



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 and a residential structure on Unit 65, Plan D-17, Part 1, in the former Village of Richmond in the County of Carleton, now in the Township of Goulbourn in The Regional Municipality of Ottawa-Carleton.

B E T W E E N :

NEIL VAN GALDER

Appellant

- and -

THE RIDEAU VALLEY CONSERVATION AUTHORITY

Respondent

J. B. Fortey for the appellant.
P. A. Webber for the respondent.

The appellant applied to the respondent for permission under Ontario Regulation 875/76 to place fill and construct a residence on a parcel of land known as Unit 65, Plan D-17, Part 1 in the former Village of Richmond. This parcel of land lies on the westerly side of York Street in the community known as the Village of Richmond. Upon refusal of permission the appellant appealed to the Minister of Natural Resources under subsection 2c of section 27 of The Conservation Authorities Act, as amended by The Conservation Authorities Amendment Act, 1973 and by Ontario Regulation 900/77 the power and duty of hearing and determining the appeal was assigned to the Mining and Lands Commissioner.

Approximately fifteen years ago the father of the appellant, Adrienne Van Galder acquired a parcel of land lying between York Street and the Jock River and lying southerly of King Street. He constructed a residence at the intersection of King and York Streets. The residence was a bungalow with an eleven block basement containing two bedrooms, a recreation room and a furnace. During his period of

ownership he has had no problems with water and his basement has always been dry.

Recently Adrienne Van Galder has obtained severances for the easterly part of the parcel lying to the south of the residence and has conveyed one part to his wife and one part to the appellant. The appellant's part measures 69 feet on York Street and has a depth of 110 feet. The father retains a parcel of land between the son's land and the river.

Prior to the making of Ontario Regulation 875/76 three houses were constructed between the appellant's land and Cockburn Street which is the first street westerly of King Street. These houses were built by Donald Green who still retains the house on the corner parcel. At the time he obtained a severance from the land division committee it was made a condition that the buildings should be erected easterly of the line known as the fill and construction limit. Fill was placed on the three parcels raising the site of the houses to 310 feet. These houses were built between 1974 and 1976 and contained basements. A bedroom was constructed in one of the basements. Green knew of no water problems except on one occasion when the sewer backed up. One of the conditions of either the severance or the building permit was that there should be no openings below 309.5 feet.

The regional flood elevation for this part of the Jock River watershed as established by J. L. Richards & Associates is 309.5 feet. The elevation of York Street in front of the subject lands is 306.5 feet. The land slopes gradually to the river where the elevation at the top of the bank is approximately 304 feet. There is a two foot bank at the river. The appellant proposes to bring fill onto his land so that it will be raised to a height of 311 feet at the site of the house which is similar to the elevation of the fill of the Green property and slope the fill from the site of the house to the road and to the back of his lot. He intends to construct a four foot concrete block wall in the basement and construct an additional four feet of frame construction on top of this wall and to have the floor of the bungalow constructed above the frame wall. He proposes to have

the lowest opening at 310 feet. The evidence indicated that the site of the appellant was, prior to filling of other units, the highest unit in the block between Cockburn Street and King Street and had an elevation of 306.5 feet at its highest point.

The evidence of S. Van Ingen Schenau, P.Eng., of J. L. Richards & Associates Limited, who has had experience with water hydrology and water management matters since 1951 and who prepared the flood mapping for the Jock River established that the regional flood elevation is 309.5 feet. The elevation of the subject lands is 305 feet at the boundary nearest the river. The elevation of the greater part of the subject lands is 306 feet. He concluded that the proposal of the appellant would involve an importation of 430 cubic yards of fill and with the loss of storage created by the proposed building there would be a total loss of storage capacity of 500 cubic yards. The witness gave evidence that the elevation of York Street at the subject lands was 306.5 feet. The elevation at York Street and King Street is nine inches higher and the elevation at Cockburn Street is lower. Accordingly in the event of a regional flood there would be no road access to the property by reason of water of a depth of approximately three feet covering the streets. The witness explained the fill and construction limit as the limit of a channel that would provide adequate hydraulic capacity in all conditions for the Jock River and that any encroachment below this line would create obstruction to the flow of the river during a regional flood. It was apparent that in the event of a regional flood the houses constructed by Green and the appellant's house would be completely surrounded by at least three feet of water.

The witness further indicated that the subject lands were not capable of the application of the stage storage doctrine and further even if the fill were obtained from the lands of the father of the appellant, the doctrine would not be applicable.

The first submission on behalf of the appellant was that the evidence of absence of flooding during the last fifteen and thirty years is indicative of too high a standard being applied by the respondent. It was submitted that the regional flood was only a

theoretical storm in accordance with the evidence of the expert witness for the respondent who admitted that such a storm had not occurred in the area within the recorded history. It was submitted that the fill and construction limit was a more appropriate maximum elevation and had been adopted on the Green lands. Reference was made to other houses on land owned by Arthur Brown at a similar elevation in the floodplain. These houses were erected prior to the making of Ontario Regulation 875/76.

Counsel for the appellant dealt with each of the four reasons provided by the respondent for its decision and submitted that the fact that the subject lands are in the regional floodplain should not be conclusive in refusing to grant permission. He indicated that the obvious intent of the regulation is that construction may be permitted in the floodplain and because the property was very close to the edge of the floodplain and the fill and construction limit that had been accepted at one time, the stringent test of being in the floodplain should not prevent the exercise of the granting of permission that is contemplated by the regulation.

