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Ontario

The Mining and Lands Commissioner

In the matter of The CONSERVATION AUTHORITIES Act

AND IN THE MATTER OF

An appeal against the refusal to grant permission to construct a two-storey, single family residence on part of Lot 16 in Concession 1 R.F. in the Township of Osgoode in the Regional Municipality of Ottawa-Carleton.

B E T W E E N :

RAJIV NUNDY

Appellant

- and -

THE RIDEAU VALLEY
CONSERVATION AUTHORITY

Respondent

H.S. Brown, for the appellant.
P.A. Webber, Q.C., for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission to construct a two-storey, single family residence on part of Lot 16 in Concession I R.F. in the Township of Osgoode. 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 November 7, 1984.

The appellant has an option to purchase a parcel of land fronting on the east side of the Rideau River. The parcel has a frontage of 240 feet, approximately, on the Rideau River. Access to the property is obtained over a private right-of-way leading to Regional Road 19.

The regional flood elevation, which is based on the one in one hundred year storm, is 286 feet or 87.17 metres above mean sea level. A cross-section and a plan showing elevations filed as Exhibits 7 and 6, respectively, indicate in the regional flood the depths of water at the edge of the River would vary from 2.57 feet to 4.31 feet. Such flooding would be slightly more than one and

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one-half feet at the front of the proposed residence. The parcel continues to slope upwards toward the east and at the rear of the parcel the depths vary from .67 feet to 1.42 feet. The access road which has elevations of from 86.77 to 86.99 metres would be covered to a depth of at least .18 metres or seven inches at the spot elevations shown on the plan.

The evidence clearly established that the entire lot would be flooded in a regional storm and further the evidence showed that in spring thaws which did not have the intensity of a one in one hundred year storm approximately 80 per cent of the parcel was inundated with spring flood waters.

The appellant caused plans for a residence to be prepared by architect students and by a structural engineer in respect of the basement. In the preparation of the plans the specifications of Central Mortgage and Housing Corporation in respect of buildings to be erected in a flood fringe were said by the appellant to have been used. No objection was taken to the safety aspects of the proposed building from the point of view of structural damage by B.A. Reid, P.Eng., the Water Management Co-ordinator of the respondent who gave evidence. However, in passing it should be noted that the specifications of that corporation, which were filed as Exhibit 14, expressly indicate that they were prepared for use in respect of a flood fringe area, which area is not controlled by the respondent as a one-zone policy is the basis of the regulation in question. In the present case, the building would be situate in the flood way as contrasted with the flood fringe and that corporation has made no provision for the specifications for buildings in such areas. On p. 3 of the exhibit it clearly specifies that N.H.A. funding will not be available for the construction of buildings in the flood way and would not be applicable where there is a one-zone area.

The appellant indicated that he was prepared with a view toward providing access above the elevation of the regional flood to place clean crushed stone on a driveway from his garage to the access road and on the portion of the access road that would be

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subject to flooding in the event of a regional storm. In this regard, counsel for the respondent indicated that this tribunal had in the past refused to permit amendments. The evidence of Reid indicates that such a proposal would have additional hydraulic considerations and for this reason the practice of this tribunal of not permitting serious amendments will be followed.

On cross-examination of Reid, he was asked whether the proposed building and raised septic tank, which had been approved by the Ministry of the Environment, would have a measurable effect on the hydraulics of the flood plain. The witness indicated that he had not made any calculations but was of the opinion that there would be no measurable effect. The witness stated that there would be no measurable effect from the loss of storage capacity. On examination by the Bench the witness admitted that the respondent had on two occasions issued permission for new buildings in the flood plain, one where the amount of flooding was less than six inches and the other where the building was situate on an inlet which was not on the main channel of the flood plain.

Counsel for the appellant, while admitting that the subject lands were entirely within the flood plain and had experienced partial flooding in the past submitted that the thrust of the evidence was that the proposal had no measurable effect either on the hydraulic capacity or the storage capacity of the flood plain, that the proposed residence was acceptable from the point of view of structural or property damage and that with his amendment, access would be provided which should relieve any concerns regarding public safety. He also submitted on the basis of the two examples mentioned in the evidence that the respondent had a policy of granting approval for new buildings in the flood plain and that the subject application fell within such policies.

It was further said that as a lay person, the excavation of the basement would provide additional storage. However, in passing, it must be noted that in the experience of the tribunal such additional storage is not regarded as being relevant to the control of flooding and is not an offsetting factor in the event of

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a regional storm. Counsel relied on the fact that only .4 feet of water in the event of a regional storm was the matter to be considered and that issues of public safety were adequately met or would be met by the present application as amended.

