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Ontario

The Mining and Lands Commissioner

In the matter of The Act

CONSERVATION AUTHORITIES

G.H. Ferguson, Q.C.) Tuesday the 4th day of
Mining and Lands Commissioner) April, 1989.

AND IN THE MATTER OF

An appeal against the refusal to grant permission to construct an addition to an existing building Municipally known as Cottage No. 46, Ferndale Park, on part of Lot 32 in Concession III in the Town of Caledon (Ching.) in the Regional Municipality of Peel.

B E T W E E N :

SAMIR MESSIEHA

Appellant

and

CREDIT VALLEY CONSERVATION AUTHORITY

Respondent

The appellant in person.
J. Olah, for the respondent.
N. Koltun, for the Town of Caledon on behalf of Mary Schofield, the building inspector for the Town of Caledon.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission to construct an addition to an existing building Municipally known as Cottage No. 46, Ferndale Park on part of Lot 32 in Concession III in the Town of Caledon, formerly in the Township of Chinguacousy. 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 Toronto on November 17, 1988. Subsequent to the hearing the appellant retained counsel in respect of the calling of additional evidence. Counsel for the appellant has advised that this aspect of the matter will not proceed and that it is appropriate to proceed with the rendering of the decision and the reasons.

The subject lands constitute a part of an unofficial plan lying in part in the floodplain of the Credit River southerly of Belfontaine and known as Ferndale Park. The evidence indicated that there is no ownership by the occupants of

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the buildings and that some type of co-operative arrangement exists under which a person desiring to acquire the interest of a previous occupant purchases the shares of the previous occupant in the co-operative.

The evidence of the appellant indicated that he paid $6,000 under the arrangement entered into in 1985 for the existing building which measured twenty-four feet by eighteen feet and had an addition at the back measuring six feet by eight feet in which toilet facilities were located. Part of the arrangement was that the building be raised and new beams be placed under the building. The transaction was closed in 1986

The building fronts on a road running parallel to and westerly of the Credit River. Another road runs at right angles to this road along the southerly side of the property. Subsequent to the closing of the transaction the appellant constructed an addition at the westerly end of the building which addition protruded ten feet westerly from the main wall of the existing building. The toilet facilities were proposed to be or have been moved from the original location into the main part of the original building and the addition was designed for use as a kitchen. In addition the appellant proposed to construct a balcony on the southerly side of the addition over a door which would provide access from the side road.

A number of proceedings were taken by the local municipality by way of stop order and prosecution in respect of the construction of the addition to the building but this tribunal considers these matters not to be relevant in respect of the issue before it.

The existing building is situate within the flood plains of the regional storm and the one in one hundred year storm of the Credit River. It is located near the mid point of the channels of both floods. The expert evidence called by the respondent indicates that in a regional storm there would be 2.1 metres or approximately seven feet of flood waters at the site. In a one in one hundred year storm there would be one metre or three feet of flooding. In addition the evidence indicates that

the velocity of the regional storm would be in excess of three feet per second and that such a velocity coupled with the depth of flooding would make the building and the addition highly susceptible to damage in a regional storm and further that it would not be possible for the dry flood-proofing of the addition or the building. The usual meaning of dry flood-proofing is the protection of a building from a regional flood and provision of access from the building so protected to land above the elevation of the regional flood. The evidence also indicates that such a depth of flooding and such velocities would have a risk to human life that would be in the building or in the area

evidence indicated that it was the policy of the respondent only to permit additions to existing residential buildings in a regional flood plain where dry flood-proofing can be done and accordingly the stated policy of the respondent was to refuse permission.

case of the appellant made reference to three properties which were said to be precedents for the granting of permission in circumstances analogous to the present. The first reference was to a property known as the property of Gino Faion. This property is situate westerly of the subject lands but on the road along the southerly side of the subject building. The evidence clearly establishes that this building is outside of the regional flood-line and was not within the jurisdiction of the respondent and any permits issued would have been issued out of an abundance of caution or some other reason. In any event it is certainly not a precedent for the granting of permission within the central part of the channel of the regional flood.

