



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

IN THE MATTER OF

An appeal against the refusal to permit the construction of an addition to an existing house on part of lots 3 and 4, Plan 376, municipally known as 19 Duke Street, in the City of London in the County of Middlesex.

B E T W E E N :

LLOYD C. NICHOLS

Appellant

- and -

UPPER THAMES RIVER
CONSERVATION AUTHORITY

Respondent

The appellant in person.
R. J. Flinn, Q.C. for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission under Ontario Regulation 755/73, a regulation made by the Upper Thames River Conservation Authority and approved by the Lieutenant Governor in Council, to add 1,320 square feet to the existing house containing 750 square feet and situate on the subject lands. By Ontario Regulation 783/76 the duty of hearing the appeal was assigned to the Mining and Lands Commissioner.

Sections 3 and 4 of Ontario Regulation 755/73 read as follows:

"3. Subject to section 4, no person shall,

- (a) construct any building or structure or permit any building or structure to be constructed in or on a pond or swamp or in any area

susceptible to flooding
during a regional storm;

- (b) place or dump fill of any kind or permit fill to be placed or dumped in the areas described in the schedules hereto whether such fill is already located in or upon such area or areas or brought to or on such area or areas from some other place or places; or
 - (c) straighten, change, divert or interfere in any way with the existing channel of a river, creek, stream or watercourse.
O. Reg. 755/73, s.3.
4. Subject to The Ontario Water Resources Act or to any private interest, the Authority may permit in writing the construction of any building or structure or the placing or dumping of fill or the straightening, changing, diverting or interfering with the existing channel of a river, creek, stream or watercourse to which section 3 applies, if, in the opinion of the Authority, the site of the building or structure or the placing or dumping and the method of construction or placing or dumping or the straightening, changing, diverting or interfering with the existing channel will not affect the control of flooding or pollution or the conservation of land. O.Reg. 755/73, s.4."

The appellant, a real estate salesman, purchased the subject lands four years ago. He gave evidence that prior to completion of the purchase he attended at the offices of the City of London and was assured that he would have no difficulty in obtaining a building permit to erect an addition to the existing residence on the property. Upon his recent application for a permit he was refused until such time as he could obtain a permit under Ontario Regulation 755/73. He applied to the respondent and following a hearing his application was rejected on the grounds that inasmuch as the area is susceptible to flooding during a regional storm, in the opinion of the Authority, a permit would

affect the control of flooding or pollution or the conservation of land.

The appellant presented four points in his argument. Firstly, he pointed out that his proposal would result in the construction of a building that is smaller than the two adjacent houses. Secondly, he understood that the Almatex Paint Company was being granted permission to build an addition to its plant that is situate on the east side of Duke Street to the south of his property. Thirdly, he did not believe there is a flood problem and if there is such a problem the respondent should buy the property. Fourthly, he had indicated his willingness to execute an indemnity agreement, indemnifying the respondent and the City of London against any future claims if a permit were granted.

Mr. Murray T. Kinniburgh, the Resources and Technical Supervisor of the respondent, gave evidence on behalf of the respondent. The subject property lies within the natural formation known as the Coves. The Coves are an area that is believed to have encompassed an oxbow in the Thames River. At some time in the past a dyke was erected which prevented the river flowing through its natural channel with the result that the East Cove and the West Cove are now stagnant bodies of water fed by runoff.

The respondent has caused James F. Maclaren and Associates, consulting engineers, to prepare a study of the regional flood lines and the maximum observed flood lines in the area. This study and the resultant mapping shows the following relevant elevations:

Regional flood line - 774 feet
Elevations of the dyke - 772.5 to 776 feet
Maximum observed flood line (1937) - 772 feet
Elevation of the existing dwelling
on the subject lands - 767.5 feet
Elevation of site of proposed extension - 765 feet

The Coves form a horseshoe-shaped body of water with the

dyke at the northerly and separating these bodies from the main channel of the river. In the area immediately south of the dyke there is park land. At approximately one-third of the distance from the north end of the area a street known as Springbank Drive crosses the Coves in an easterly and westerly direction.

