



The Mining and Lands Commissioner Le Commissaire aux mines et aux terres

R. Yurkow)
Deputy Mining and Lands Commissioner)

Friday, the 20th day
of March, 1992.

IN THE MATTER OF THE CONSERVATION AUTHORITIES ACT

AND IN THE MATTER OF

An appeal to the Minister under section 28(5) of the Conservation Authorities Act against the refusal to issue permission for the placing and removing of fill and construction of a pond and dyke, on Part of Lots 6,7 and 8, Registered Plan No. 1037, 1st Range from the Grand River, Town of Dunnville (formerly Township of Moulton) in the Regional Municipality of Haldimand-Norfolk.

B E T W E E N :

ROBERT D.P. BLAKE

Appellant

- and -

GRAND RIVER CONSERVATION AUTHORITY

Respondent

DECISION

Wayne R. Waterworth appeared on behalf of Robert Blake.

John M. Harris appeared on behalf of the Grand River Conservation Authority.

This Tribunal is taking a new direction on appeals from decisions of conservation authorities. Therefore, this is an appropriate time to review the legislative framework and philosophy within which conservation authorities operate.

LEGISLATION FRAMEWORK

Conservation Authorities Act

The governing legislation is the *Conservation Authorities Act*. Individual authorities are set up throughout the province, presumably, with the idea that each is familiar with and sensitive to local needs and concerns.

The objects of each authority are set out in section 20 of the Act. These are, basically, to further conservation, restoration, development and management of natural resources.

An important power of authorities is to control the flow of surface water to prevent flooding, pollution and property damage.¹ The jurisdiction of authorities is limited to areas within flood plains. Flood plains are areas that are prone to flooding during particularly heavy storms.

To support their powers, authorities may make regulations.² These regulations may cover a range of subject matter that, largely, relate to control of surface water flow and prevention of flooding, pollution and damage. The Act permits authorities to make regulations prohibiting or regulating construction and placing of fill.³

Regulations

Authorities have made regulations under the Act. Naturally, each regulation deals with its appropriate area, but the text of one regulation is similar, if not identical, to the others.

A standard regulation prohibits the construction of a structure (which includes a building) and the dumping of fill. The regulation gives some relief from this rigid standard by providing for exceptions. An exception may be granted if the authority is of the opinion that the exception will not adversely affect conservation of land or control of flooding or pollution.

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¹Clause 28 (1)(f).

²Section 28.

³Clauses 28 (1)(e) and (f).

Guidelines

Under section 3 of the *Planning Act*, the government may issue policy statements on land use planning. Every agency of the government (which includes conservation authorities) must "have regard" to the policy statements. The government has issued a policy statement on flood plain planning.

The guidelines recognize that, for effective flood plain management, the whole watershed must be considered. They, also, recognize that a particular activity may not have a significant effect but many similar activities can have an undesirable effect. This is referred to as the cumulative effect.

There is a recognition that communities and individuals may have long standing vested interests within a watershed and that it is desirable to protect those interests. In protecting one interest, other interests may be put at greater risk.

A function of each authority is to balance competing interests and uses. Certain uses, such as marinas and agriculture, may be considered acceptable even though they may increase risk elsewhere in the watershed. Other uses, such as industrial, are often quite unacceptable. Building a dyke to protect a dozen long establishing houses may be permitted though it may slightly increase the risk elsewhere in the watershed. Permitting one new house to be built may not be acceptable though its undesirable effect is not measurable.

In each application for an exception, the authority must form an opinion as to whether any harm that may arise outweighs the social benefit accruing if the exception is permitted.

Appeals

The legislation, subordinate legislation and policy statements are designed to give a local body, familiar with local circumstances, the power to protect local resources and to manage them for the good of local communities. There is a safeguard against arbitrary or unreasonable acts in an appeal to the Minister of Natural Resources. The duty of the Minister to determine appeals has been assigned, by regulation, to the Mining and Lands Commissioner.

It is not intended, on an appeal, to give someone in Toronto, unfamiliar with local circumstances, the obligation to second guess an authority. This applies if

the authority has formed an opinion that, on the information before it, is a reasonable one. It need not be the only opinion that could have been arrived at, merely a reasonable one.

