Box 330
24th floor, 700 Bay Street
Toronto, Ontario
M5G 1Z6

Ontario

The Mining and Lands Commissioner

In the matter of The CONSERVATION AUTHORITIES Act

G.H. Ferguson, Q.C.) Friday, the 17th day of
Mining and Lands Commissioner) June, 1988.

AND IN THE MATTER OF An appeal against the refusal to issue permission to demolish and construct a residential garage on the property municipally known as 42 Riverside Drive, West Montrose, Ontario, in the Township of Woolwich in the Regional Municipality of Waterloo.

B E T W E E N :

ALLAN K. EARL and PATRICIA EARL
Appellants

- and -

GRAND RIVER CONSERVATION AUTHORITY
Respondent

A.K. Earl, for the appellants.
J.M. Harris, Q.C., for the respondent.

The appellants appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission to demolish a garage and construct a new garage on the property municipally known as 42 Riverside Drive in the community of West Montrose in the Township of Woolwich in the Regional Municipality of Waterloo. 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 May 9, 1988.

The subject lands are situate on the south side of the Grand River. They are composed of a parcel with a frontage on the river and on Riverside Drive of approximately 600 feet. Although Mr. Earl gave evidence that the width of the property was 400 feet it is more likely that the width of the property ranges from approximately fifty feet at the easterly side to 125 or 150 feet at the westerly side. On the westerly part of the property there is situate a barn. In the central part of the property there is situate a house in which the appellants are resident. Immediately east of the house there is a garage. The

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garage is in a very dilapidated condition and according to Mr. Earl it is unsafe even to enter the building. He proposes to remove the building and erect a new garage measuring twelve by twenty feet or sixteen by twenty-four feet whichever is permitted. The present garage measures nineteen feet by twenty-five feet and is situate approximately ten to fifteen feet easterly of the house. He had obtained estimates of $1,300 for a kit for the smaller sized garage and $2,599 for a garage measuring sixteen by twenty-four feet. He had also obtained an estimate of the cost of repairing the existing garage and it was estimated that it would cost $2,780.93, which estimate did not include the removal of any necessary parts of the existing building. He also obtained an estimate from Webber Construction Limited of West Montrose which provided a price of $5,750 for the removal of the existing building and the erection of a pole-type building storage shed measuring eighteen feet by twenty-four feet. This estimate contained a statement as follows:

> P.S. To repair existing garage does not seem very practical considering the state it is in now.

There is a retaining wall approximately three feet in height along the easterly and the northerly side of the garage. This wall has been in existence for some time.

The appellants acquired the subject lands approximately one and one-half years ago at a price of $48,000. Mr. Earl was unable to provide the tribunal with any evidence of the respondent having granted permission to carry out a similar project on similar lands. His argument was that the replacement of the existing building was the most economical method of providing the subject lands with the same building capacity and that such would be an improvement over the existing situation, particularly from the point of view of safety of the existing building.

Although the evidence did not deal with the point it appears to the tribunal that it was unlikely that any part of the purchase price represented a figure in respect of the garage.

The evidence of the respondent indicated that the elevations of the subject lands are in the area of 1,057.4 feet

above sea level. There has been a gauge a short distance downstream from the subject lands for a number of years and there is considerable data available with regard to the potential for the flooding of the subject lands. In a regional storm which would have a flow of 39,000 cubic feet per second the elevation of the regional flood would be 1,064 feet providing a flooding to the depth of 6.6 feet on the subject lands. A one in one hundred year flood would have a flow of 35,700 cubic feet per second and an elevation of 1,063.3 feet resulting in 5.9 feet of flooding on the subject lands. A twenty year flood with a flow of 27,200 cubic feet per second would have an elevation of 1,061.8 feet and 4.4 feet of flooding on the subject lands. In addition there is a history of observed floods with 2.8 feet of flooding on the subject lands on April 19, 1972, 3.1 feet on May 17, 1974, 1.2 feet on June 30, 1976 and one foot on April 14, 1979. The evidence also indicated that the velocity of the flows would be in the vicinity of six feet per second which is normally considered an erosive velocity.

With reference to its policy, the evidence indicated that the respondent has adopted a two-zone policy in the area. The general thrust of such a policy is that the controls are lessened in the fringe area and are more strictly enforced in the central part of the flood plain which is called the floodway. In this instance the respondent has adopted the policy that the part of the flood plain within the one in one hundred year flood shall be considered to be the floodway and the area above the one in one hundred year flood will be considered to be the flood fringe. It was clear that the subject lands fall within the flood plain of the one in one hundred year storm and are situate within the floodway portion of the flood plain.

