



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 erect a two-storey structure housing a commercial establishment on the first floor and living quarters on the second floor on Lots 6, 7 and 8, Block "B" on Registered Plan 225, on the west side of Water Street in the Separated Town of St. Marys in the County of Perth.

B E T W E E N :

NORMAN F. CLARKE and
THERESA R. CLARKE

Appellants

- and -

UPPER THAMES RIVER
CONSERVATION AUTHORITY

Respondent

The appellants, in person.
T.G. Price, for the respondent.

The appellants appealed to the Minister of Natural Resources from the refusal of the respondent to issue permission to construct a two-storey structure housing a commercial establishment on the first floor and living quarters on the second floor on Lots 6, 7 and 8, Block "B" on Registered Plan 225 on the west side of Water Street, in the Separated Town of St. Marys. 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 Stratford on the 18th day of October, 1984.

The appellants have acquired a parcel of land measuring 66 feet by 85 feet on the west side of Water Street in the Town of St. Marys. In addition, they are in the process of purchasing an adjoining 33 feet from the Town. This sale is conditional on the construction of a building on the 66 feet. The land lies between the west limit of Water Street and railway tracks along the east bank of the Thames River which flows in a southerly direction at this location. It was proposed to construct a two-storey structure

measuring approximately 65 feet by 40 feet on the combined properties. The first storey was proposed to be a commercial area and the second storey was to provide a residence for the appellants who have sold their existing residence.

The part of the subject lands presently owned by the appellants was acquired through a severance to which the respondent indicated that it had no objection. The proposed use of the land shown in the application for severance was for a parking lot.

The regional flood elevation of the subject lands, although it was questioned by the appellants without any scientific basis, is 1000.7 feet. The one in one hundred year flood line has been calculated at 996 feet. The elevation of the subject lands is 992 feet with the result that the subject lands would be inundated by 8.7 feet of water in the event of a regional storm. In addition there was evidence regarding the elevation of the 1937 flood which indicated that the flood line on that occasion was 1002 feet which is greater than the regional flood as presently calculated.

The appellants raised three issues in connection with their application. Firstly, it was argued that the policy of the respondent was to permit construction in the downtown core of St. Marys and reference was made to a number of permissions that had been granted. The position of the appellants was that the first of these examples was new construction of major proportions. The evidence submitted on behalf of the respondent was that the proposal, which has not been carried out according to the appellants, was an extension and it was accompanied by provisions for flood proofing to the elevation of 1001 feet, none of which proposals have accompanied the present application. With reference to the other eight examples, they were clearly examples of extensions to existing commercial buildings and there was no evidence that in any of the situations were residential premises involved as is the case with this application. The argument of the appellants was that if extensions in the flood plain are permitted there is no reason for which complete new buildings should be refused as the reasons for preventing new buildings are equally

applicable to extensions and additions to existing buildings. With regard to this argument the first observation is that the present application included residential premises which would be located, even though on the second floor, below the elevation of the regional flood and there was no evidence that the policy of the respondent as it might be inferred from their practice extended to residential construction. However, with reference to the argument itself, the major purpose of the Conservation Authorities Act and the regulations that have been made thereunder is to prevent reoccurrences of floods such as those that occurred in Hurricane Hazel and in 1937 on the Thames River. To achieve this, conservation authorities were created under the Act and they were given authority to make regulations prohibiting the construction of buildings and other structures in flood plains. Pursuant to these programs the flood plains have been established and conservation authorities, including the respondent, have enacted regulations the main thrust of which is to prohibit the construction of buildings within flood plains unless the proposal falls within some recognized principle of flood plain management. The words of the regulation in the particular case are found in section 4 of Regulation 180 of Revised Regulations of Ontario, 1980 and read "will not affect the control of flooding or pollution or the conservation of land". Hence the major tool of flood prevention is the prohibition of construction within flood plains. The most serious type of construction is the construction of residential property as there is a greater risk of loss of human life in connection with such property. However, with regard to the argument of the appellants it must be obvious that if effect were given to the argument there would be no control exercisable whatsoever under the practice and policies adopted by the Conservation Authorities Act and the Regulation. Accordingly, the precedents which were quoted to the tribunal cannot be established as a grounds for granting permission in the present case. The fact that the proposed building includes residential quarters and the fact that it is a new building are inconsistent with any concept of flood plain management.

