IN THE MATTER OF THE CONSERVATION AUTHORITIES ACT

Appeal No. CA 014-92

Linda Kamerman	)	Monday, the 14th day
Mining and Lands Commissioner	)	of December, 1992.

AND IN THE MATTER OF

An appeal to the Minister under subsection 28(5) of the Conservation Authorities Act against the refusal to allow permission to erect a new structure on Lots 46 and 47, Plan 162, Plattsville.

B E T W E E N:

GORDON JUNKER and JEANETTE JUNKER

Appellants

-and -

GRAND RIVER CONSERVATION AUTHORITY

Respondent

ORDER

WHEREAS an appeal from a refusal to extend time for permit 22/568/89 was received on July 8, 1992;

UPON MOTION OF THIS TRIBUNAL AND UPON READING THE PARTICULARS OF MATERIAL FILED AND UPON HEARING the submissions of counsel for the parties;

1. **THIS TRIBUNAL ORDERS THAT** the appeal is hereby dismissed;

. . . . 2

2. THIS TRIBUNAL FURTHER ORDERS that no costs shall be payable to either party to the appeal.

REASONS for this Order are attached.

SIGNED this 14th day of December, 1992.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER.

IN THE MATTER OF THE CONSERVATION AUTHORITIES ACT

Appeal No. CA 014-92

Linda Kamerman	)	Monday, the 14th day
Mining and Lands Commissioner	)	of December, 1992.

AND IN THE MATTER OF

An appeal to the Minister under subsection 28(5) of the Conservation Authorities Act against the refusal to allow permission to erect a new structure on Lots 46 and 47, Plan 162, Plattsville.

B E T W E E N:

GORDON JUNKER and JEANETTE JUNKER

Appellants

-and -

GRAND RIVER CONSERVATION AUTHORITY

Respondent

REASONS

A preliminary motion was held on November 17, 1992, pursuant to a Preliminary Submission made by John Harris on behalf of the respondent, to determine whether the Tribunal has jurisdiction to consider the matter brought forward by the appellants.

The appellants were represented at the preliminary hearing by Wayne R. Bumstead, of the law firm of Sutherland, Hagarty, Mark & Somerville. Mr. Gordon Junker was also present.

The respondent was represented by John M. Harris of the law firm of Matlow, Miller, Harris, Thrasher.

. . . . 2

FACTS WHICH ARE NOT IN DISPUTE

The appellants submitted an application, dated November 14, 1989, to the respondent for permission to construct a residential dwelling on land which is susceptible to flooding during a regional storm. The application was presented to the Executive Committee of the respondent on February 9, 1990, where it was approved with conditions, which were fulfilled, as evidenced by a letter dated April 2, 1990 from the respondent to the appellants, under the signature of Fred Natolochny. Paragraph two of the April 2, 1990 letter states, in part, "This permission... will expire within two years from the date of the permission (or as extended in writing by this Authority upon the written request to do so by the applicant)."

A permit, bearing number 22/568/89 was issued on April 3, 1990, signed by K.W. Thomson, Assistant General Manager of the respondent, details of which are reproduced:

Nature of Work: Erect a new structure

Purpose of Work: To erect a new residential structure on a property located in Blandford-Blenheim Township.

Location of Work: Lots 46 & 47, Plan 162, Plattsville, Township of Blandford-Blenheim

Proposed Start of Construction: April 1990

Proposed Completion of Construction: April 1992

SPECIAL CONDITIONS:

The attached plans denoted as Schedule "B" form part of the Grand River Conservation Authority's permit and must be implemented in order that the true intent of the permit be achieved.

This permit does not absolve the permittee of the responsibility of obtaining necessary permission from applicable federal, provincial or local municipalities.

GENERAL CONDITIONS:

The permittee, by acceptance and in consideration of the issuance of this

. . . . 3

permit, agrees to the following conditions:

1. Authorized representatives of the Grand River Conservation Authority will be granted entry at any time into lands and buildings of the permittee, or lands and buildings under his control, in order to make such surveys, examinations, investigations, inspections or other arrangements which such representatives deem necessary.

2. The permittee agrees:

   (a) to indemnify and save harmless, the Grand River Conservation Authority and its officers, employees, or agents, from and against all damage, loss, costs, claims, demands, actions and proceedings, arising out of or resulting from any act or omission of the permittee or of any of his agents, employees or contractors relating to any of the particular terms or conditions of this permit.

   (b) that this permit shall not release the permittee from any legal liability or obligation and remains in force subject to all limitations, requirements and liabilities imposed by law.

