



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

G.H. Ferguson, Q.C. )  
Mining and Lands Commissioner ) Friday, the 17th day of  
June, 1988.

AND IN THE MATTER OF

An appeal against the refusal to grant permission to reconstruct a new single storey residence with garage on Part of Lot 30, Concession 1 in the Township of Oxford-on-Rideau in the United Counties of Leeds and Grenville.

B E T W E E N :

ROBERT SOUMAKO  
Appellant

- and -

THE RIDEAU VALLEY  
CONSERVATION AUTHORITY  
Respondent

L. Townsend, Student-at-Law, 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 construct a new single storey residence with a garage on Part of Lot 30 in Concession 1 in the Township of Oxford-on-Rideau in the United Counties of Leeds and Grenville. 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 the 21st day of April, 1988.

The subject lands consist of an almost triangular parcel of land lying on the east side of the Kemptville Creek, approximately one mile upstream from the confluence with the Rideau River. The easterly boundary of the subject lands measures 129 feet. The northerly boundary of the subject lands measures 190 feet and the frontage along the creek measures approximately 250 feet. The elevation of the regional storm in respect of the subject lands is 287.5 feet. The lowest elevation at the proposed site of construction is 282 feet. The result is

that in a regional flood the site will be subject to 5.5 feet of flooding.

The subject lands are the most southerly of approximately eight properties along the east side of Kemptville Creek that are serviced by a private road running westerly and southerly from County Road 19. The regional flood line is a very short distance to the west of County Road 19 which runs in a northerly direction at this location. The properties are approximately two hundred metres directly from the county road but the subject lands are serviced only by the private road which measures approximately 425 metres to the county road.

With reference to the history of the building that existed on the subject lands, an elderly couple resided in a house situate on the subject lands for many years. The residence was erected on concrete blocks measuring three feet above the ground. Following the death of one spouse the property became vacant and in May, 1985 the lands were purchased by Randolph Courrier. He moved into the property with his family and made considerable renovations to the property. He paid \$16,500 for the property and expended approximately \$18,000 on its renovations. After acquiring another home in 1987 he sold the property to the appellant at a price of \$44,000. The appellant moved into the house and within two weeks of the closing of the transaction the house was completely destroyed by fire.

Not only are the subject lands subject to 5.5 feet of flooding in a regional storm but they are subject to significant flooding in lesser storms. The evidence indicates that in a one in twenty-five year flood which occurred during the spring freshets on March 29, 1976 not only were the subject lands inundated but the flood waters inundated the lands for some 200 metres toward County Road 19 and the access road was inundated if not to, at least close to, County Road 19. The flood plain map, Exhibit 3, shows that the regional flood plain crosses County Road 19 a short distance to the north of the intersection with the private road. The evidence was that the depth of flooding on this occasion was estimated to be close to five feet. Exhibit 12

shows the house, since destroyed by fire, and the other houses clearly surrounded by water nearing the tops of the foundations, if not over such foundations and extending toward County Road 19.

Not only are the subject lands subject to the aforementioned depth of flooding but they are situate on a point with the building site being surrounded for practical purposes on three sides by the waters of the creek. This location according to the evidence of Mr. Reid, the engineer for the respondent, makes the site subject to risk from ice floes that might jam and spread onto the land.

The application of the appellant was not complete. Firstly the appellant had proposed enlarging the size of the new residence by some 200 square feet. With the objection of the respondent to this aspect, the appellant was proposing to reduce the size of the building in respect of which permission was sought.

Secondly the appellant had every intention of constructing a building, if such were possible, that could withstand the flows of a regional storm. The evidence was not clear as to whether the proposed engineering would be designed to deal with ice floes. The appellant had obtained estimates of the cost of obtaining such plans and had been advised that such plans would cost in the vicinity of \$3,000. He was reluctant to expend this sum and his agent proposed that the appeal be dealt with as a request for approval in principle with the plans being subject to the approval of the respondent when drawn.

Thirdly, the respondent had made no plans for sewage disposal on the property. His position in this regard was that he and his engineer would work out some proposal that would be satisfactory.

