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Ontario

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 second storey addition to a structure on part of Lot 11 in Concession III, W.H.S. in the City of Mississauga.

B E T W E E N :

FIELD AVIATION LIMITED and
DEREK TEELE

Appellants

- and -

CREDIT VALLEY CONSERVATION
AUTHORITY

Respondent

Wayne Barrett, B. Arch., Dipl. Arch., M.R.A.I.C., agent for the appellant.
R.I.R. Winter, Q.C., for the respondent.

The appellant, Field Aviation Limited, appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission to construct a second storey addition to a residence on part of Lot 11 in Concession III, W.H.S. in the City of Mississauga. By Ontario Regulation 364/82 the power and duty of hearing such appeals were assigned to the Mining and Lands Commissioner. The hearing was held in Toronto on September 13, 1982.

At the commencement of the hearing a motion was made on consent adding Derek Teele as a co-appellant. This action was taken as the corporate appellant had transferred the subject lands to Derek Teele after the commencement of these proceedings.

The subject lands are situate on the north side of Derry Sideroad West a short distance westerly of the community of Meadowvale. They also lie westerly of Willow Lane which runs in a northerly direction from Derry Sideroad West. Along the

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northerly side of the subject lands there is an existing watercourse which was formerly the tailrace of a mill constructed in conjunction with the Credit River. The area of the subject lands is relatively small, keeping in mind that it is serviced by a well and a septic tank and has an area of approximately 8,212 square feet. The evidence was that the minimum size of a lot, according to the regulations of the Ministry of Health, on which such services may be used is 15,000 square feet.

The subject lands are situate within the regional flood plain of the Credit River which is fairly wide at this location and narrows as it approaches Lake Ontario. The evidence of the engineer for the respondent, D.J.S. Tefft, on questioning from the Bench was that the flood plain was approximately 800 metres in width and that the gradient was relatively steep in this area. This witness indicated that the flow at the relevant cross section of a regional flood would be 65,000 c.f.s. and in his opinion such a flow would have a devastating effect upon an average building unless there was an equalization of the hydrostatic pressures.

There was no dispute as to the elevation of the regional flood or the elevation of the subject lands. The regional flood has an elevation of 168.2 metres according to the evidence produced on behalf of the appellant and the elevation of the subject property is 165 metres leaving a depth of water of 3.2 metres.

There is doubt as to the velocity of the regional flow. The evidence on behalf of the appellant was firstly, that it was 3.5 metres per second. Upon questioning from the Bench it appeared that the witness intended to say .35 metres per second. This evidence apparently was based on a report of

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a firm of engineers hired by the appellant, which report was not filed with the tribunal or attempted to be filed with the tribunal. On the other hand the engineer for the respondent indicated that he doubted the accuracy of the figure of .35 metres, particularly, when Barrett, who is an architect indicated that such velocity is less than wind pressure.

Situate upon the subject lands is a building some 100 to 150 years of age. It is of unusual construction with the walls being composed of two by ten inch planks laid on their side and nailed together. Extensive renovations were made to the building in 1977. Foundations were added to the easterly portion of the building and the building was bolted to the foundations. It seems that there was a change in the upper floor of the building at that time and three bedrooms were made into two bedrooms. These changes were made without the approval of the respondent.

In 1980 a fireplace and chimney were constructed with the approval of the respondent. The present application involves a number of changes in the first floor primarily composed of converting a bedroom to a dining area and changing the furnace room to a different location with incidental changes resulting therefrom. On the second floor it was proposed to add a third bedroom over an existing living room and porch which are situate on the upstream side of the building.

Over the years a garage had been removed from the premises and currently parking is done on the public road allowance, the site of the garage being used for a tile bed.

The evidence for the appellant included a statement that it would take twenty-two hours for a regional flood to peak and consequently there was adequate time to vacate the premises in the event of a regional flood. It was further suggested

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that with the level of flooding in the second floor being only two or three feet, there would be no risk to even a young child with such a depth of flooding. Although the regulations officer and the engineer for the respondent were called this time period was not disputed.

