



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 house and relocate the existing garage on Lot 7 in Concession III, in the City of Burlington in the Regional Municipality of Halton.

B E T W E E N :

DOUGLAS SWALLOW

Appellant

- and -

THE HALTON REGION
CONSERVATION AUTHORITY

Respondent

The appellant, in person.
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 house and relocate a garage on Lot 7 in Concession III in the City of Burlington. By Ontario Regulation 364/82 the power and duty of hearing such appeals were assigned to the Mining and Lands Commissioner. The appeal was heard in Toronto on November 24, 1982.

The subject lands are a 7/8 acre parcel lying northerly of the Guelph Line and westerly of the Bronte Creek. An existing residence approximately one hundred years in age is situate at the end of a driveway approximately one hundred and sixty-five feet in length from an outlet, that is common with other landowners in the area to the Guelph Line. The proposal of the appellant was to add a cylindrical addition to the residence which would be two storeys in height and to replace the existing garage with a new garage near the Guelph Line so

that it would not be necessary to shovel the long driveway in the winter time.

At the outset the respondent, as a result of recent flood plain mapping and the development of an interim policy in respect of existing buildings in the flood plain, indicated through its counsel that it was prepared to withdraw its objection to the part of the application dealing with the extension of the residence. It was submitted that the order might provide for such approval subject to flood proofing and a site plan location. The determination of these two matters was not completely agreed upon by the parties and this tribunal is of the opinion that the better approach is for the parties to work out these principles and in the event the tribunal can be of assistance in this regard the parties may again apply to the tribunal in this regard. Accordingly, the issue between the parties relates solely to the replacement of the garage. The existing garage had been dismantled through a misunderstanding of the appellant following consultation with municipal officials that the necessary permit could be obtained. However, the respondent is treating the matter as if the principle of replacement of existing buildings were applicable.

The subject lands are situate within the flood plain of the regional flood on Bronte Creek. Exhibit 1, a recent flood plain mapping, shows both the regional flood elevation and the elevation of the one-hundred year storm. There was some doubt as to the location of the proposed relocation and after an adjournment it was agreed that the proposed location was situate within the flood fringe i.e. the area between the maximum elevation of the one-hundred year storm and the regional storm.

The issue between the parties appears to be reduced to one point. The evidence of the respondent was that it has established an interim policy in respect of relocation and minor

additions to existing buildings in the flood plain of the regional storm. The respondent has not adopted the provincially recommended two zone policy. Its policy is as follows,

"On the flood fringe outside of a minimum 100 year storm floodway where the depth of flooding is less than one meter and velocities are less than one meter per second an application may be considered for approval by the Halton Region Conservation Authority to construct minor additions to existing buildings or relocate existing buildings or structures provided it can be shown that such works will not increase the risk to life or damage to existing flood plain properties and where such works are proposed to be flood proofed against regional storm flows, and where no alternate site exists for the proposed works outside of the regional flood plain."

Thomas Carey Moore, the Manager of the Water Resources Branch of the respondent who is a qualified engineer and has had experience in water related matters with the authority for a period of three years, gave evidence respecting elevations and velocities of the regional flood. Based on the new mapping filed as Exhibit 1, there is a cross-section through the site of the proposed garage showing an elevation of 179.95 metres. The elevation of the subject lands appears to be 173 metres which would result in there being a depth of water in a regional flood at the location of approximately six feet. It will be noted that this depth is considerably in excess of the depth of water mentioned in the policy of the respondent. With regard to velocities the evidence of the witness was that the velocities at the proposed site are in the range of three metres per second. This range is three times the velocity mentioned in the interim policy. The witness further indicated that, although he was not aware of the proposed strength of the garage these velocities are extremely serious and in normal

circumstances would cause sufficient erosion to remove the building itself from its foundations and cause the floating debris to damage other properties in the flood plain or cause the blocking of downstream constrictions whether they be natural or man-made with the result that a damming effect can be created.

Notwithstanding the foregoing observations the witness indicated that he was satisfied that there is at least one location on the subject lands to which the garage could be located and comply with the new interim policy of the respondent.

On cross-examination the witness indicated that the only concern was a regional flood as the site is above the one-hundred year storm and that the occurrence of a regional storm would be remote. He qualified this statement somewhat by saying that the potential for recurrence of a regional storm is more frequent than most people believe.

The submissions made by the appellant were that this tribunal should exercise a discretion and override the policy of the respondent. It was suggested that the standards were theoretical and impractical with the appellant referring to them as "conversation pieces".

It was submitted on behalf of the respondent, that the policies were relevant to the appropriate issue and that there was no evidence to show that the application falls within the policy of the respondent either as expressed or as exemplified in practice as shown by the evidence.

At the outset it may be said that one cannot deny that this tribunal has a discretion in the matter. However, the thrust of the argument of the appellant was that the discretion should be exercised on the basis of such matters as comfort or an economical approach. There can be no doubt that the existence of a discretion does not permit the exercise of the function on the basis of whim, prejudice, or what might be

referred to as intestinal sensations. The significance of the decision being discretionary is that the decision has to be based on the policy matters contained in the legislation as contrasted with legal rules established by law, whatever that law may be. Hence, the exercise of a discretion should be based on some principle related to flood plain management, which is the obvious purpose of the Conservation Authorities Act.

With reference to the policy of the respondent the written policy is set out above. A number of cases were drawn to the attention of the tribunal but the evidence indicated that in each case the site was either above or understood to be above the elevation of the regional storm.

As the hearing proceeded this tribunal had some difficulty in understanding why, with a slight difference in elevation and with the possibility that the proposed site was actually higher than the site of the residence, that the policy of the respondent would permit an extension of residential premises but prohibit a relocation of an existing garage. However, as the evidence was fully developed the issue of velocities became significant and the risks, in the event a regional storm both of damage to the garage itself and to downstream properties from contact with the garage in a floating position and upstream properties that might result from the creation of dams as a result of floating debris from the garage, became apparent to the tribunal. The evidence of velocities shows that the velocity at the proposed site would be in the vicinity of three metres per second while at the location of the residence the velocity would be merely one metre per second.

The engineer gave a reason for the difference in velocities and there was no evidence of an expert nature to contradict his evidence. This tribunal appreciates that, as was

given in evidence by Moore, a velocity of three metres or nine feet per second has significant erosive force and it has been the experience of this tribunal in other hearings that concern has been expressed where velocities reach five or six feet per second. Accordingly, the tribunal is satisfied that there are significant concerns with respect to the proposed location of the garage, which concerns could be alleviated if an alternative site were chosen. There appears to be no reason in the evidence before this tribunal that the convenience of the present owner should outweigh the risks to the present owner as well as all future owners of the property and adjacent landowners in the flood plain. This tribunal is of the opinion that the appellant would be well advised to consider the alternative location mentioned by the witness for the respondent.

1. IT IS ORDERED that the appeal in this matter be and is hereby dismissed.
2. AND IT IS FURTHER ORDERED that no costs shall be payable by either party to this appeal.

DATED this 17th day of December, 1982.

Original signed by G.H. Ferguson

Mining and Lands Commissioner.