Counsel for the respondent would not concur in this approach. It not only involved an amendment of the application but would not provide for a proper finalization of the matter as the issue of agreement on the engineering plans might be subject to further appeal.

The evidence of Mr. Reid indicated the very serious aspects of the construction of a residence on a site subject to

5.5 feet of flooding and with no access to a location above the regional flood elevation. He did give evidence that the respondent on the basis of hardship has granted permission in the past in at least two instances. In one case, in the Township of Osgoode the subject lands were subject to four feet of flooding. In a second case in the vicinity of Kars permission was granted in an area subject to 1.5 feet of flooding. He also suggested that the executive committee may not have been fully informed of the value of the building on the subject lands at the time it made its decision. He also indicated that he felt that the proposal would not create an impediment to the flows of the regional flood but he was concerned regarding the lack of access both for the occupants and for those persons providing services in the event of a regional flood.

The agent for the appellant relied on the ability to construct a residence that would be six and one-half feet above the regional flood elevation and suggested that with the construction of tiers the element of control of flooding would be met. It was suggested that the risks would be no greater than the risks that existed prior to the fire. Counsel for the respondent submitted that the matter fell within the concept of control of flooding and that the matters of risk to persons and the public are clearly evident in the case. He also pointed to several provincial documents outlining policy approaches, none of which suggested the construction of residences in such circumstances. He also pointed out the fact that the subject lands have a history of flooding and a propensity for damage from ice jams.

With reference to hardship, it was submitted that the respondent has a very broad policy in this regard and had extended such leniency in other cases but the risks involved in this case are so significant that the respondent could not grant permission on the basis of the hardship of the case.

This tribunal is satisfied that there is no principle of flood plain management that permits the placing of residential buildings in a flood plain with depths of water of 5.5 feet in a

regional storm, particularly in a one in one hundred year situation. It is usual where exceptions are made to require floodproofing of the proposed building or structure. In this case the proposed floodproofing consisted of raising the proposed building above the elevation of the regional flood. This tribunal is of the opinion that floodproofing includes the taking of steps to protect the occupants and where access to the property is over a private road measuring approximately 425 metres, the most of which is flooded in regional storm and storms of significant lesser frequency the tribunal is of the opinion that floodproofing cannot be achieved where no provision is made for adequate access both from the property by the occupants or to the property by personnel providing public service to the occupants of the property.

With reference to the hardship matter the evidence indicated that the appellant was having some difficulty in collecting his fire insurance and that he might not collect fire insurance in the event he were not allowed to rebuild. The policy was not put in evidence and the tribunal cannot make a finding in this regard. With reference to hardship the tribunal dealt with the issues of granting permission on the basis of hardship in the case of Reid et al. v. The Rideau Valley Conservation Authority, a decision dated April 30, 1981,

Counsel for the appellants emphasized the original investment and the continued payment of taxes by the appellants over an eighteen year period. In the opinion of this tribunal there are two principles that illustrate the inappropriateness of making a decision on this approach. Firstly, the control exercised by a conservation authority is not similar to a zoning by-law. It is not a rule that limits the natural or existing intrinsic values or utility of the land in question for a betterment of all of the landowners of the community or area considered collectively. This law represents an inherent weakness, exposure or lack of utility of land in question and is designed to prevent uses of lands for which the land itself is inappropriate. Upon the passing of the regulation the intrinsic worth of the land is not in reality decreased but rather its existing weaknesses which may not be apparent to a purchaser who does not fully investigate the capabilities of the land are made a matter of law.

Secondly, one cannot compare the investments with the implications of a regional flood when it occurs. The losses of property in a regional storm probably offset the investment of the affected areas and it is pointless to increase such investment with an additional



input of capital. Also it is impossible to relate the lost investment to the potential loss of life that occurs in regional storms, keeping in mind that such loss may be the loss of the owner or family of the occupant of the subject lands.

The tribunal is satisfied that the decision of the respondent in this matter was made in accordance with principles of flood plain management and accordingly the appeal is dismissed.

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

SIGNED this 17th day of June, 1988.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.