Ontario

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The Mining and Lands Commissioner

In the matter of The CONSERVATION AUTHORITIES Act

AND IN THE MATTER OF

An appeal against the refusal to issue permission to place fill on part of Lot 33, Broken Front Concession, in the Township of Osgoode in The Regional Municipality of Ottawa-Carleton.

B E T W E E N :

HECTOR REID and FLORENCE REID

Appellants

- and -

THE RIDEAU VALLEY CONSERVATION AUTHORITY

Respondent

B.G. Curley, for the appellants.
P.A. Webber, for the respondent.

The appellants appealed to the Minister of Natural Resources from a decision of the respondent dated June 23, 1980, refusing the issue of permission to place fill on part of Lot 33, Broken Front Concession, in the Township of Osgoode. By O.Reg. 717/80 made under the Ministry of Natural Resources Act, 1972 the power and duty of hearing the appeal was assigned to the Mining and Lands Commissioner. The appeal was heard in Ottawa on April 15, 1981.

In 1962 the appellants purchased a parcel of land on the east bank of the Rideau River containing approximately 15,000 square feet. The parcel was shown as Parcel 2 on a plan of survey dated June 26, 1962 by D.E. Chartrand, O.L.S. and was a subdivision of part of the north half of Lot 33 in the Broken Front Concession. The plan was not approved under the Planning Act. The appellants purchased the land as a site for a retirement home and have made no use of the property in the intervening years. Over these years taxes have been paid on the property with the current interim bill being $82.60.

The parcel is bounded on the east by River Road or Regional Road 19. The north limit of the property measures 109 feet from the river to the road and on the south limit the measurement is 84 feet. Photographs

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of the area show the parcel to be a low lying and treed area. There were four parcels on the plan and parcels 1 to 3, inclusive, appear to remain in a state of nature. A substantial residence and garage have been erected on Parcel 4.

The jurisdiction of the respondent is found in O.Reg. 875/76 as amended by O. Reg. 52/80. By the amendment the subject lands were brought within the schedule of lands in respect of which the permission of the respondent must be obtained before fill may be placed on the lands. The evidence of the respondent indicated that the regional flood elevation of the subject lands is 287.2 feet and the elevation of the subject lands is 280.56 feet. The maps establishing the regional flood elevation were prepared by James F. MacLaren Limited and use the River Road as a dyke to form the upper limit of the area subject to flooding by a regional storm. The report of June, 1976 prepared by that company was filed indicating that the regional storm adopted for the purpose of the regulation of the respondent is the one in 100 year storm. Accordingly, the subject lands in the state of nature would be subject to seven feet of flooding in a regional storm.

In this regard, the evidence of the appellants was that they had prepared the application without any technical assistance and would be prepared to modify the amount of fill so that the fill could extend to the roadway thereby excluding any possibility of surrounding of the proposed house and filled area with water during a regional storm. However, it is not the practice of this tribunal to deal with amended applications at a hearing and if an appellant wishes to subsequently amend its application for reconsideration by the respondent or make a new application to the respondent it is free to do so.

The evidence was rather sketchy as to the amount of residential build-up along the banks of the Rideau River. It appears that there was some residential build-up along these banks but the extent of such build-up was not documented in detail. However, the position adopted by the respondent relied on the precedential implications of the loss of storage capacity, while admitting that the actual loss would be insignificant in respect of the particular property.

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The scientific evidence given by Bruce A. Reid, B.E., P.E., on behalf of the respondent also indicated that the subject lands had been flooded in the year 1976. An aerial photograph filed as Exhibit 16 was said to show the subject lands to be almost completely flooded with water during that spring season. The amount of fill that was involved was calculated at 1,500 cubic yards which equates to approximately 75 truck loads of fill. The evidence also indicated the safety hazard, particularly with small children, in connection with a building that would be surrounded by six or seven feet of flood waters during a regional flood. In addition the evidence indicated that there was no known method by which the stage storage doctrine could be applied by the appellants to the subject lands.

It was interesting to note that on cross-examination, Mr. Reid indicated that there might be a less chance of erosion or creation of eddys which would create erosion by an equal application of fill along the river bank. However, on questioning from the bench, the witness indicated that there would be with such a placing of fill, increased flows creating downstream erosion and higher flooding upstream with the filling in of all of such areas.

The first submission of counsel for the appellants was that the executive committee of the respondent did not conduct a proper hearing at the time the permission requested was refused. The evidence in this regard indicated that the evidence on which the executive committee made its decision was not made available to the appellants, that the appellants were unable to hear the evidence, if any, submitted on behalf of the respondent and that the appellants had no opportunity of knowing or cross-examining the evidence against their application.