The evidence also indicated that the subject lands had been flooded and covered with ice floes during ice jamming conditions. This portion of the river is, according to the evidence of the respondent, particularly susceptible to ice jams and pictorial evidence showed ice floes in 1981 having been left

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on the areas adjacent to the subject lands and on Riverside Drive itself.

With reference to policies the respondent has prepared a written statement of policy in respect of the administration of its regulation and a copy of this policy was filed as Exhibit 7. The evidence of the employees of the respondent was that the proposal did not fall within the subject policy as the policy only authorized rebuilding and additions where the amount involved did not exceed fifty per cent of the value of the existing building. In this case it is apparent that the value of the existing building is negligible and any replacement or repair of the building would be beyond the principle mentioned by the witnesses for the respondent.

The evidence indicated that the executive committee of the respondent had considered the application and was concerned particularly with reference to the construction of a completely new building in the floodway and the increase in the value of construction in the floodway which would be subject to flooding not only in the regional storm but in storms of much more frequent occurrence. The witnesses indicated that there was concern not only in respect of the building but in respect of the contents of the building. Their evidence indicated that the opportunity for warning is minimal in cases of ice jamming which is a particular problem in respect of the subject lands and in the event of summer thunderstorms which according to the records had caused flooding of the site.

The appellant relied in part on by-laws of the Township of Woolwich which were said to require that buildings be maintained and kept in a safe condition. Apart from the fact that the appellant neither proved the existence nor the content of such by-laws, the tribunal has difficulty in concluding that there is a relationship between such by-law, assuming it does exist and the matters of control of flooding. It may well be that the removal of obsolete buildings in the floodway could be required by the township by-law and to this extent the by-law could be said to be consistent with the control of flooding but

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such an interpretation would be the converse to that argued by the appellant. It seems to the tribunal that, generally speaking, such by-laws, should not be argued as a basis for permitting exceptions to the general prohibitions contained in the regulation of the respondent.

With reference to the written policies of the respondent in this matter it may be worthy of note that the courts have commented on the use and the validity of such policies. In the text entitled "Principles of Administrative Law" by Jones and de Villars it is said at pp. 137 and 138 in respect of such policies,

> On the other hand, it would be incorrect to assert that a delegate cannot adopt a general policy. Any administrator faced with a large volume of discretionary decisions is practically bound to adopt rough rules of thumb. This practice is legally acceptable, provided each case is individually considered on its merits. As Bankes L.J. said in R. v. Port of London Authority; Ex parte Kynoch, Ltd.:
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> > There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case... [I]f the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes.
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> Similarly, a delegate does not necessarily commit an error by referring to the policy adopted by another governmental agency when deciding to exercise his own discretion. It is true that the principles of natural justice and fairness may in both cases require the delegate to disclose the existence of such policies so that a person affected thereby can intelligently make representations as to why the delegate should exercise his discretion differently in the particular case. Nevertheless, the legal issue boils down to whether the delegate in fact has exercised his discretion or fettered it.

It is clear from the authorities that it is perfectly permissible for an administrative body to lay down such rules and it is also clear that an individual case should be considered. It is apparent to the tribunal in this case that the respondent had regard to the serious aspects of flood control in dealing

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with the application and there is no ground for attacking the decision of the respondent on the basis that it had fettered its discretion in following its written policies.

Further it may be observed that it was not clearly shown to the tribunal that the respondent in any way did not follow its policies. The appellant was unable to bring to the attention of the tribunal any instance in which a decision inconsistent with the decision that he had received had been rendered by the respondent nor did he bring to the attention of the tribunal any argument that he was entitled to permission pursuant to the express written policies of the respondent, which of course, might not necessarily be followed in an individual case by the respondent having regard to the facts of the particular case.

The issue in this case could be said to be the action that should be taken with buildings that are situate in the floodway portion of a flood plain that have deteriorated to the level that there is no economic value in the buildings. The tribunal is satisfied that the respondent has addressed this issue and has had regard to the seriousness of the proposal, particularly keeping in mind the depth of flooding in a regional storm and the depth of flooding in storms of more frequent occurrence. The appellant has not shown to the tribunal that the decision is inconsistent with the policy of the respondent, either expressed or in fact, and there is no evidence that there is any overriding federal, provincial or municipal concern that should be considered in the present case that was not considered by the respondent. There is no ground on which the tribunal considers that it should reverse the decision of the respondent.

1. THIS TRIBUNAL ORDERS that the appeal in this matter is dismissed.

2. THIS TRIBUNAL ORDERS that no costs shall be payable by any of the parties to the appeal.

SIGNED this 17th day of June, 1988.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.