



# The Mining and Lands Commissioner

## In the matter of The CONSERVATION AUTHORITIES Act

G.H. Ferguson, Q.C. ) Wednesday, the 27th day of  
Mining and Lands Commissioner ) July, 1988.

AND IN THE MATTER OF

An appeal against the refusal to grant permission to construct a single family residence fronting on York Street (Units 38 to 38A on Index Plan D-20) in the Village of Richmond in the Township of Goulbourn in the Regional Municipality of Ottawa-Carleton.

B E T W E E N :

MARSHALL HOGAN and LISA HOGAN Appellants  
- and -  
THE RIDEAU VALLEY CONSERVATION AUTHORITY Respondent

R.E. Hedges, for the appellant.  
H.R. Brodmann, for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission to erect a house and garage on part of the property in the Village of Richmond owned by the appellants. Under 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 April 21, 1988.

In February, 1987 the appellants acquired Unit 38 in section D-20 in the Township of Goulbourn in the Regional Municipality of Ottawa-Carleton. The Jock River flows easterly through the Village of Richmond and York Street in the first street on the southerly side of the River running in an easterly direction. Unit 38 has a frontage on Cockburn Street which runs southerly from York Street of 21.51 metres. The depth of the property along York Street is 64.19 metres. A house and metal shed are situate on the westerly end of Unit 38.

The proposal of the appellants was to sever Unit 38 in equal parts and sell as a vacant lot or build a house and

subsequently sell the easterly half of the unit. According to the evidence the responsibility for making the decision on the severance lies with the regional municipality but the Township of Goulbourn had approved the severance subject to the respondent having no objection. In sending their application to the respondent the appellants entitled their letter with reference to approval of the proposed severance and indicated in it that the building that would be erected would conform with the guidelines, whatever that may mean. This left the respondent with the need of making a number of assumptions with respect to the application and the respondent dealt with the application on the basis that fill would be placed on the entire new lot. The tribunal notes this matter as, if the application of the appellants were merely for approval of their application for severance, the matter is not one from which an appeal lies. Further the matter is most difficult to deal with as, although the appellants used the services of a qualified engineer as a witness, no site plan of the proposed buildings or the elevations, existing or proposed, in connection with the building and the driveway were placed in evidence before this tribunal.

Prior to remedial works taken around the turn of the decade, the subject lands, namely, the easterly half of Unit 38, would have been flooded to a serious depth in a regional flood. The regional flood in this part of Ontario is considered to be the flood associated with the one in one hundred year storm. Following the remedial works the flood lines were re-established by Acres Consulting Services Limited. Exhibit 4 shows the one in twenty-five, one in fifty, one in seventy-five and one in one hundred year flood levels. The respective elevations of the regional flood are 93.5, 93.65, 93.7 and 93.75 metres. The only spot elevation that was placed before the tribunal is one shown on Exhibit 4 of 93.5 which is on the one in twenty-five year contour. The exhibit also shows that the elevation of York Street at its intersection with Cockburn Street is 93.6 indicating that flood waters would cover this portion of York Street in a regional flood. However the portion of York Street

immediately to the north of the subject lands appears to be above the regional flood elevation and if access to this part of York Street was made from the subject lands there would be an access route without traversing the flooded portion of York Street.

Exhibit 4 indicates that the westerly part of the subject lands is above the elevation of the one in one hundred year storm. There was no precise definition of this line by the taking of specific elevations. Exhibit 4 shows this area as extending almost to the centre line of the subject lands at the southerly part of the subject lands and narrowing as the contour line approaches York Street. Some of the other exhibits do not show as large a portion of the subject lands above the regional flood line. The evidence of P.R. Frigon, an admitted expert in hydraulics and hydrology, stated that three-quarters of the portion to be severed was in the flood plain and by inference the portion above the flood line was one-quarter of the subject lands.

Dealing with the nature of the flooding in the various storms the evidence showed that in 1976 in a storm that was considered to be a one in ten year storm there was considerable flooding in the general area but there was no indication that the subject lands were inundated by the photographs of that flooding. There are three houses on the north side of York Street opposite the entire portion of Unit 38 which are probably built on fill or have fill added around their basements. Lying immediately to the east of Unit 38 is Unit 54 which has similar measurements to Unit 38 and fronts on King Street, a north and south street. York Street forms a T-intersection with King Street. Exhibit 4 shows two buildings fronting on the west side of King Street and two houses have been approved for the space between the group of three houses and the two houses fronting on King Street. One of these houses has been completed and the second house is under construction. These houses will be referred to as the Van Galder houses.

