



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 construct a house on Lot 3 according to Plan 786 in the Township of North Dorchester in the County of Middlesex.

B E T W E E N :

HAROLD GRAYSON and
JOAN GRAYSON

Appellants

- and -

UPPER THAMES RIVER
CONSERVATION AUTHORITY

Respondent

D.S. Thompson, for the appellants.
T.G. Price, for the respondent.

The appellants appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission to remove an existing residence from Lot 3 according to Plan 786 in the Township of North Dorchester in the County of Middlesex and replace the residence with a new residence and garage. 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 London on October 17, 1984.

The appellants own Lots 3 and 4 according to Plan 786. The original application was to construct a new residence with an attached garage on Lot 4. The appeal was argued on the basis that the issue was the removal of the existing residence on Lot 3 and the building of a new residence on that lot. The existing residence measures 26 feet by 30 feet. It was proposed that the new residence measure 25 feet by 42 feet and that an additional garage measuring 25 feet by 25 feet be placed at the south end of the residence. The appellants indicated that they would waive the garage if permission were granted for the house.

The existing house fronts on the road known as the travelled road that runs in a northerly direction from a road

running in an east-west direction known as River Road and being parallel to the Thames River. The Waubuno Creek flows southerly into the Thames River and forms the rear boundary of the lot in question. The lots are included within the one in one hundred year flood line of the Thames River as well as the regional flood line. There has been no calculation of the Waubuno Creek flood lines. The existing house is 150 feet from Waubuno Creek and faces in an easterly direction. Easterly of the house the flood plain extends for approximately 200 metres or in excess of 600 feet.

The elevation of the regional flood is 246.89 metres. The elevation of the one in one hundred year flood is 246.19 metres. The existing house is situated on an area with an elevation of 245.2 metres and would appear to be situated on filled lands, particularly as the appellants indicated that there was a wall between the house and the river which caused the usual spring floods to be diverted around the existing house. The elevation of the lands to the east of the existing house are 244.7 metres and as low as 244 metres at a location closer to the regional flood line than to the subject lands. Accordingly, there would be approximately seven feet of flooding on the subject lands in a regional flood.

With reference to the programs for control of flooding the evidence on behalf of the respondent indicated that the subject lands and lands adjoining had been included in a program for land acquisition and that, although approvals by the municipalities and the Ministry of Natural Resources have not yet been obtained, if funds were available acquisition might occur within one or two years. Apart from this aspect the witnesses for the respondent indicated that the policy of the respondent was to reject applications for new construction in flood plains.

The evidence of the appellant, Harold Grayson, was that the subject lands flood annually in the spring thaws although on no occasion in his twenty-nine years of residence has there been any difficulty with water entering the house. He admits that there was three feet of water on Lot 4 but gave evidence that this water was

diverted by the retaining wall around and to the south of the existing house. Although the appellant, Harold Grayson, had not observed it there was additional evidence supported by photographs and slides indicating that in the spring thaw of the year 1984 there was flooding on the front portion of Lot 3. Mr. Grayson admitted that he had seen six inches of water on the front but he interpreted this as being on the road rather than on his lot.

There was evidence of permissions given in respect of other lands in the area but they are not helpful to this tribunal. One of the properties appears to have been built above the regional storm flood line. There was some confusion in respect of the type of renovations on the Thompson property which was further north and at a higher elevation than the subject lands. Permission had been granted to an owner at the intersection of the travelled road and the River Road to raise an existing building above the nuisance level although the elevations in this area would indicate that in a regional flood there would be greater flooding than on the subject lands.

The appellants had estimated that the cost of building the new residence would be in the vicinity of \$43,000.

Four arguments were advanced on behalf of the appellants. Firstly, it was suggested that the proposed changes were merely cosmetic changes and ought not to be denied. Secondly, it was submitted that the reasons given by the respondent inferred that the reason was the increasing of the threat and risk to loss of life and increased property damage and it was submitted that there would be no greater risk of loss of life as it would not be expected that the number of residents in the house would increase.

With reference to the increased value of the premises, it was submitted that the Act and Regulations do not prohibit the improvement of existing property and that an increase in the value of property which would result in additional compensation if a program of compensation resulted from a regional flood was not a relevant consideration.

In addition it was submitted that the evidence did not disclose a problem related to floods and that the small amount of

increase in the loss of storage capacity would not interfere with the control of flooding.