With reference to the aspect of the effects on the hydraulics and storage capacity being immeasurable, counsel submitted that the test should not be based on immeasurability and should have reference to potential risks. With reference to precedential implications, which was the sixth reason relied on by the respondent in its reasons, it was submitted on behalf of the appellant that there were precedents for the issue of permission in similar circumstances, the precedent had already been set and permission should not be refused to the appellant.

It was submitted on behalf of the respondent that the appropriate approach to the case should be based on principles of flood plain management. The two prime considerations in this regard were said to be the fact that all the subject lands were in the flood plain and there was proof of significant flooding in circumstances less than regional storms. It was pointed out that there was no proper application of the stage storage principle. With reference to the issue of measurability, counsel submitted that the fact that the risks are not measurable is not the recognized principle and that consideration should be directed to the end result if all potential lands were given the same permission. Counsel referred to the fact that in the event of a regional storm the flooding surrounding the residence would vary from one to one and one-half feet and that such an area would have to be crossed before any occupant could reach dry land. He submitted that there was no precedent for the granting of permission in such circumstances and he distinguished the two cases that were mentioned on the basis that flooding in one instance was only six inches and the location was out of the flood channel in respect of the other application.

In his reply, counsel for the appellant submitted that having regard to the test of control of flooding the proposed

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results of the subject application were insignificant and not measurable. He repeated his submission that the real area of concern was the .4 feet on the access road rather than the 1.5 feet of flooding around the residence.

Dealing with this last point the tribunal is concerned with the submission that the only relevant consideration should be the depth of water beyond the subject lands. The lands in question will be flooded in a regional storm to depths from in excess of four feet at the northwest corner to approximately one foot at the rear of the property and it is such depths of flooding that create the risk to human life. One cannot assume that the provision of a driveway which may or may not sustain the flows of the regional flood is adequate protection. Further the depth of .4 feet relates to a spot elevation located outside the right of way and the evidence shows lower elevations on the spot elevations on the right of way.

With reference to the argument that there was no measurable effect on the control of flooding, it must be remembered that the evidence of the witness Reid was not that there was no measurable effect on hydraulics but that he had not calculated whether there would be, although he did not expect such to be the case. The tribunal adopts the approach of counsel for the respondent in that the concept of control of flooding is related to the entire watershed and that the precedential implications of a particular application or the amount of reduction of the storage capacity or intereference with the flows must be regarded in the light of similar permission being afforded in respect of any other application. It is patent to the tribunal that if every applicant were permitted to erect structures and place fill in the flood plains to the extent that the present application proposes there would be a serious problem and accordingly, it cannot be concluded that the fact that the intrusions into the flood plain were immeasurable that they would not affect the control of flooding.

In this regard reference may be made to the decision of

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Van Galder v. The Rideau Valley Conservation Authority in which it was said,

> Perhaps the best way of illustrating to applicants that the law requires consideration to be given to matters which individually would appear to be insignificant would be to point out the fact that the subject matter of the consideration by the conservation authority in determining whether permission should be granted is the matter of the control of flooding. The standard is not whether the particular application would affect or have a serious effect on flooding. The test is the effect on the control of flooding. Where the hazard, though not in itself significant, is representative of the hazard to other property in the flood plain it is essential in establishing approaches to consider the precedential implications even though there may not be a significant change in the risk by particular proposals. The obligation of the conservation authority is to establish a program to control flooding and the significant consideration is the effect on the control program rather than an attempt to measure the percentage of the storage capacity involved in the particular case. In order that all landowners can be treated equally it is essential in granting exceptions that there be an assessment of the effect on the control program and in such an assessment the issue of precedent becomes vital. Unless it can be shown to this tribunal that a valid exception can be made to the program it is essential that no principle be established that would detract from the overall approach of the program.

On other occasions this tribunal has said it is not the policy of this tribunal to create and require a conservation authority to administer a de minibus principle, particularly as such a principle is inconsistent with the concept of control of flooding.

The tribunal is satisfied that the reasons given by the respondent in this matter were valid and that the applicant has not been deprived of any policy of the respondent under which other landowners have been granted permission.

IT IS ORDERED that the appeal in this matter be and is hereby dismissed.

AND IT IS FURTHER ORDERED that no costs shall be payable by either party to the appeal.

DATED this 3rd day of December, 1984.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.