By reason of the construction of houses and the placement of fill in connection therewith, the nature of the

flooding of the subject lands is a backwater storage basin situation. The buildings on the north side of York Street and on the west side of King Street create a buffer between the natural flows of the regional storm and the subject lands but the natural flows will flow southerly through the ditches along King Street into the ditches along York Street and will ultimately find their way onto the subject lands and approximately two lots to the south thereof. Secondly, flood waters may come upon York Street at its intersection with Cockburn Street and flow into the ditch on the south side of York Street and hence flow easterly and southerly into the same basin. Accordingly, the subject lands form part of a backwater area which is not in the direct paths of the flood waters of the four storms mentioned above.

The application is so void of detail that it is difficult to consider principles of flood plain management in connection with the proposed construction. The respondent assumed a considerable amount of fill would be placed and rejected the application to construct for three reasons, namely, the situation within the one in one hundred year flood plain, the loss of flood plain storage volumes and the precedential implications.

These principles were continued to be expressed before this tribunal. The argument of the appellants was based on the granting of approvals for two Van Galder houses. Approval for the construction of these houses with minimal fill was granted under an infilling principle whereunder consideration is given by the respondent to existing building lots where the amount of flooding is minimal, and floodproofing can be obtained. The evidence of Frigon was that the risks of flooding was greater on these two lots than on the subject lands and Reid, the engineer for the respondent, agreed with this position.

In the view of this tribunal the comparisons are interesting but do not form the basis for a proper decision. The comparison is, in effect, a comparison of apples and oranges. The granting of permission in the Van Galder case was made pursuant to a bureaucratic, not in the pejorative sense,

approach of creating rules and the fact that a property falling within those rules was more susceptible to flooding than another property does not warrant the same treatment for that property unless it falls within the four corners of such rules. This was the position of the respondent and the tribunal sees no reason to override this position. Accordingly the tribunal is of the view that the appeal should be decided upon the application of flood plain management principles.

In studying the case the tribunal has considered the fact that the evidence of Frigon indicates that one-quarter of the subject lands is above the flood line. The measurements of the subject lands are 32.095 metres along York Street and 21.51 metres in a north and south direction. These measurements convert to 105.3 feet by 70.57 feet or 7,431 square feet. One-quarter of this area is 1,857 square feet. The only indication of the building contemplated by the appellants was an advertisement for plans for a house and garage. The area of such house was 1,277 square feet and the garage was approximately 400 square feet. If both buildings were constructed on the portion of the subject lands above the regional flood line there would be a surplus of 180 square feet. However there was no site plan filed and the tribunal, although it has given considerable thought toward issuing a conditional permission, has considered, particularly in light of the failure of Frigon to provide specific evidence of elevations and the location of the regional flood line that it would be not only too conditional but also too speculative to issue such permission.

Included in such considerations of the tribunal was an application of a modified incremental staged storage principle. The modification would arise by virtue of the fact that the storage area is a backwater area and any intrusions therein does not affect the flow of the regional flood. Accordingly, part of the land above the regional flood line could be used to replace the storage necessary to provide an access to York Street. The tribunal has concluded that it is more appropriate that the appellants be given the opportunity of deciding more specifically

on the type of house and garage or combination thereof that they wish and the location thereof before any conditional approval should be granted.

One of the submissions of counsel for the appellants was that the respondent in dealing with this matter should relate only to matters of water management in its consideration of the application, particularly as the evidence indicated that the respondent felt that matters of pollution and conservation of land were not at issue. Involved in such matters are the zoning by-laws and official plans. While this tribunal has consistently taken the position that a conservation authority should not reject an application on the grounds of non-compliance with the zoning requirements for the reason that an applicant is entitled to ask for modifications or exceptions to those requirements it is certainly open to a conservation authority to have regard to matters of conservation of land if it so wishes to put that matter in issue and it may well be, keeping in mind the lack of judicial interpretation of the extent of the phrase "conservation of land", that such considerations may not be irrelevant.

With the assumptions that the respondent was required to make, the tribunal is satisfied that its decision was appropriate. The flood line has been considerably reduced as a result of remedial works. The evidence indicates a risk of ice floes jamming or holding back flood waters and the tribunal appreciates the concern that the respondent has in protecting the reduced flood plain that has been established.

In summation the tribunal is satisfied that the respondent should not have treated the subject lands in the same way as lands that fall within its infilling principle. The theory of an infilling principle is that existing building lots should, where possible, be made available for the use for which they were created and sold, if such is the case. The present application is not an application for the use of an existing building lot and the tribunal is satisfied that there is sound ground for distinction. The tribunal is also satisfied that the decision of the respondent was sound in respect of general

principles of flood plain management but as indicated this decision should not stand in the way of the appellants making a precise application supported by appropriate site plans with present and proposed elevations which might satisfy the principles of flood plain management.

1. THIS TRIBUNAL ORDERS that the appeal in this matter is dismissed.

2. THIS TRIBUNAL ORDERS that no costs shall be payable by any of the parties to the appeal.

SIGNED this 27th day of July, 1988.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.