



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

G.H. Ferguson, Q.C. ) Monday, the 29th day of  
Mining and Lands Commissioner ) July, 1985.

AND IN THE MATTER OF

An appeal against the refusal to issue permission to construct an addition to an existing building on Part of Lot 26 in Concession II, EYS, in the Town of Richmond Hill, in the Regional Municipality of York.

B E T W E E N :

JOHN M. FEDYNA

Appellant

- and -

THE METROPOLITAN TORONTO AND  
REGION CONSERVATION AUTHORITY

Respondent

F.L. Carruthers, for the appellant.  
J.H. Wigley, for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to issue permission for the construction of an addition to an existing building situate on part of Lot 26 in Concession II, E.Y.S., in the Town of Richmond Hill in the Regional Municipality of York. By Ontario Regulation 364/82 the power and duty of hearing and determining such appeals were assigned the Mining and Lands Commissioner. The appeal was heard in Toronto on the 4th day of June, 1985 following an adjournment granted on the 21st day of May, 1985.

The appellant or one of his associated companies owns a sixteen acre parcel on the north side of Elgin Mills Road, East in the Town of Richmond Hill. The property is used as a nursing-residential home for retired persons and a number of buildings have been constructed on the property for that purpose. In 1973 a two-storey brick building was constructed at the southwest corner of the subject lands. In applying for a building permit the applicant requested a permit for a 150 bed residential

structure and related parking, dining and recreation facilities. As a condition of the issue of the permit the municipality required the entry into a site development agreement, a copy of which was filed as Exhibit 5. Paragraph 3 of the agreement reads,

3. Prior to the issuance of any building permit the Owner shall have flow conditions in the watercourse checked under Hurricane Hazel conditions using calculations by methods acceptable to the Land Use Conservation Branch of the Ministry of Natural Resources to verify that the proposed development of the lands will not aggravate the existing drainage situation nor be affected by the calculated flows.

In addition, Paragraph 6 of the agreement provided the Town with an easement for the construction of drainage and future maintenance works.

The reason for Paragraph 3 appears to be that a tributary of the Rouge River flows in an easterly direction along the northerly side of the proposed building and at the northeasterly corner turns in a southerly direction flowing along the east side of the building and outletting across Elgin Mills Road.

For the purpose of complying with Paragraph 3, Marshall, Macklin, Monaghan Limited was engaged to prepare a report on the regional storm and other elevations of the site, which report was filed as Exhibit 2. The report concluded that the designed flow at the site was 910 cubic feet per second and concluded using the Manning equation that the regional flood elevation was at an elevation of 728 feet which would be two feet below the elevation of the slab on which the proposed building was to be erected. The appellant indicated that there was a slight delay in the issue of the building permit but he assumed that the report had been passed to the various agencies interested and that the Conservation Authorities Branch of the Ministry of Natural Resources must have approved the report as the building permit ultimately issued.

However before the ultimate issue of the building permit a problem respecting sewage developed and the municipality restricted the building permit to the construction of a building having a capacity for 102 beds or persons rather than the 150 mentioned in the application. No reduction in the size of the

other facilities was required and it was the appellant's understanding that at such time as the Town of Richmond Hill became connected with the City of Toronto or the Metropolitan Toronto sewage system a building permit for the southerly wing on his proposed building would be approved. Construction proceeded on the basis of 102 beds with facilities related to a 150 bed building.

The appellant recently learned that the Town of Richmond Hill had been able to connect to the Toronto sewage facilities and applied for a permit for the 50 bed wing which had been withheld in the 1973 building permit.

Apparently the subject lands are not included in the areas that have been the subject of flood plain mapping projects by the respondent. Further it is noted in examining Regulation 170 of Revised Regulations of Ontario, 1980 that the scheduled areas in respect of this tributary of the Rouge River terminate at the concession lot to the south of the subject lands. In any event the appellant was required to apply to the respondent for permission to construct the wing. He was again required to file a study of the flood plain elevations as newer technology exists and there was some doubt as to the current applicability of the tests used by Marshall, Macklin, Monaghan Limited. Some work had been done in the area in connection with flows by the engineering company of Gore & Storrie Limited and because of the existing knowledge and expertise of this company the appellant engaged the company for the preparation of a second study.

The conclusions of that study were that the flows of the regional storm were 2,340 cubic feet per second or 66.3 cubic metres per second and that the flows of the one in one hundred year storm were 950 cubic feet per second or 26.9 cubic metres per second. Following the processing of the flows through the HEC-2 computer model it was established that the elevation of the one in one hundred year flood was slightly below 224 metres and slightly below the grade level of the existing building but the elevation of the regional flood was 226 metres which indicates that the proposed building would be situate in two metres of flood waters during a regional flood. Converted to inches the depths of the water would

be approximately eighty inches. Based on this report the respondent refused to issue the permission requested under the Conservation Authorities Act.

The evidence indicated for what it is worth that the elevation of Elgin Mills Road had been raised since the construction of the building now existing on the subject lands. The evidence indicates that the size of the culvert was increased so that it would pass a flow of 1,000 cubic feet per second which is in excess of the flows determined by the Marshall, Macklin, Monaghan Limited study. There was no evidence given that would indicate the effect of this culvert in the calculation of the flows under current standards and the tribunal cannot draw any conclusions regarding this aspect of the matter even though counsel argued that the size of the culvert was responsible for the problems that his client faces.