The second argument mentioned by the appellants, although

it was not referred to in the final submission, was an element based in effect on the legal principle of estoppel. It was argued in the brief submitted by the appellants that at the time approval was given to the severance of the 66 foot part of the subject lands that there was a temporal qualification of the use, namely, that it was stated to be a use "at the present time". It was suggested that this qualification of the application for severance carried with it some inference that the respondent would be obliged to consider future uses at the time its position with regard to the severance was made. The evidence in respect of the particular transaction indicates that in expressing its lack of objection to the severance the respondent clearly reserved its responsibility to consider even the proposed use at such time as it might be implemented. There is every reason to believe that the use of the subject lands as a parking lot would be one of the most acceptable uses of the subject lands from the point of view of flood plain management and in the absence of the application showing any other use the approach can only be regarded as an illogical extension of not objecting to the severance.

Thirdly, it was submitted that the policy of the respondent was inconsistent with the official plan of the Town of St. Marys. Reference was made to part of Paragraph 2.7.4.2 on page 28 of the official plan. The complete paragraph is as follows:

2.7.4.2. To achieve the above stated objectives the following policies shall be adopted and administered in partnership by the Town of St. Marys and the Upper Thames River Conservation Authority. These policies shall be applied to the area presently below the Hurricane Hazel floodline, as designated by the Upper Thames River Conservation Authority:

- 1) New building will be permitted below the designated flood level providing that building applications are submitted for review and approval by Council and the Upper Thames River Conservation Authority. In reviewing all such building applications, consideration will be given to the following guidelines:
 - a) The proposed use of the building space below the regional flood line.
 - b) The use of foundations and structural techniques within the building which will minimize or prevent flood damage.

- c) The elevation of the building's foundations.
 - d) The orientation of the building in relation to direction and velocity of flood flow.
 - e) The amount of imported fill required, if any.
- 2) Residential construction in flood plain lands will not be permitted, except where such residential development represents minor infilling of an existing residential area, or is a replacement of existing dwellings destroyed by fire or other natural disasters. Any permitted residential construction will be subject to the conditions of sub-section 1).
 - 3) Buildings located in the Central Area as shown on Schedule A and in floodplain lands may be expanded or altered providing such alterations are not major and are subject to the approval of Council and the Upper Thames Conservation Authority.
 - 4) Consideration will be given by the Upper Thames River Conservation Authority and Council to building applications below the regional flood level where revised flood line mapping or remedial structural action indicates a reduced hazard of flooding.

It was submitted that the failure of the respondent to grant permission in the subject application constituted a failure to exercise the co-operation required by the official plan. The submission of the respondent was that it was not bound by a provision in the official plan to refuse to carry out its duties and responsibilities under its Act and its Regulation.

With reference to this argument the tribunal is of the opinion that subparagraph 2 which was not quoted by the appellants is a complete answer to the argument raised by the appellants. The subparagraph excludes residential construction in flood plain lands unless it constitutes a minor infilling of an existing residential area. There is no indication that the exception is applicable in the evidence in this case. The other alternative is the replacement of an existing dwelling destroyed by fire or a natural disaster and there is no evidence that this is the case in this application. Accordingly the tribunal cannot adopt the argument based on the official plan. With reference to official plans and other documentation where there is a conflict between the policies of the conservation authority and the local planning authority the tribunal has consistently taken the position that the provisions of

the planning legislation are not relevant in the appeals. The reason for the distinction is that zoning legislation is a political determination of the good of the entire community determined through the political process while the prohibitions contained in the Conservation Authorities Act and Regulations are related to the inherent incapacities of the land for the use in question.

In summation the present application involves the construction of residential and commercial premises in an area that is subject to flooding both in the one in one hundred year flood and in the regional flood and in the past has probably been flooded to serious depths. There is no doubt that the residential property and the occupants of the residential part of the property would be subject to the risks associated with major floods. With the location of the subject lands at the edge of the Thames River there is no opportunity for the application of the stage-storage doctrine or any other recognized exception to the general prohibition of construction of residential property in flood plains. No provision can be made for access and egress to the residential building in the event of a regional flood and the construction of residential building in an area that is prone to the depths of flooding of the subject lands is the major reason for the enactment of the Conservation Authorities Act and the regulations made thereunder.

The tribunal is satisfied that the appellants have not been deprived of any policy of the respondent under which permission in similar circumstances has been given to other applicants. There is no provincial policy under which permission should be granted to the appellants and accordingly this tribunal has no alternative but to dismiss the appeal.

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 any of the parties to the matter.

DATED this 18th day of December, 1984.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.