A second property referred to was the property next door in respect of which a building permit had issued. A permit had issued for the purpose of stabilizing the foundation of this property known as the Holmes property. The evidence further indicates that while there had been an addition at the rear or westerly side of this property the addition was made prior to the time that the respondent had jurisdiction over the area. There

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was no evidence to indicate that the permission of the respondent extended to the authorization of an addition on the westerly side of the Holmes property

The third property raised was known as the Kettingham property. The municipal number of this property is 77 Credit Road. The evidence of the officials of the respondent indicated that this property is above the regional flood-line and hence cannot form any precedent in respect of the subject application.

In addition to the risks of flooding the Manager of Resources Planning of the respondent, Marilyn Eger, gave evidence that the subject property was at risk in the spring break-ups from ice damage and that the build-up of ice not only would damage the property but might also create additional flooding if it created an ice jam.

The appellant made very brief submissions relying primarily on his alleged good faith in proceeding in the matter. He also referred to the fact that the new building was more likely to withstand flooding than the building at the time that he acquired it. Counsel for the respondents submitted that both matters were not relevant and I concur with the position taken by counsel. The harm dealt with by the Conservation Authorities Act is the creation of intrusions into flood-plains which would cause additional flooding as well as being hazards to the occupants of the buildings.

It is apparent to the tribunal that with the depth of flooding and the velocity of the regional flood that the position of the expert witness, Kenneth R. DePodesta, P. Eng., to the effect that the proposed addition was highly susceptible to flooding indicates that the type of construction carried out by the appellant is the type of construction intended to be prohibited by the Act

On the evidence the tribunal is satisfied that the action taken by the respondent in this matter is in accordance with its express policy. Not only was the decision of the respondent in accordance with its express policy but having

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regard to the examples placed before the tribunal it cannot said that there was any implied policy of the respondent under which the appellant should be granted permission. There was no evidence before the tribunal that the appellant was deprived of permission in circumstances in which the owners of similar properties had been granted permission and it would follow that the respondent had established that it had dealt fairly and in accordance with accepted principles of floodplain control with the appellant.

The tribunal is not aware of any policy of the Province of Ontario or of any conservation authority that permits the establishment of residential property in an area that is subject to seven feet of flooding in a regional storm. Further even if such were the policy the evidence indicates that no satisfactory method of flood-proofing such an addition would be possible in the present circumstances and this secondary ground would support the refusal of the permission. For the foregoing reasons tribunal has no alternative but to dismiss the appeal.

Counsel for the respondent made a strong plea for costs in this matter. Reference was made to the failure of the appellant to co-operate with the Township officials in proceeding with the building notwithstanding the issue of stop orders, the need for hearings and inspections and the need to call expert witnesses at the hearing. It was pointed out that neither the evidence nor the submissions established any reasonable basis for allowing the appeal and that the conduct of the appellant nothing more than a strategy to delay proceedings. The submission of the appellant in this regard was that he acted in good faith and that he had no ability to pay costs. With reference to the first submission the tribunal might be convinced that the appellant acted in ignorance in the first instance but he continued with his construction following action taken by the Township to warn him of the needs of obtaining permits and notwithstanding the subsequent issue of a stop work order. The actions of the appellant in ignoring both of these warnings cannot in the opinion of this tribunal be classed as action

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taken in good faith and the second argument is one which, at best, can only be said to be not relevant. Accordingly, keeping in mind that an expert witness was called and that the hearing lasted for one and one-half days the costs of the respondent are fixed at $2,000

1. THIS TRIBUNAL ORDERS that the appeal is dismissed

2. THIS TRIBUNAL ORDERS that the appellant shall pay to the respondent its costs and disbursements of the matter fixed at $2,000.

SIGNED this 4th day of April, 1989.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.