   (c) that all complaints arising from the proposed works authorized under this permit shall be reported immediately by the permittee to the Grand River Conservation Authority. The permittee shall indicate any action which has been taken, or is planned to be taken, with regard to each complaint.

3. The Grand River Conservation Authority, when it deems necessary, may cancel this permit, or may change any of the conditions at any time and without prior notice.

4. This permit shall not be assigned.

5. This permit does not absolve the permittee of the responsibility of obtaining necessary permission from applicable federal, provincial or local municipalities.

Schedule B contains a letter to Fred Natolochny dated February 20, 1990, signed by the appellants, which sets out the following:

The applicants agree to have the proposed dwelling constructed in the following manner, as per your request;

. . . . 4

1. The top of the foundation will not be lower than 1.3 metres above road grade.

2. No services (other than necessary plumbing) will be located or hung below the first floor habitable level.

3. The dwelling will not have a basement and the crawl space will not have a poured concrete floor.

The applicants further agree to submit a grading plan showing the finished grade and proposed flow patterns of run off water of the site.

Schedule B also contains a letter to Fred Natolochny dated March 30, 1990, which sets out that the following is enclosed:

1. A copy of the "Save harmless agreement"

2. Detailed drawings of the home to be erected

3. Proposed flow patterns of run off water

On February 12, 1992, the appellants wrote to Mr. Natolochny requesting an extension of their permit for an additional year. Mr. Natolochny responded by letter dated March 4, 1992, advising that the flood plain policies had changed and that staff were not in a position to grant an extension to the permit.

Gordon Junker appeared before the Executive Committee of the respondent on March 27, 1992 where the matter of the extension of permit 22/568/89 was discussed. The Executive Committee resolved that an extension would not be granted. No reasons were given.

ISSUE

The issue for determination by the Tribunal is whether the refusal to extend time for permission to construct having been granted on an earlier occasion falls within its jurisdiction to consider an appeal under subsection 28(5) of the **Conservation Authorities Act**.

. . . . 5

SUBMISSIONS

Mr. Harris pointed out that the question of granting permission with conditions and subsequent refusal to extend time for meeting those conditions arises before this Tribunal for the first time and the determination will be a matter of precedent.

It is the position of the respondent that the refusal to extend permit 22/568/89 for an additional year to April 1993 as requested by the appellants does not constitute a refusal within the meaning of subsections 28(3) and (5) of the **Conservation Authorities Act**. Subsections (3) and (5) are reproduced:

> 28(3) Before refusing permission required under a regulation made under clause 1(b), (e) or (f), the authority, or where the power to issue permission has been delegated to its executive committee, the executive committee shall hold a hearing to which the applicant shall be a party.
>
> 28(5) An applicant who has been refused permission may, within thirty days of the receipt of the reasons for the decision, appeal to the Minister who may dismiss the appeal or grant the permission.

Mr. Harris submitted that, by not fulfilling the condition of building within the required time frame, the appellants have allowed the permission to lapse. In considering whether or not to extend time for building, he submitted that there is no requirement that the respondent consider such a request and is not required to hold a hearing as contemplated under subsection 28(3). As the matter does not involve a refusal of an application for permission it is not a proper matter for appeal.

Mr. Harris submitted that the reason for the refusal to extend time are set out in Mr. Natoluchny's letter of March 4, 1992, involving changes in policy for construction in flood plains, which would require a fresh consideration of the application. He submitted that the proper course of action for the appellants would be to bring a new application to determine whether the new policy requirements can be met, failing which, would allow for a proper appeal at that time.

Mr. Bumstead submitted that the wording of subsection 28(5) is sufficiently broad to give this Tribunal jurisdiction to hear a refusal to extend a permit, as the result is the same as a

. . . . 6

refusal of an application. If the Tribunal accepts the submissions of the respondent, the appellants would be in a position where they could not appeal a decision of the Conservation Authority, because they could not bring their appeal within the narrow confines of the meaning Mr. Harris would give to the word, "refusal".

If the refusal to extend time is not found to be the same thing as a refusal to grant permission, the question arises as to what remedies are left to applicants such as the appellants. Mr. Bumstead submitted that the legislature, by giving the authority to hear appeals to the Tribunal, intended that such matters as arise in this preliminary motion, should be determined by the Tribunal.

