



# The Mining and Lands Commissioner

In the matter of The CONSERVATION AUTHORITIES Act

G.H. Ferguson, Q.C. ) Tuesday, the 23rd day of  
Mining and Lands Commissioner ) May, 1989.

AND IN THE MATTER OF

amended  
December 5, 1988.

An appeal against the refusal to issue permission to place fill and construct a single family dwelling on Lot 66, Registered Plan 460(C), the premises municipally known as 228 Bernard Avenue, in the City of London in the County of Middlesex.

B E T W E E N :

DEE WHITE

Appellant

- and -

UPPER THAMES RIVER CONSERVATION  
AUTHORITY

Respondent

B. Card, for the appellant.  
S.R. MacKay, for the respondent.

The appellant appealed from the refusal of the respondent to grant permission to construct a single family dwelling on Lot 66, Registered Plan 460(C), property that is municipally known as 228 Bernard Avenue, in the City of London. The application also included a request for permission to place fill in connection with the construction of the dwelling. By 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 London on December 5, 1988.

Although there was some confusion in the application of the appellant to the respondent in that the municipal number used in the application referred to a property on the south side of Bernard Avenue the property owned by the appellant consists of two lots situate on the north side of Bernard Avenue which are known as 228 Bernard Avenue. A single family dwelling has been

constructed sometime in the past on one of the lots and the proposal of the appellant was to sell the lot on which the existing residence is situate and construct a residence on the lot which is vacant. The registered plan has been declared under the Planning Act not to be a registered plan for the purposes of the Planning Act and among the consents required for the proposal there is a requirement for severance.

The subject lands are situate in the part of London known as Broughdale. The Thames River has a very tortuous course at this location creating a number of oxbows and the subject lands fall within an area contained within one of the oxbows. It is apparent from the larger scale maps filed that, in the event the river left its existing channel and assumed a straight course during a regional storm, the subject lands would be at the centre of the flood plain. The technical evidence indicates the elevation of a regulatory flood, a flood of less intensity than a regional flood but adopted administratively in lieu of the regional flood, at the subject lands would be 792.32 feet. The elevation of the one in one hundred year flood would be 790.35 feet. The site elevation of the subject lands is 789.37 feet indicating that in a regulatory flood there would be three feet of flooding. This evidence indicates that the site is within the part of the flood plain that is commonly referred to as the floodway, namely, the area below the elevation of the one in one hundred year flood.

The area within the oxbow in which the subject lands are situate has been built up for a number of years. There are a number of residences which apparently were constructed in the era of World War II. There are also a number of apartment buildings which were constructed during the fifties.

Although this tribunal does not consider zoning provisions to be significantly relevant in determining appeals under the Conservation Authorities Act the appellant called Jerome Tikalsky, the planning administrator of the City of London, to give evidence regarding the zoning in the area. Tikalsky produced a map of the area which was filed as Exhibit 2 and illustrated the

existing buildings in the area and also showed in blue a line that was considered to be the flood line of the river. Tikalsky's evidence was that the map was not an accurate map and was based on very old information probably going back to the forties. He stated that some contours were incorrect and that the flood line and the policies had changed since the flood line shown on the map was laid down. He pointed out that the flood line shown on Exhibit 2 was not the regulatory flood line and probably dates back to the forties, a date prior to the construction of the residences and the apartments according to his evidence.

Tikalsky indicated that the planning provisions of the city were under current review and that no final decision had been made as to the proposed rezoning. He indicated that there was an attempt to simplify the zoning procedure and that there is a draft policy that in the flood plains, which are normally zoned as O.S., the areas on which there are buildings that are inconsistent with the O.S. zone are left out of the zone. However there had been no decision of council on this point.

The witness confirmed that the area was subject to consideration for the establishment of a special policy area and that it was anticipated that studies would be conducted during 1989.

Kenneth M. Turner of the building department of the City of London was called. He gave evidence regarding the practice of that department and its policy to refuse permits if the permission under the Conservation Authorities Act were required and not obtained. He indicated that the plan currently used by his department was two and one-half years old and did not include Bernard Street in the O.S. zone. He made reference to building permits for two new homes in the area issued in 1982 and 1984 and fourteen permits issued since 1960 for additions. It was pointed out that one of these houses was closer to the river than the subject site.

