



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 an addition to a cottage situate on Lot 1 in Concession VI, N.S., in the City of Burlington.

B E T W E E N :

VILIS KLEPERIS

Appellant

- and -

THE HALTON REGION
CONSERVATION AUTHORITY

Respondent

Rev. Juris Calitis, agent for the appellant.
M.J. Haesler, Q.C., for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to issue permission to construct an addition to a cottage situate on Lot 1 in Concession VI, N.S., in the City of Burlington. 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 Hamilton on October 1, 1982.

In his opening remarks, Rev. Calitis, the Pastor of St. Andrew's Lutheran Church, advised that the church has operated a summer camp on the Bronte Creek for approximately thirty years. The camp is used primarily by children but there are a small number of cottages for summer use which are erected on leased sites. The control of the property of the respondent is governed by a development agreement with the City of Burlington which controls the character of buildings erected on the premises.

In 1980 the appellant, on the strength of then existing flood plain mapping which showed the subject lands to be outside the flood plain, obtained a building permit from the City of Burlington and proceeded to enlarge his cottage. Shortly thereafter the city withdrew the permit on the grounds of new flood plain mapping. On completion of the mapping the appellant applied for permission from the respondent and in his correspondence was advised that in view of the two and one-half feet of potential flooding in a regional storm his application would be refused. It was suggested that, although it was not shown in the application, the appellant would be prepared to take steps to flood proof his addition and the evidence indicated that he was prepared to flood proof not only the addition but also the existing cottage.

The evidence of the appellant was that he proposed to add two bedrooms and a family room in order that the cottage could accommodate a larger family. He indicated that he had spent some time and money under the original permit but the extent of such expenditure was not documented. He indicated that in his experience and the experience of other cottage owners over the thirty year period in which the camp had been operated there had never been any flooding experienced at the subject lands and their information was that even in Hurricane Hazel there was no flooding. The appellant attempted to question the validity of the flood lines on the flood plain mapping filed as Exhibit 4 by pointing to higher areas and suggested that as the problem was a backwater problem the subject lands would not be flooded in a regional storm notwithstanding the fact that the flood plain mapping shows the subject lands to be in the flood plain.

In passing it may be noted that this tribunal cannot draw such inferences from plans themselves. The plans are prepared through a computer process which, like any other

process may be subject to error but in the absence of evidence to show such error the tribunal has no expertise of its own through which it can conclude that a property is within or without a flood plain or that the degree of flooding in a regional storm would be less than is indicated on the flood plain mapping.

The witness pointed out facts which indicate the need for control of buildings in flood plains indicating that in the Credit Valley there are 2,000 permanent homes and 6,000 people residing in the flood plain. He suggested that the situation would be improved if the cottage were raised and flood proofed.

Here again, this is not the evidence of a qualified expert and while it may appear to the average person that raising of a cottage above the flood elevation and flood proofing a cottage are answers to the regional storm such is not the case as structures constructed in the flood plain with flood proofing have a serious effect on flood plain management.

The evidence of John Douglas Hall, the Manager of the Resources Planning Division of the respondent, indicated that the subject lands were probably subject to four feet of flooding in a regional storm. It was pointed out that there was a variation in the final plan with information that had been provided to the appellant at the time the application was rejected, the information that was available at that time being merely a preliminary draft of the plan.

This witness outlined the reasons for rejecting the permission and as the appellant has these they will not be repeated in full. In summary the reasons related to the subject lands being situate in an area susceptible to flooding during regional storms, the policy of the respondent to avoid, where possible, the construction of building or structures in such areas, the potential damage to the building itself even though

the building were flood proofed and the potential loss of life and property damage to the properties in the camp as well as the subject lands. The authority was concerned with the precedent that would be set. If permission were granted, similar additions would have to be approved for all other cottages in the camp site.

The witness commented further on an interim policy of the respondent to provide some relief for existing buildings. This policy permits minor alterations of existing buildings that are in flood plains provided the buildings are under full time occupation and are not used seasonally.

The evidence of Carey Thomas Moore, the Manager of the Water Resources Division of the respondent, indicated his role in the preparation of the flood plain mapping and gave evidence that the mapping was accurate to within .25 of a metre.

The submissions on behalf of the appellant were that he had been caught in the middle of a change which was unexpected and because he had started his construction under a building permit at a time that it was considered unnecessary to have a permit from the respondent, he should be entitled to proceed. It was submitted that the risk of life was unlikely because there were areas within the camp where the occupants could gather in safety in the event of a flood. It was further suggested that it was strange that if a cottage was being improved that such improvements should be rejected. It was frankly submitted that the case was a test case but that on the merits by reason of the construction having been undertaken some time ago the permission sought should be granted.

On behalf of the respondent it was pointed out that the proposal of the appellant is more than merely improving his existing cottage and involves an addition of two bedrooms and a family room which carries with it the usual problems

associated with the erection of structures in a flood plain. The reasons given by the respondent in the beginning, were relied upon. In reply it was submitted that the cost or the financial burden of improving the existing cottage is not warranted unless an extension were authorized.

At the outset it should be observed that there was nothing in the evidence brought to the tribunal by or on behalf of the appellant or extracted from the witnesses of the respondent that established any principle of flood plain management on which the application should be granted. The policy of the respondent was outlined and there was no evidence to show that the policy of the respondent as carried out in fact, varied from the policy stated in the evidence. There was no suggestion that the appellant was being denied permission in circumstances where permission had been granted to another applicant.

The real thrust of the appellant's case, apart from the fact that he had received a permit from the building department of the local municipality, was that flood proofing of the building would justify the granting of permission. There was no scientific evidence to establish that such an approach constitutes an acceptable principle of flood plain management. From the experience of this tribunal flood proofing is not normally accepted by any conservation authority as a grounds for exception but is merely used as one of the conditions where a proposal falls within some acceptable principle of flood plain management.

With reference to the issue of the permit by the municipality all this tribunal can observe is that if the municipality made an error and to grant permission under the Conservation Authorities Act was wrong, in so doing one would be attempting to deny the adage that two wrongs do not make a right. The respondent has outlined the harm associated with the proposal of the appellant and the risks to life and property in

the event of a regional storm. It may be noteworthy to comment that the evidence showed that the existing experience does not include an occurrence of a regional storm and that in the area in question Hurricane Hazel was not considered to be a regional storm. The concerns of the respondent regarding precedent are borne out particularly by the submission that the present application is a test case.

On the evidence the appellant is not entitled to permission under the basic policy of the respondent or under the interim policy that has been adopted pending finalization of the results of the recent flood plain mapping. In the absence of the establishment of any applicable principle of flood plain management this tribunal has no alternative but to dismiss the appeal. It may well be that as programs of the respondent are developed in the future some principle of flood plain management may become applicable.

1. IT IS ORDERED that the appeal in the matter be and is hereby dismissed.

2. AND IT IS FURTHER ORDERED that no costs shall be payable by either party to the matter.

DATED this 17th day of December, 1982.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.