Mr. Bumstead pointed out that the refusal to extend time by the Executive Committee was made without reasons. The closest thing to reasons given is the letter of March 4, 1992 from Mr. Natoluchny to the appellants, where it states,

> The flood plain policies in Plattsville have changed from the time your application was issued. Your proposal does not conform to policy and therefor staff are not in a position to grant an extension to the permit.

Mr. Bumstead submitted that the contents of the letter have led the appellants to believe that there would be no reason to reapply, as their application would be refused on the basis of the new flood plain policies. In that case, an appeal from the refusal would come before the Tribunal in any event, involving additional steps to have a hearing on the merits.

Mr. Bumstead submitted that there are public policy reasons for giving a broad interpretation. If the motion of the respondent is allowed, then Conservation Authorities would be in the position of granting permission with conditions which would ultimately amount to refusals in any number of situations, and would have the result of, due to the lapse of time, precluding an appeal on the merits.

Mr. Bumstead submitted that the respondent exceeded its jurisdiction under section 28 by imposing a time limit on the permission, where there is no clear statutory authority to do so. Section 4 of Ontario Regulation 154/86 gives the

. . . . 7

respondent the authority to either permit or refuse "... the construction of any building or structure or the placing or dumping of fill or the straightening, changing, diverting or interfering with the existing channel of a river, creek, stream or watercourse..." within its jurisdiction. Section 7 allows the authority to withdraw permission where representations contained in the application are not met. Mr. Bumstead submitted that the meeting of representations is a different matter from the meeting of conditions, as the latter are imposed by the respondent without authority.

Mr. Bumstead submitted that he had been unable to find any authorities for the position he put forth on behalf of the appellants.

Mr. Harris replied that the situation was as follows. The permit was granted in 1990. Since that time, the policies of the province and the respondent concerning the building in flood plains had changed. The situation is analogous to one where a permit was issued by a municipality under an existing Official Plan, and where changes were subsequently made to the by-laws so that the use, once legal would be rendered non-conforming.

Mr. Harris submitted that the appeal is from a permit which specifically states two years to build. With the non-compliance within the two year requirement, the old permit is gone and the appellants must re-apply. In the event of a refusal of the second application, the appellants could appeal within the meaning of subsection 28(5) of the Act.

Mr. Harris concluded by stating that the issue of refusal to extend time for an existing permit falls within the jurisdiction of the Courts and not within the jurisdiction of the Tribunal.

The Tribunal asked the parties what the situation would be if a permit were granted with conditions, and the applicants were at the time of the granting unhappy with the conditions.

Mr. Bumstead stated that permission with conditions should be treated as a refusal.

Mr. Harris submitted that, as the issue of making conditions does not appear in the regulation, being silent, by implication, the respondent is authorized to make conditions. Other-

. . . . 8

wise, it would not be in a position to ensure compliance. He stated that over the years, permits under the Act have contained conditions. He submitted that a previous Mining and Lands Commissioner has granted appeals, on the condition of granting of conditions. In conclusion, he submitted that permission could be made with or without conditions.

In response to the Tribunal's question, Mr. Harris stated that, if an applicant was not happy with conditions, they could appeal to this Tribunal.

FINDINGS

This motion raises two separate questions. The first is whether the respondent exceeded its jurisdiction in issuing a permit with conditions.

Section 28 of the **Conservation Authorities Act** is silent with respect to the issue of conditions. Subsection 28(1) provides that, in the case of clauses (b), (e) and (f), regulations may be made requiring the permission of the authority to divert a watercourse, construct in an area susceptible to flooding or for the placing of fill in an area over which the authority has jurisdiction.

Ontario Regulation 154/86 also does not specifically provide for granting of permission with conditions attached. Section 4 provides that, "... the Authority in writing may permit...".

Mr. Bumstead argued that to issue a permit with conditions, there must be a statutory power to make such conditions, and that no such power exists. The Tribunal notes that the appellants are seeking to appeal the refusal to extend time of conditions for which their counsel has argued there is no statutory authority.

The Tribunal notes that wording of the permission does not clearly state that it is a permission with conditions which, if not met, results in the permission being null and void. This is the result, according to the position advanced by Mr. Harris.

The question was put by the Tribunal as to what the result would be, where a permission was granted with conditions which the applicants did not like.

. . . . 9

Both counsel agreed that, in such a situation, the permission should be treated as a refusal.

No argument was presented on the possibility that the permission could be treated as valid, with the attached conditions only being void **ab initio**.

The second issue is whether the refusal to extend the condition limiting the time of the permission amounts to a refusal from which the applicant may appeal. This issue goes to the nature of the jurisdiction of the Tribunal to make such determinations.