William Joseph Diver and Richard Martin Goldt, employees of the respondent gave evidence regarding the establishment of the regulatory flood elevations and the one in one hundred year

elevations. Their evidence was consistent with the finding that the elevations noted above are the best evidence of the flooding elevations for the area and without a complete scientific study this tribunal could not come to a conclusion, notwithstanding the argument of counsel for the appellant that the documentation was unsatisfactory, other than that the area in question fell within the regulation of the respondent and fell within the floodway of the flood plain of the Thames River. The use of the municipal map was clearly questionable according to the evidence of Tikalsky. Its origin according to his evidence relates to the 1937 flood. The construction of residences and apartment buildings in the oxbows since that time provide the usual reason for changes in regional flood elevations. The purpose of the Conservation Authorities Act is to control development in such areas and to prevent increased flooding and this tribunal has no difficulty in concluding that a line based on 1937 information is not a suitable base for present day decisions particularly keeping in mind the amount of development that has taken place. The tribunal has no reason to believe that the elevations of the regulatory flood and the one in one hundred year flood provided in the evidence are inaccurate. Accordingly this tribunal cannot give effect to the argument of counsel for the appellant that the proper decision in this case is one which finds that the subject lands are outside the area of jurisdiction of the respondent.

The second point of counsel for the appellant was that the respondent failed to properly exercise its mandate and used irrelevant principles in rejecting the application. This tribunal cannot endorse this approach to the appeal. The evidence is that the subject lands are within not only the flood plain of the regional storm but in the floodway of the regional storm and regardless of the method of expressing the concern of the respondent the decision is clearly based on issues relating to the control of flooding. In this regard it may be noted that the

regulation of the respondent, Ontario Regulation 171/88, is prohibitory. Section 3 prohibits the construction and section 4 creates a discretionary exception where the Authority may grant permission if in its opinion "the site of the building or the placing or dumping and the method of construction or placing or dumping etc."... "will not effect the control of flooding or pollution or the conservation of land".

It is abundantly apparent to this tribunal that the prime reason for refusal of the permission was the control of flooding. The reasons appear on p. 47 of the brief of Mr. Card. Reference is made to the risk to life and property damage from flooding. These are the usual implications of construction of residential buildings in flood plains and while they may relate more specifically to the risks rather than the program it is the opinion of the tribunal that the reasons should not be criticized merely because they refer to the risks rather than specifically refer to the program which obviously is the prohibition of the construction of residential buildings in flood plains. It would seem to the tribunal that it is more relevant in dealing with applicants, particularly those who are not represented by counsel, to illustrate the risks as well as the technical implications of the proposal. Included in this point was the submission that the decision of the respondent involved matters of precedent, rather than the consideration of the specific property. The issue of precedent as this tribunal reads the reasons is not related to the specific application but to the effect of the specific application in respect of the establishment of a special policy area and the tribunal will deal with this matter later.

The fourth point was that the decision of the respondent was inconsistent and unfair. There was nothing brought out in the evidence of any recent issues of permission in the floodway of the Thames River which would indicate that the present decision is inconsistent with the policy, express or implied, followed by the respondent. With reference to fairness the thrust of the program

of conservation authorities is the prevention of the risks associated with the development of flood plains and the regulation and control of properties that are subject to flooding in regional storms. The regulation, which is prohibitory in its approach, is basically safety legislation designed to illustrate the inherent incapacities of the land itself and the tribunal cannot conclude in the absence of an implied policy inconsistent with the present decision that there was any unfairness about the decision of the respondent in this case.

Lastly it was submitted that permission should be granted without the tribunal imposing any requirements of flood proofing or in the absence thereof that the matter should be retained by the tribunal until such time as flood proofing standards could be established.

As indicated above nothing has been brought to the attention of this tribunal that the decision in the present case is inconsistent with any current policy of the respondent. Further from the point of view of this tribunal on the evidence the decision is contrary to the policy of the Province of Ontario recently confirmed in a joint document of the Ministry of Natural Resources and the Ministry of Municipal Affairs. Under that policy new development in the floodway is to be prohibited or restricted whether the area be in a one-zone or a two-zone concept area. The exceptions usually relate to buildings or structures that can only be constructed in the floodways and the construction of residential housing therein is the prime reason for the controls provided by the Conservation Authorities Act. Accordingly this tribunal on the basis of provincial policy cannot allow the appeal.

The tribunal has not overlooked the evidence relating to the consideration of the establishment of a special policy area. The only conclusion in this regard that can be made by the tribunal is that the application must be considered as premature. There was no evidence that such a policy decision will be made and

until such time as a decision is made individual cases should not be determined on the assumption that a special policy area would be established. Even assuming that a special policy area were established it must be remembered that special policy areas are created in association with remedial works which will provide some method of protection to the buildings within the area from regional storms. The studies preparatory to the establishment of such areas consider remedial works, the cost and effectiveness thereof and recommend standards of flood proofing to be followed based on the effectiveness of the remedial works. Accordingly at this time even assuming that a special policy area were to be established it is not possible for this tribunal to establish flood proofing standards that would be consistent with the principles associated with the establishment of such an area.

For the foregoing reasons this tribunal has no alternative but to dismiss the appeal.

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 the appeal.

SIGNED this 23rd day of May, 1989.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.