The second reason related to the fact that the land, once filled, would become an island in the event of a regional flood. It was admitted that such would be the case but that the subject lands would be similar to other lands in the area. The third reason dealt with water problems in basements during flooding. It was submitted that if past experience is the test of this reason, the evidence before the tribunal of Green and the father of the appellant did not support this reason. It was suggested that the fourth reason which dealt with loss of storage capacity and reduction of the channel cross-section were merely standard phrases that are frequently used, that the evidence of the expert witness for the respondent indicated that there was no effect on the cross-section and that there would only be removal of storage at high water levels. It was submitted that the evidence of the recent experience was contrary to the existence of such a hazard.

Counsel for the respondent took issue with each of the interpretations of the reasons and submitted that the significant

difficulty with the approach of the appellant was a failure to realize that the regional storm concept is used and that current experience is not a standard of assessing the risk of building in the floodplains. He pointed out the risks associated with the proposal both to the property itself and to the occupants particularly children in the night in the event of a regional storm. He submitted that while the subject lands may be less vulnerable than other lands in the community there remains a significant hazard and the cumulative effect of the hazard must be guarded against.

At the outset it is apparent to this tribunal that the recent history of flooding resulting from spring runoffs can not be regarded as a proper standard in assessing the risks of placing fill and constructing a residence on the subject lands. I know of no basis and there was no evidence produced before me that would warrant the questioning of the validity of the regional flood elevation or to conclude that the evidence of thirty years experience should override the risks associated with the regional storm. Such an approach can only be referred to as the Raymore Drive approach and as the residences and Raymore Drive itself disappeared during Hurricane Hazel, I cannot accept the submissions that there is not a serious hazard in connection with the construction of homes on the subject lands.

Further I am not significantly swayed by the fact that the hazard may be less than the hazard for the entire community. The fact that the entire community is within the floodplain and the existing residences are subject to the hazards of a regional flood it does not mean that new residences should be permitted. If such would be the approach there would be no need of The Conservation Authorities Act and the regulation made thereunder. This application can only be viewed on the basis that there is a risk of flooding to the elevation of 309.5 feet which would create an island and the proposed house and the three adjacent houses recently constructed would be surrounded by the flooded river along the westerly side and flood waters to a depth of three feet across the only access to or from the lands. Accordingly in respect of the first submission it can only be held that there is a significant and a serious risk, that the regulation

provides a measure of protection to prevent the risk being increased and protects a property being exposed to the risk and accordingly, it would be necessary to find some justification for granting an exception to the prohibition of constructing buildings and placing fill contained in section 3 of the regulation.

In my opinion the second reason of the respondent has been sustained. In reality the reason is closely related to the first reason and the comments in respect of the first reason are equally applicable to this concept. With reference to the third reason I have some doubt as to whether with proper floodproofing there would be a basement water problem in connection with the proposed house. This is an engineering matter and there was no evidence to deal with the question of whether the proposed method of floodproofing would be adequate to keep the waters of a regional flood out of the basement in which it was proposed to install a furnace and other facilities. The witness Green indicated that there are sewers and that there had been a back up of a sewer during the last three years. There may well be a problem of sewers backing up in the event of a regional storm causing damage to the furnace and other facilities. In the absence of evidence on this aspect I make no finding.

With reference to the fourth reason counsel for the appellant indicated that the statement of these types of risk is a stereotyped comment. It may well be that the wording adopted failed to draw to the attention of the applicant the significance of the principles involved. One would expect that as a result of the discussion with the officials of the respondent that the implications of the subject ought to be apparent to the applicant. Approaching the matter from a different view it may be said that the appellant produced no evidence to establish that the concerns related to the cumulative effects of placing fill in the flood plain should be overlooked. It is a rare application where the percentage of the flood-plain involved is high. The significant concern in this regard is the precedential aspects of granting permission to the first applicant and subsequently, by reason of the policy adopted on that occasion, having to grant a similar permission to all other landowners in similar

situations.

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 ^{it} effect 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 floodplain 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.

Typical exceptions that are made to the absolute prohibition are not of assistance to the appellant's case. From the point of view of storage capacity the subject lands were not capable of providing storage alternatives at the elevation at which fill is proposed to be placed. This exception is known as the stage storage principle and where this principle is applicable many conservation authorities will grant permission to utilize part of the storage capacity. It is not necessary to provide the alternate storage on the subject lands but the alternate storage should be situate sufficiently close to the subject lands to permit the alternate storage to hold the water that would otherwise be held by the displaced storage. There was no

evidence to indicate that lands of the father of the appellant could provide such alternate storage.

On occasion, where the stage storage principle is applicable, a landowner is permitted to fill his land to the regional storm elevation. In such circumstances access to and from the land is essential and even if the appellant's proposal can be adopted to the stage storage principle the net result contains the hazard of lack of access and this is not a satisfactory situation. In such cases while increased hazard to other landowners may be reduced there is still a risk to the residence on the subject lands and its occupants. An application of the stage storage doctrine is not necessarily conclusive.

In view of the continuing risks to the inhabitants of the subject lands and the absence of the removal of the risk of flooding hazards to other lands I am of the opinion that the decision of the respondent is valid.

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

IT IS FURTHER ORDERED that no costs shall be payable by either of the parties.

DATED this 27th day of April, 1978.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.