Residences have been constructed in the past along each side of Springbank Drive. Duke Street runs in a southerly direction from Springbank Drive. Residences and other buildings have been constructed in the past along each side of this street. Duke Street lies within the land that is surrounded by the Coves. It is a flat area and currently is dependant on a pumping station to pump out drainage water. The area encompassed by the Coves is approximately 100 acres in size, and apart from the aforementioned buildings, is composed of a trailer court, orchards and other vacant lands. This central area has elevations from between 759 feet to 766 feet.

The policy of the respondent is to prevent any expansion or new construction in this central area. This policy is based on a second study by James F. Maclaren and Associates which examined the protective measures that would be necessary to protect the Coves area from flooding during a regional storm. The 1973 estimate of the cost of such remedial works was in the vicinity of one million dollars and funds have not been available to undertake the construction of such works.

The witness indicated that as far as the respondent was concerned it had not received an application from Almatex and upon the most recent inspection there was no indication of any construction having commenced on their property. The regulation has been enforced by causing a sewer contractor to remove fill placed on property lying to the east of the East Cove within the flood plain. The German-Canadian Club erected a building on the strength of a building permit

issued by the city at a time when there was no liason between the city and the respondent. This situation has been rectified.

The position of the respondent was that it was concerned with the situation that would arise in the event of a regional storm which would top the existing dyke and flood the Coves including the subject property. In such event the subject property would be in nine feet of water resulting in risks to the property itself and the inhabitants of the property and creating risks of public expenditures in evacuation programs and restoration programs.

Mr. Kinnibrugh indicated that the proposal did not greatly affect the storage capacity if the building alone were permitted. With modifications to raise the building and the surrounding land to the regional flood line there would be a significant interference with the storage capacity.

Counsel for the respondent pointed out that the proposal would create a hazard three times as great as the existing hazard and would set a dangerous precedent. This precedent could be applicable to other residences in the area and might even make it difficult to refuse the application of the Almatex plant if an application is received from the company.

In reviewing the representations it is noted that the proposal of the appellant does not fall within any of the recognized exceptions to the prohibition of construction and placing of fill in the flood plains. The risks of flooding in the event of a regional storm are too great to permit further extension of the existing property. The evidence indicates that in the event of a storm equalling the 1937 flood which is the highest flood on record, the property would be in seven feet of water. In view of this danger to any building that may be erected and to the occupants of

the building, a permit should be refused.

Dealing more specifically with the points put forward by the appellant it is noted firstly that he alleged that he had been assured by city officials that he could proceed to build an extension. However, it is apparent today that there are serious problems and these problems must not be overlooked. These problems are not reduced by reason of the proposal being smaller than adjacent buildings.

On the point of there not being a flooding hazard I have no alternative but to accept the professional evidence of the witness for the respondent and conclude that the subject lands have a substantial risk as a building site.

The matter of whether the respondent or some other authority should have a program to acquire such property is not one for this tribunal to determine. The cost of such a program would be enormous particularly when all similar properties across the province are considered. It may well be that in the future some program may be developed to provide assistance for people who have acquired hazard land. However, I know of no such policy or program at the present time.

With reference to the matter of an execution of an indemnity agreement I cannot accept this approach as sufficient grounds in itself to warrant the issue of a permit. The indemnity agreement meets to some extent the problem of provincial and municipal expenditures in the event of future floods in cases where exceptions are made on other recognized grounds. Further it provides no real assurance that this consideration is effectively dealt with as such agreements do not run with the land, i.e. are not binding on subsequent purchasers. The indemnity agreement is frequently made a condition of a permit where there is a recognized exception to the prohibition of the regulation but in this case there has been no

evidence submitted which would indicate that any of the recognized exceptions should apply. In fact, the evidence indicates that there is a very serious hazard and that the risks involved should not be increased. The site is in the centre of a low lying flood plain which would be subject to unacceptable flooding in the event of a storm of the equivalent of the severest storm on record or in a regional storm. Accordingly, I am of the opinion that the refusal by the respondent to grant the permission was proper.

IT IS HEREBY ORDERED that the appeal herein be and is hereby dismissed.

There shall be no costs payable by any of the parties.

DATED this 19th day of November, 1976.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.