An appeal must be allowed if an authority did not look at the application thoroughly (and thus did not have a real opportunity to form an opinion). Likewise, an appeal must be allowed if the evidence cannot, reasonably, support the opinion.

In refusing an application, an authority must give reasons.⁴ The reasons must be such that one can understand why the authority refused permission. They must show what facts and speculation were considered in arriving at the decision to refuse.

BACKGROUND TO THE APPEAL

Appellant's Situation

Robert Blake (Blake) owned a large parcel of land on the banks of the Grand River. At least part of this land was used for agriculture and he had an orchard on it. A few years ago, he got permission to build a four foot berm to protect the orchard.

Four foot berms are referred to as agricultural berms. Their purpose is to protect crops and top soil, not to flood proof. These berms will allow high rising water to flow over them but will keep out ice flows that may damage trees and scrape off top soil. Agricultural use is considered desirable and, since water can flow over the berms, there is not a lot of water storage capacity lost.

Blake then got permission to build a marina on the land. Marinas are another use that is commonly accepted on the very sensible grounds that they, by their nature, must be adjacent to water. As part of that permission, he was allowed to flood proof some 1,700 feet along the river bank. In this case, flood proofing involved building a six to seven foot berm. This would, in theory, keep out all flooding.

Blake is now asking to flood proof an additional 300 feet along the river

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⁴Conservation Authorities Act, subsection 28(5).

bank. He already has the four foot agricultural berm along this stretch. He is asking for an additional two to three foot height.

The flood proofing of this last part would enable Blake to extend the peripheral use of the marina. It would create more storage space for trailers and the like as well as recreational area for users of the marina.

Permission Refused

The Authority refuses to give this last piece of permission. Three reasons are given for the refusal. They were that the objectives of the Authority were, briefly, to prevent property damage, control installations that would, cumulatively, limit channel capacity and increase flood heights, and protect "unwary purchasers".

CONCLUSIONS

Unwary Purchasers

I will deal with the last reason for refusal first. It is not an acceptable reason to refuse an application. The GRCA argues that a purchaser from Blake could be misled by the reference to "flood proofing" into thinking that the land could not be flooded. It argues that any berm may be breached and, therefore, there are no guarantees.

I find this argument specious. It would apply to any dyking that is installed to protect settlements. All buildings in a flood plain are subject to the same risk. Even dams built by a government to protect against flooding may fail. A buyer of a house may find the roof or the basement develops leaks. It is up to buyers to satisfy themselves as to what they are buying. If this argument were to hold, no building would be permitted in a flood plain and no attempts at flood proofing would be permitted because the result could not be absolutely assured.

Property Damage and Reduced Water Storage Capacity

The Authority concedes that the effect of Blake's proposal is minute and may not be measurable. It argues that many such encroachments would increase downstream peak flows. Blake concedes that his proposal would limit flood storage capacity, albeit, insignificantly.

If the argument of insignificant affect were allowed, there would be no limit to the number of small incursions into a flood plain area: none on its own harmful but, in total, potentially devastating. It is accepted that some incursions are socially desirable and outweigh the harmful effects. The Authority argues, and I accept the argument, that each incursions decreases the tolerable loss of storage capacity.

Blake's proposal seems directed at increasing the profitability of his commercial enterprise (his marina business) and, by extension, the value of his land. It is hard to see that there is any benefit to society or the common good from the proposal. The Authority has decided not to use up limited storage capacity on this proposal.

The evidence (written report and testimony) of Lorraine Minshall on behalf of the Authority establishes that there would be a loss of storage capacity. There was argument about the amount of the loss and how the amount was calculated, but it is clear that there would be a loss.

Blake has not established that the Authority was unreasonable in refusing to give permission, that its decision was based on wrong considerations or that its refusal could not be supported. Therefor, the appeal is dismissed.

SIGNED this 20th day of March, 1992.

Original signed by R. Yurkow

R. Yurkow
DEPUTY MINING AND LANDS COMMISSIONER