It was brought out in cross-examination of the witness for the appellant that it would not be possible to flood proof the lower storey of the building or even move the furnace and other utilities to a location above the flood elevation. The approach of the witness appeared to be that it would be satisfactory in the event of a regional storm, for the services on the lower floors to be completely flooded and two feet of water permitted to enter the second storey of the building. It was also apparent that there was no access from the building to an area above the flooded area in the event of a regional storm.

The evidence on behalf of the respondent was that it was not the policy of the respondent to permit residential construction in flood plains either by way of original construction or reconstruction and reference was made to two cases in which such permission had been refused. It was pointed out that there are between 500 and 1,000 similar buildings in the watershed and the policy of the respondent is to prevent any reconstruction except where the degree of flooding is less than one foot in depth and adequate flood proofing principles can be observed. The reasons advanced for the refusal were the prevention of loss of life and property damage in the event of a regional flood, the protection of future purchasers buying in a high risk area, a reduction of public and private expenses of evacuation, replacement, clean-up and similar costs in floods and finally, the general policy of the respondent that there will be no extensions in flood plains without adequate flood proofing.

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With reference to loss of storage capacity it was submitted that this consideration was insignificant and that the other factors outweighed this consideration. Some evidence was raised that the area was subject to ice jamming, particularly at the Derry Sideroad some distance downstream from the subject lands with the result that there would be a backup of flood waters onto the property. Some of the evidence related to the hypothetical effect of such ice jams floating backwards upstream against the building. This tribunal would be more concerned with ice jams at the site of the building and the building up of ice against the building, particularly as the evidence indicates that there were trees below the subject lands which would tend to hold ice and other debris. The evidence of the engineer indicated that the pressures from ice are substantially greater than the pressures from water and accordingly, the concerns regarding ice should not be overlooked. The engineer also pointed out that it was not possible to flood proof the existing building in an acceptable fashion and that the granting of permission on the principle of what was referred to as wet flood proofing is limited to buildings such as car washes where the passage of water would not be impeded and would not cause significant damage.

The arguments on behalf of the appellant were not based on principles of flood plain management but were based instead upon the concept that the appellant had not been justly dealt with before the executive committee of the respondent and on a pragmatic or common sense approach that the proposal of the appellant improved the situation by providing sleeping quarters in a second storey rather than on the ground floor which would flood first. It was also suggested that it should not be the policy of the tribunal to prevent the reasonable use of existing buildings in the flood plain and that the role of this tribunal should be to stretch or modify the mandate of the respondent to

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permit exceptions which should be considered on an individual basis rather than with reference to the entire situation.

The submissions on behalf of the respondent were that the respondent had acted within its legislative authority contained in the Conservation Authorities Act and the regulation made thereunder, that the respondent had dealt with the applicant in accordance with its policy and that this tribunal should not interfere with the discretion of the respondent contained in the regulation made under the Conservation Authorities Act. Counsel pointed out that there was no evidence of discrimination in respect of permits for residential purposes and in fact the evidence indicated that the policy was against the issue of the permit in question. It was submitted that the refusal of the respondent to create an exception to the prohibition contained in the regulation was amply justified by the reasons provided on behalf of the authority and that to create an exception would create a precedent that would be incapable of quantification with the result that the exception would become uncontrollable. It was submitted that if these reasons were overruled the appellant should be required to flood proof the building and that the evidence showed that flood proofing was either unsuitable or impossible depending on the nature of flood proofing adopted particularly, with reference to the utilities. It was further submitted that if the appeal were allowed the appellant should be required to enter into an indemnity agreement which could be registered on title and which would impose significant provisions respecting flood proofing.

In reply the agent for the appellant indicated that his principal might not be prepared to comply with conditions and that the respondent should not be permitted to maintain a position which would require landowners to let their property decay through denials of applications and that landowners should

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be permitted to have their rights to modify or improve their property for their daily and customary use.

