to obtain medical or other assistance if required. The potential of loss of life of public officials in

such circumstances is real and in the past public officials have lost their lives in attempting to provide their services over flooded roadways. The matter cannot be dealt with solely on the concept that the proposed building will in itself withstand the ravages of a regional flood.

The fact that an appellant was the owner of the lands prior to the making of the regulation has never been recognized as a grounds to create an exception in respect of the lands of the appellant. The obvious reason is that such action would in effect defeat the purpose of the Conservation Authorities Act and the regulations made thereunder. If all existing owners at the time of the enactment of the statute or the relevant regulation were excepted from the application of the Act and the regulation the purpose of the Act could not be achieved.

There was no evidence of any overriding federal, provincial or municipal concern in this case. The tribunal is satisfied that the appellant was dealt with by the respondent in accordance with its policies, express and implied, and no principle of flood plain management was brought to the attention of the tribunal or established before the tribunal under which the permission sought should be granted.

1. THIS TRIBUNAL ORDERS that the appeal is dismissed.
2. THIS TRIBUNAL ORDERS that no costs shall be payable by either party to the appeal.

SIGNED this 10th day of April, 1989.

Original signed by

MINING AND LANDS COMMISSIONER.