Room 569, Fifth Floor
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Toronto, Ontario M7A 1A2

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 place fill material on Lot 1, Concession 1, W.H.S. in the City of Mississauga, in The Regional Municipality of Peel.

B E T W E E N :

MICHAEL HOSINEC

Appellant

\- and -

CREDIT VALLEY
CONSERVATION AUTHORITY

Respondent

The appellant, in person.
R.I.R. Winter, Q.C., for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission to place fill on part of Lot 1 in Concession I, W.H.S. in the City of Mississauga, in the Regional Municipality of Peel. By Ontario Regulation 609/81 the power and duty of hearing and disposing of the appeal were assigned to the Mining and Lands Commissioner. The appeal was heard in Toronto on November 24, 1981.

The subject lands are a parcel of land measuring approximately 500 feet in width and being situate on the north side of Eglinton Avenue approximately 500 feet to the west of Highway 10. The lands have been owned by the appellant and his

family since 1948 and have been used for agricultural purposes since that time. The father of the appellant at one time used the property quite extensively but has since ceased to be actively engaged in agriculture.

Cooksville Creek flows in a southerly direction through the subject lands. It enters the subject lands at the northwest corner and leaves the property at the south limit i.e., Eglinton Avenue, at a location approximately 285 feet from the southwest corner of the subject lands. The proposal is to place fill in the easterly part of the subject lands lying to the east of the area at which the creek leaves the subject lands. It is proposed to raise the land to the height of Eglinton Avenue which is said in the application to be six feet higher than the subject lands.

The appellant failed to make any estimate of the quantum of fill which he proposed to place on the subject lands. The application indicates that the fill will be sloped at the westerly side to a point approximately 40 feet easterly of the intersection of the creek and Eglinton Avenue. Further the application fails to state any purpose for the proposed filling and on extensive inquiry from the Bench the appellant failed to disclose any reason for the placing of the fill.

At the outset it may be mentioned that the appellant took the position that the respondent had no jurisdiction in respect of the matter. It may be said, if such was the case, that it is equally apparent that this tribunal would have no greater jurisdiction and if this principle were given effect, this tribunal could not grant the permission that was sought. However, this tribunal is satisfied from the evidence submitted on behalf of the respondent that the respondent has full jurisdiction. From the point of view of administrative jurisdiction Exhibit 1 was a certified copy of an Order in Council dated February 17, 1955 which enlarged the jurisdiction of the respondent to include the watershed of the Cooksville

Creek. In connection with legislative jurisdiction as contrasted with administrative jurisdiction Ontario Regulation 211/73 contains the usual provision prohibiting the placing or dumping of fill in the areas shown in the schedules and by Ontario Regulation 398/79 an area north of Eglinton Avenue and including the subject lands was made as Schedule 4 to the first-mentioned regulation with the result that there can be no question as to the jurisdiction of the respondent.

The reason given by the appellant as to his feeling that the respondent had no jurisdiction was that the area in question was not a natural stream. However, the prohibition that is contained in clause _b_ of section 3 of the 1973 regulation merely refers to areas described in the schedules and there is no requirement either in the regulation itself or in the provision of the _Conservation Authorities Act_ which authorizes the making of such regulation that an area that is made the subject matter of a fill regulation must be a natural stream. The regulation-making power of conservation authorities in respect of the placing of fill is found in clause 28(1) (_f_) of the _Conservation Authorities Act_ which reads,

> (_f_) prohibiting or regulating or requiring the permission of the authority for the placing or dumping of fill of any kind in any defined part of the area over which the authority has jurisdiction in which in the opinion of the authority the control of flooding or pollution or the conservation of land may be affected by the placing or dumping of fill.

It will be seen from the foregoing that there is no requirement that the area in which the dumping of fill is controlled must be a natural stream or the flood plain of a natural stream and accordingly there can be no legal objection to the regulation of the respondent on the alleged basis. Further again, if the regulation had no legal validity this

tribunal would not be in a position to grant the permission requested.

Michael Harry Brewes, an Engineering Technologist with the respondent, gave evidence respecting the effect of the placing of fill on the subject lands in the event of a regional storm which under the regulation of the respondent is the Hurricane Hazel storm. The flood plain mapping of the watershed was filed as Exhibit 4. The placing of the fill would create a loss of flood storage capacity which would effect the hydraulic capacities of the river basin in connection with the passing of the waters of a regional storm. In other words the placing of the fill would utilize part of the storage capacity of the flood plain of a regional storm and hence the control of flooding along the watershed would be effected. In addition the witness pointed out that the fill would act as a dam and hold back water causing additional flooding upstream of the fill. He referred to a study that had been done of the area indicating that with the existing culvert there would be in a regional storm an overtopping of Eglinton Avenue by 38% of the flows of the regional storm and with the removal of part of the storage capacity this percentage would be increased.