On behalf of the respondent it was argued that there was a significant difference in the proposed buildings, particularly with an addition of 12 feet by 25 feet and the garage measuring 25 feet by 25 feet. It was submitted that these increases constituted a substantial change in the existing situation. Secondly, it was argued that under Regulation 180 of Revised Regulations of Ontario, 1980 the major principle is the prohibition and the exception to permit construction is discretionary. It was submitted in respect of the exercise of discretion that there were two areas of effect on the control of flooding. Firstly, it was submitted that the permission of allowing new construction in an area that would be subject to approximately seven feet of flooding would establish a serious precedent which if allowed would provide a basis for six or seven other property owners in the area requesting permission to build on vacant land. Secondly, it was submitted that a program of purchase is a valid method of control of flooding and the expenditure of funds at this time flies in the face of such a program. It was also suggested that the phrase "control of flooding" particularly when associated with an opinion of a conservation authority warrants an interpretation that the risk of life or damages to property are appropriate considerations when considering the control of flooding. It was submitted that one could not rely on the existing number of residents and that in the future there could be larger families and with reference to damage that the expenditure of \$43,000 created a more significant risk than presently exists.

Further, it was submitted that the evidence indicated that the policy of the respondent was to prohibit new construction in flood plains and that the subject application did not fall within any exception to the policy as enunciated by the Province or by the respondent particularly as the subject lands were below the one in one hundred year elevations.

In reply it was suggested that it was not within the jurisdiction of a conservation authority to engage in a population

control program and that their interest should be directed toward the control of flooding which, it was submitted was not affected by the proposal.

It is apparent to the tribunal that the program of control of flooding of the respondent in respect of the subject lands involves two approaches that are relevant to this appeal, namely, the prevention of new construction in flood plains, particularly residential construction and an acquisition program. Both of these approaches are recognized principles of control of flooding and the application of the appellants cannot be considered to be other than not in accord with such approaches to the control of flooding. It may be unfortunate that the reasons of the conservation authority referred to an increase in the risk of life and damage to property. The tribunal is of the opinion that the inference derived from the evidence respecting the increase in size of the residence that there would be an increase in risk both as to people and property is well established by the evidence but apart from there being such an increase in risk there are the patent risks of construction of residential buildings in an area subject to approximately seven feet of flood waters in a regional storm. It is beyond doubt that it is the responsibility of conservation authorities through the Conservation Authorities Act and Regulations made thereunder to prevent reoccurrences of the Hurricane Hazel situation and other situations in which deaths, injuries and property damages have occurred as a result of the construction of residences in flood plains. The depth of flooding in this particular case is so significant that it is beyond question that the respondent acted properly in the circumstances in refusing the permission requested.

With reference to the issue of value of property the tribunal accepts and it has been accepted for a considerable length of time that the acquisition of property in areas subject to serious flooding is a proper tool of the control of flooding and the tribunal cannot accept the argument of counsel for the appellants in this regard. The suggestion that a landowner should be permitted to increase the capital investment in respect of a

parcel of land or a building, if not the value, is inconsistent with such a program and assuming such investment were recoverable on an acquisition regardless of the fair market value, such an approach can only be regarded as an irresponsible use of public funds. However, it is also possible that if the end result of the capital investment was not reflected in the true market value and the acquisition price did not reflect the existing market value plus the capital investment, the landowner might shortly be in a position where a financial loss is suffered and it is only fair that where an acquisition is imminent that the landowner be made aware of this risk. Both the public and private purses are exposed to unwarranted losses if this aspect is not regarded.

With reference to the question of loss of storage capacity and the negligible effect the additional size of the residence would have, the usual consideration of such matters relates to the issue of precedent and reference is made to a statement in the decision of Van Galder v. The Rideau Valley Conservation Authority in which this matter was discussed 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 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.

Accordingly, the tribunal is of the opinion that the decision of the respondent in this matter is in accordance with the policies of that conservation authority and the Province of Ontario

and that there is no recognized principle under which an exception could be granted to permit the construction of a residence in an area subject to approximately seven feet of flooding in a regional storm situation. The prevention of such construction is the main purpose of the Conservation Authorities Act and this tribunal can see no reason to create any exception to that overall approach in this case.

IT IS ORDERED that the appeal 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 11th day of December, 1984.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.