It has always been the position of this tribunal that matters affecting the validity of the hearing before the conservation authority or its executive committee should be dealt with by the Divisional Court on an application under the relevant statute and that it is not the function of this tribunal to deal with such matters. Before this tribunal, the matter is completely heard and the parties are given full opportunity to present their evidence and arguments and the appeal is conducted as an appeal

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de novo. Keeping in mind that the appeal to the Minister is an administrative appeal, i.e., a reconsideration of the administrative issues, as distinguished from a judicial review, which is normally a matter for the courts and not a political appointee, it is unnecessary and probably improper to give any weight to the validity of the proceedings before the original tribunal in the decision of this tribunal.

Secondly, it was alleged that the reasons given by the respondent for its refusal, i.e. that the proposed filling would have a serious effect on flooding and upstream development, fail to relate to the jurisdiction of the respondent which under section 4 of the regulation is required to review the application in the light of the "control of flooding". In the view of this tribunal the argument requires the same answer as the first submission.

On the merits the submissions of the appellants were that by the evidence of the respondent's own expert, the loss of storage capacity by the placing of the fill was insignificant and taken by itself the application would have no effect on the control of flooding. This argument was further enlarged to the position that the respondent should in considering similar applications, grant permission to fill until such time as the control of flooding would be affected and that any landowner who may apply should be entitled to obtain permission up until such time.

There were two basic submissions on behalf of the respondent. Firstly, the respondent relied on the safety hazard and the dangers to life and property during regional storms. Secondly, it was submitted that the argument of the appellants respecting "control of flooding" was inconsistent with a prior decision of this tribunal in the case of Van Galder v. The Rideau Valley Conservation Authority.

In reply it was submitted that this approach to the matter of control of flooding was improper and that each case should be considered on its merits and only when, on the merits of the individual case, there is an effect on the control of flooding, should the permission be refused. It was also pointed out that the present application is limited

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to the placing of fill and that the control of a conservation authority in respect to housing falls under a different provision than the provision respecting the placing of fill.

With reference to the last point the relationship between an application to place fill in an area that falls within the regional flood plain and the subsequent application to erect a structure thereon is sufficiently significant to make the purpose for the placing of fill a relevant consideration in the fill application. The existence of a legal relationship is illustrated by clause 6 (2)(d) of the regulation which requires the purpose,i.e. the proposed use of the land following the placing or dumping of fill, to be set out in the application. The implications of placing fill as a base for a future residence are far more significant than, in the light of the conservation authority program, most other purposes. Where the purpose is a residence, the hazards related to the construction of residences in flood plains become relevant and the safety hazards and risks to life and property become a required consideration. Included in such consideration are matters of risks of drowning, difficulties of rescue, power loss and damage to property, particularly at night when most regional floods peak.

With reference to the approach on "control of flooding", until such time as there is some determination that indicates that the approach in the Van Galder case is incorrect, this tribunal can do no more that repeat what was said on that occasion as follows;

> 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

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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.

In addition it may be said that the argument of the appellants contains two presumptions. Firstly, if one were to accept the argument it would have to be presumed that the standard of protection provided by the regulation is too high. The evidence indicates that the standard under the regulation is the one in 100 year storm. This standard is the lowest of the three standards adopted in Ontario and keeping in mind that the appellants produced no scientific evidence to establish that the standard was too high, the presumption cannot be made. Secondly, and based on an acceptance of the first presumption, it presumes that the lower standard can be identified, recognized and put into application when its level occurs. Apart from the fact that the first presumption cannot be accepted, this tribunal is not aware of and no evidence was produced by the appellants of the level of the lower standard or methods of its recognition. Accordingly this tribunal cannot accept this argument.

Counsel for the respondent pointed out the significant precedent that would be established if the placing of fill to the depth of seven feet were permitted. It would be difficult to disagree with his submission that if this application were granted, it would be practically impossible to reject any application for the placing of fill. The depth of fill is substantial and would extend practically from the water's edge to the regional flood line, exhausting all of the storage capacity of the subject lands which are totally within the flood plain particularly if the appellants were permitted to add additional fill to counteract the moat effect of their present application.

With regard to the facts and submissions of the case of the appellants, I can find nothing in the appellants' evidence or submissions that indicates that the appellants have been deprived of the benefit of any policy of the respondent under which it would have been entitled to the issue of permission for the placing of fill. The regulation is based

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on the one in 100 year storm and consequently the more modern principles of flood fringe do not apply. Also the stage storage doctrine is inapplicable. The case is further complicated by the fact that the upper limit of the flood plain is Regional Road 19 and experience has shown in the Grand River Conservation Authority area that such dykes do not always fulfill their purpose and breakdown with the result that there is flooding beyond and above the dyke.

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.

While it is not conclusive or exhaustive in itself, it is noted that the subdivision of the four parcels was effected in 1962 without the approval of the Planning Act which undoubtedly reduced the cost of the

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land but probably removed the consideration of the matters that go into a plan of subdivision for residential purposes.

Having considered the evidence and submissions of both parties, this tribunal cannot conclude that the decision of the respondent was improper.

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 of the parties to this matter.

DATED this 30th day of April, 1981.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.