The Tribunal obtains its jurisdiction to determine matters arising under the **Conservation Authorities Act** by virtue of Ontario Regulation 364/82, whereby the power of the Minister to consider such appeals is assigned to the Mining and Lands Commissioner. The Commissioner is appointed by virtue of the **Ministry of Natural Resources Act**, which provides under subsection 6(7) that:

> 6(7) Part VI of the **Mining Act** applies with necessary modifications to the exercise of the authorities, powers and duties assigned to the Commissioner under clause (6)(b).

The question to be determined is whether there is a general authority to determine all matters which may arise in connection with the hearing of an appeal under subsection 28(5) of the **Conservation Authorities Act**. Section 105 of the **Mining Act**, which is contained in part VI, is reproduced:

> 105. Except as provided by section 171, no action lies and no other proceeding shall be taken in any court as to any matter or thing concerning any right, privilege or interest conferred by or under the authority of this Act, but, except as in this Act otherwise provided, every claim, question and dispute in respect of the matter or thing shall be determined by the Commissioner, and in the exercise of the power conferred by this section the Commissioner may make such order or give such directions as he or she considers necessary to make effectual and enforce compliance with his or her decision.

In determining whether the provisions of section 105 of the **Mining Act** would apply to give the Tribunal the statutory power to determine all matters which arise in connection with an application, the Tribunal finds that the case of **Drover v. Grand River Conservation**

. . . . 10

Authority, (1987) 62 O.R. (2d) 141 (Div. Ct.) is binding on its determination of this matter.

In **Drover**, the issue was whether section 156 of the **Mining Act**, [now section 135] would apply to limit the period for judicial review of an order or decision of the Commissioner. The relevant portion of section 156 is set out:

> 156(1) No proceedings by way of an application for judicial review under the **Judicial Review Procedure Act**, or, except in proceedings provided for under this Act, by way of other proceedings whatsoever, may be brought to call into question,
>
> . . . . .
>
> (b) any order or judgement given or made or purporting to have been given or made by the Commissioner under this Act, more than thirty days after filing of the order or judgement of the Commissioner in accordance with section 150; or
>
> . . . . .
>
> (2) Notwithstanding anything in the **Judicial Review Procedure Act**, no court may extend any limitation of time fixed by subsection (1).

The Court noted that the limitation period in subsection 156(1) begins with the filing of the Commissioner's decision with the mining recorder pursuant to section 150.

The Court considers the meaning of "with necessary modifications" contained in subsection 6(7) of the **Ministry of Natural Resources Act** in its determination of whether the limitation period for judicial review is applicable to matters which arise under the **Conservation Authorities Act**, at page 144:

> Obviously , there is an imperfect fit when provisions of one statute are imported into a totally different statute. This is why the words "with necessary modifications" are used in s. 6(7)....
>
> . . . . .
>
> ...In our view, s. 6(7) does not import the limitation period of s. 156(1) into this proceeding. The words of s. 156(1) specifically state that it applies to an order or a judgement of this Commissioner "under this Act". "This Act" is the Act in which the section appears, namely, the **Mining Act**. The order in question was not made under the **Mining Act**. It was made by the Commissioner with respect to a matter under the **Conservation Authorities Act**. In our view, s. 6(7) did import the provisions of Part VIII of the **Mining Act** to appeals under the **Conservation Authorities Act**.

> However, the specific words of s. 156(1)(b) take this limitation section out of the general importation. This does not mean, however, that the rest of Part VIII does not apply, with necessary modifications.

Section 105 of the **Mining Act** gives the Tribunal broad judicial powers to determine any question which arises before the Commissioner. The Tribunal notes that the section uses the words, "in this Act". The argument has been advanced by Mr. Bumstead that public policy requires a broad interpretation of the jurisdiction of the Commissioner. Whether the granting of the judicial powers contemplated by section 105 should include the **Conservation Authorities Act** is one of statutory interpretation. The Tribunal finds that, in the absence of very clear statutory to the contrary, the words, "in this Act" cannot be found to be applicable to its jurisdiction to determine all matters which arise in connection with an appeal pursuant to subsection 28(5) of the **Conservation Authorities Act**. The Tribunal finds that the matters arising in this motion to determine its jurisdiction to hear an appeal from a refusal to extend time of conditions of a permit are outside of the powers granted by Part VI of the **Mining Act.**

No submissions were made on the issue of costs. The Tribunal finds that there will be no order as to costs.

CONCLUSION

This appeal is dismissed for the reasons outlined above.