On the other hand, the appellant produced a statement purported to have been obtained from the meteorlogical office at the airport of Malton indicating that the culvert in Eglinton Avenue could pass a very substantial quantity of water. This tribunal has a very great difficulty in accepting this document which was filed as Exhibit 9 for any purposes. The document is signed by the appellant himself although it is addressed to him and the best that can be said of the document is that it is a memorandum of a telephone conversation. The identity or qualifications of the person with whom the appellant spoke were unknown to him. There are three legal problems in connection with this document. Firstly, it is subject to the usual weakness of all hearsay evidence that the person making the

...5

statement is not present to verify his statement or be cross-examined thereon. Secondly, the qualifications of the person making the conclusion are not available to give it any significant weight. Thirdly, there is nothing in the statement itself on which its conclusion can be examined or verified. While the statement contains a conclusion that the culvert would pass a certain quantity of water at a certain velocity this tribunal cannot relate and no evidence was provided on which the tribunal could make a relation between those flows and the flows of a regional flood. In choosing between the evidence of the witness and the unverified statement this tribunal can only accept the evidence of the witness and accordingly it must be concluded that there is in the construction of Eglinton Avenue an existing impediment to the flows of a regional storm sufficient to cause an overtopping of Eglinton Avenue and consequently with the placing of additional fill above Eglinton Avenue, there would be a loss of storage capacity which would have the effect of creating a greater amount of overtopping of Eglinton Avenue.

The statement itself bears out this probability. It states that the depth of rainfall in Hurricane Hazel over a 24 hour period was seven inches and during a mini hurricane on July 28, 1980 five inches fell during such a period. In dealing with the capacity of the culvert the statement reads,

> It will easily handle a rainfall of 2 inches in 24 hours or 30 million gallons that would fall on this area. (640 acres.)

If the regional storm would create seven inches of rainfall, a capacity to deal with two inches would seem considerably inadequate.

The fact that the culvert would pass a greater volume of water over a twenty-four hour period is not helpful. The

...6

significant capacity is the capacity with regard to the flows of a regional storm and the appellant provided no evidence in that regard either in the statement or otherwise. Peak flows are not created the moment the rain starts to fall nor do they remain for a significant period of time. The total capacity over a twenty-four hour period is not meaningful in determining flood risks as the serious conditions occur when the flows develop a peak at which time they have their greatest destructive capacity. The only evidence before this tribunal of this capacity is the flood plain mapping which shows the subject lands as being in the flood plain and being subject to these destructive forces. In addition to the risks to the subject lands and other lands in the flood plain, the introduction of impediments in the flows of the flood waters would have the effect of increasing such risks by creating additional flooding of lands that otherwise would not be flooded both through the utilization of storage capacity and by the backing up of the water to a greater degree than otherwise would occur.

This tribunal has not overlooked the evidence of the appellant that there was no evidence that a regional storm has existed and that the regional storm is a theoretical storm. This situation occurs in every appeal that is taken in regard to these matters and the fact that the witnesses have not observed floods of the extent of a regional storm or that regional storms have not actually occurred at that precise location cannot be considered as relevant in coming to a decision. The protection of the legislation is directed to future floods and past situations are not helpful where the elevations of the regional storm are established by the usual mapping.

Accordingly, this tribunal is satisfied that the respondent acted properly in refusing to grant the permission to place the fill requested by the appellant. The appellant failed to establish any principle of the respondent under which he

...7

would have been entitled to place fill and this tribunal is not aware of any principle of a provincial or broader nature which would justify the placing of fill in the circumstances. In addition this tribunal is greatly concerned that the application fails to show and the appellant himself in evidence failed to show any purpose for the requested permission. The reason for the creation of exceptions is the hardship to the landowner who has had the misfortune of acquiring lands which are susceptible to flooding in regional storms and there should be a significant reason for creating exceptions to the prohibitions created by the regulations. Where no reason for the creation of an exception is established there can be no real need for an exception to the regulation and if there is ever any onus on the appellant in this type of appeal, it is surely upon the appellant to establish some bona fide use or need of the exception that he requests.

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 of the parties to the matter.

DATED this 18th day of January, 19d2.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.