Regarding this case from the approach on behalf of the appellant one might be led to conclude that the proposal of the appellant should be treated as an improvement of an existing situation and therefore be given consideration. However, philosophically speaking, there are no established principles of common sense or pragmatism and conclusions based on such theories are usually subjective opinions based on the facts of the situations as viewed with the pressures and prejudices of the decision maker. In considering matters such as the present, the matter can only be viewed from the point of view of principles respecting flood control and whether the particular case can be brought within such principles. It is only in considering cases such as the present case that one sees the unreliability of adopting a common sense approach to a matter which is primarily a highly scientific study. Analysing the proposed theory, it becomes apparent, keeping in mind that the basic assumption of what is said to be the common sense approach in this case has to be that the existing situation is undesirable, if not wrong, that any change in that situation that ameliorates the effect of the undesirability, or wrong, as the case may be, is desirable. The question then arises as to whether the proposed change in reality does ameliorate or merely amends or transposes the undesirability. How such a consideration can be made without applying some scientific principle is not apparent.

Considering principles applicable to flood plain management it might be noted that there is a slight loss of storage capacity. This particular principle was, in effect, waived by the respondent through the evidence of its witnesses and the only element in respect of this aspect of the case is

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the possibility of precedent attributed to the particular case. The issue of constriction was not raised in the evidence or in submissions and it is noted from an examination of the documentation filed that the proposed extension is contained within the limits of the existing structure when viewed from the northeasterly side which is the direction from which the flow of the regional storm would come and here again there would be some justification perhaps for submitting that on a scientific approach the proposal is acceptable.

Notwithstanding the two foregoing principles the significant consideration in this case is whether, as a matter of policy, residential construction or extensions thereof should be permitted in eleven feet of flood waters. It is here where the concept of extension of existing situations cannot be construed to be a betterment of an intolerable situation warranting the creation of an exception. The hazards of permitting residential buildings in flood plains are legion.

Risks of drowning and lesser injuries to the residents of areas subject to a depth of flooding of eleven feet and their rescuers are the prime consideration. Panic usually is associated with such situations and, like fire situations, there is a human reaction to escape, frequently through depths and velocities of water which cannot be crossed. Frequently such situations occur at night when vision is restricted, if not impossible, and the usual services are disrupted. In addition to this concern there is damage to property from the water and resulting costs of repair and cleaning. Against this background the exceptions that have been developed are few in number and are restricted to situations where escape is possible and damage can be prevented.

Apart from the precedential implications the risk to the occupants of the extension cannot be reduced in the

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particular circumstances and in themselves, without a consideration of the precedential implications of the proposal, should warrant the dismissal of the appeal.

I have been asked to look at this case individually as contrasted with the result of the case in the overall program or management conducted by the respondent. In viewing this case by itself, even without considering its precedential implications, the hazards of placing residential construction in a flood plain having approximately eleven feet of flood waters in a regional storm are so patent that the application could not be justified on its own merits apart from the implication it would have on the entire program of the respondent. Even where exceptions are made and such exceptions are rarely made by any conservation authority in respect of residential construction, the exceptions are made where there is adequate access in the event of a regional storm both to and from the property and where the building can be flood proofed. This flood proofing usually requires the raising of the proposed building above the regional storm elevation which is impossible in connection with the present property as no part of it is above that elevation and flood proofing measures to reduce damage to the building itself, including the services provided to the building such as heat, electricity and water of the building. Neither factors are available in the present case. Frequently, additional elements are required such as an application of the cut and fill principle or the incremental balance principle and there is no indication that such principles could be adopted to the particular case.

On the evidence the appellant has been treated in the same way as other applicants to the authority. There is no evidence that the appellant has been deprived of a policy of the

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respondent that has been made available to other applicants and in the absence of any of the usual justifications for creating exceptions to the general prohibition of the regulation, the appeal will be dismissed.

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

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

DATED this 26th day of October, 1982.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.