At the outset of the hearing, counsel for the appellant indicated that there were two issues, firstly, whether the appellant had obtained approval prior to his construction of the existing building in 1973 and secondly, whether approval for the extension should be granted at this time. The tribunal expressly asked counsel upon which principle of flood plain management reliance would be placed and the counsel indicated that no such principle would be placed before the tribunal.

With reference to the first issue there is absolutely no evidence to suggest that the respondent granted permission under the Conservation Authorities Act in 1973. Firstly, in this regard it is noted that the evidence showed that according to the information available at that time the matter did not fall within the jurisdiction of the respondent. Secondly, in this regard, there is no fill regulation and according to the Marshall, Macklin, Monaghan Limited report the site was above the regional flood elevation and accordingly, the respondent would have had no jurisdiction to require the issue of permission. Further, the evidence clearly establishes that the respondent had no record of

application for permission having been made or considered. Thirdly, and perhaps most conclusively, the appellant did not file with the tribunal a copy of any permission granted. For the aforementioned reasons this tribunal cannot conclude that the respondent, in 1973, granted the permission which is being requested to be, in effect, formalized at this time.

Turning to the merits of the application, the evidence of the witnesses for the respondent clearly indicated that the extension of the existing building was contrary to the expressed policies of the respondent. On cross-examination reference was made to areas that are called special use areas in which permission is granted for extensions in areas with high flood elevations.

Very significantly, the evidence of John Craig Mather, an engineer qualified in the relevant matters and employed by the respondent, indicated that there is a potential velocity in the channel, due to the funnelling shape of the basin, of ten to thirteen feet per second which in his opinion indicates very erosive flows. In other cases a velocity of six feet per second has been regarded by the tribunal as being a serious flow based on the evidence before the tribunal on those occasions.

The witnesses for the respondent referred to the loss of storage capacity and the incidental effects on flows from the erection of the proposed wing. However, all of these witnesses indicated that the effects had not been calculated but it was the general estimate of the witnesses that the serious aspect of this matter, apart from risks to life and property, would be the precedential or accumulative effect of such construction.

The appellant indicated in his evidence that some expense had been incurred in the construction in 1973 by the placing and compacting of aggregate on the site of the proposed wing. The appellant brought no evidence regarding the amount and the tribunal can only consider that it is not significant. The appellant also gave evidence without bringing any records to establish the same that the existing building was being operated at a loss by reason of the over capacity of servicing areas. While the tribunal has no

difficulty in accepting this evidence there was no evidence before the tribunal that a building which would house the same number of beds could not be built on a location on the lands of the appellant that were not within the regional flood plain. The appellant's evidence was that the occupants of the proposed wing would be fully ambulatory and would be able to escape in the event of a flood. However, this evidence is also indicative of the fact that they would be able to be housed on another site on the lands if such a site were above the regional flood elevation. It should be emphasized however that this tribunal has no evidence that such a site is available on the subject lands as no evidence of the elevations beyond the stream were provided.

In submission it was said on behalf of the appellant that in effect the appellant was the victim of a multitude of bureaucracies and was faced with a problem not of his own creation. In dealing with this particular argument the tribunal has difficulty in determining how such a background would provide a basis for increasing the risk to lives and property which could arise from the placing of a building in eighty inches of flood water flowing at a velocity of ten to thirteen feet per second. In the view of the tribunal the problems faced by the appellant would only be increased by the issue of the permission in the event of a regional flood.

With reference to the issue of treating the area as a special area, the creation of new special areas is not a matter within the jurisdiction of this tribunal. The usual practice in creating such areas is based on the high cost of land and the complete commercial disruption of an entire community. What the appellant requests in this regard is special treatment on the basis of an individual's position and as far as this tribunal is concerned there is no evidence before the tribunal that the objective of the appellant could not be obtained on a different portion of the property even if at some inconvenience. Such inconvenience would undoubtedly be of lesser significance than the difficulties arising in the event of a regional flood.

Counsel for the respondent referred to a number of authorities which the tribunal does not consider necessary to set

out at this stage. Suffice it to say that this tribunal is not aware of any principle of flood plain management under which residential construction is permitted in an area subject to eighty inches of flooding in a regional storm. The appellant called an expert witness and he did not place before this tribunal any basis on which such a principle now exists or should be adopted by this tribunal.

Even if consideration were given to granting permission in this case it should only be given with the imposition of adequate requirements for the safety of the occupants and property in the event of a regional storm. The appellant was questioned regarding potential flood-proofing measures and his evidence indicated that he was not prepared to study or make any such changes to his existing building or to the proposed building.

For the foregoing reasons the appeal will be dismissed.

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

2. THIS TRIBUNAL ORDERS that no costs shall be payable by either party to this tribunal except with respect to the costs of the day payable to the respondent in the amount of \$400 which were fixed by this tribunal on the 21st day of May, 1985 as a condition of an adjournment.

SIGNED this 29th day of July, 1985.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.