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Ontario

The Mining and Lands Commissioner

In the matter of The CONSERVATION AUTHORITIES Act

G.H. Ferguson, Q.C.) Tuesday, the 16th day of
Mining and Lands Commissioner) September, 1986.

AND IN THE MATTER OF

An appeal against the refusal to issue permission to construct a residential dwelling on part of Lot 11 in Concession VIII in the Township of North Dumfries in the Regional Municipality of Waterloo.

B E T W E E N :

ANNABEL DROVER and
WILSON DROVER

Appellants

- and -

GRAND RIVER CONSERVATION AUTHORITY

Respondent

L.J. Palvetzian, for the appellants.
J. Harris, Q.C., for the respondent.

The appellants appealed to the Minister of Natural Resources from the refusal of the respondent to issue permission for the construction of a single family residence on part of Lot 11 in Concession VIII in the Township of North Dumfries 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 evidence portion of the appeal was heard in Kitchener on May 21 and 22, 1986. Argument was submitted in Toronto on June 16, 1986.

The application for permission was a second application made by the appellants in respect of the same proposed building and septic tank system. The area in question has not been included in a schedule under Regulation 163 of the respondent and accordingly, the matter of fill for the septic tank system did not fall under the jurisdiction of the respondent. However, the respondent has jurisdiction over the proposed construction of the residence if the site is in a swamp. As it is not the function

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of this tribunal but of the Provincial Courts to make a determination as to whether or not the Regulation is applicable, this tribunal assumes, with the making of the application, that the respondent had jurisdiction and that the subject lands of the application are in a swamp within the meaning of clause 3(a) of Regulation 163 of R.R.O. 1980 which reads,

> 3. Subject to section 4, no person shall,
>
> (a) construct any building or structure or permit any building or structure to be constructed in or on a pond or swamp or in any area susceptible to flooding during a regional storm;
>
> (b) place or dump fill or permit fill to be placed or dumped in the areas described in the Schedules whether such fill is already located in or upon such area, or brought to or on such area from some other place or places; or
>
> (c) straighten, change, divert or interfere in any way with the existing channel of a river, creek, stream or watercourse.

With the exception of two matters the basic facts relevant to the application are identical with the previous application and will not be repeated here. The two exceptions are that following the previous hearing the appellant arranged with the Regional Municipality of Waterloo for the changing of culverts in the vicinity of the property which reduced the volume of water that flowed over the subject lands. Also a creek to the west of the subject lands was cleared of obstructions with the result that the water through the creek flowed at a higher rate and was considered to have reduced the quantum of water in the vicinity of the subject lands.

The evidence of the appellants with respect to the safety of the raised leaching bed and the evidence of D.W. Kerr, P.Eng.. was repeated. The tribunal is satisfied that the proposed leaching bed would not be a cause of pollution. However, the purposes of the Conservation Authorities Act in permitting regulations prohibiting the construction of buildings or structures in swamps are not limited to matters of pollution solely. The evidence of Robert J. Miller, soils and forestry expert, engaged in private practice and called as an expert

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witness on behalf of the respondent indicates the nature of the concerns associated with the construction of buildings in swamps and the following extracts from his evidence illustrate the problems associated with the filling of parts of swamps and the construction of buildings on that fill.

Mr. Harris: Could you advise the Commissioner, in your opinion, as to the effect of the filling that has been done on the property--the effect of the fill in the swamp--to the swamp, I should say.

Mr. Miller: The fill has a disturbing effect on the swamp. There is a chance for instability in the fill itself being placed among organic material because organic material would not have much strength--that's why I showed that photograph of the rock casing around the utility pole. Generally, it's considered unstable and would add a sense of instability to the fill. The fill could also have an effect of impeding drainage in the organic layers of the soil and it can impede the drainage through the swamp system itself. Mr. Kerr mentioned that in his testimony where he indicated that he thought conditions on the west side of the fill area were wetter than they would have been if the fill was not placed there, as he indicated the fill was blocking the water flow through part of the swamp area. What--the fill has an effect--of--in effect of interfering somewhat with the integrity of swamp characteristics.

Mr. Harris: Alright. Now you mentioned interfering with the integrity. What--could you elaborate further on that.

Mr. Miller: Looking at the swamp from a forest management--forest and swamp management point of view, the fill itself is a legitimate--should say some fill in this are can be considered a legitimate use of a forest and swamp area under generally what are considered forest management practices. Mr. Drover alluded to this in his testimony--the reason I say some fill is that Mr. Drover indicated that the original application was for a limited fill area of 550 feet approximately.

In order to gain access to the swamp for forest management purposes some fill may be necessary to gain access for a parking area--to bring in trucks that can be loaded with wood cut from the site. However, to be done properly and to maintain the integrity of the swamp if the fill was considered a permanent fixture of the swamp area it should have been placed in a different way to maintain water flow through the swamp by, for example, removing the organic material and putting gravel underneath to allow water to maintain its flow patterns. Placed in the way it was, it really should only be considered to be temporary use of the swamp, because in its present condition not being revegetated it has the effect of interfering with the integrity of swamp control by obstructing water flow into the fill--through the fill in the organic

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material and by disrupting water flow--underground water flow through the area.

Mr. Harris: Alright. You are familar with the Drover proposal to construct a residential building on the site area--on the filled site area--I should call it that--is that correct?

Mr. Miller: That's correct.

Mr. Harris: What concerns would you have relative to the placing of the structure on the filled area?

Mr. Miller: My concerns would be from a forest and swamp management point of view.

As I said the placing of some fill, if a legitimate form of swamp and forest management. It can be considered necessary for the proper maintaining of swamp conditions and forest conditions. However to imply that the placing of fill for forest and swamp management purposes implies the right to build a house--I do not think is correct because that placement of fill as a permanent fixture of the swamp which as I mentioned, should not be--these types of access trails for forestry are usually of a temporary nature and by the placing of a house it would interrupt the overall integrity of the swamp as it becomes a permanent and uncharacteristic feature of the swamp and does not fit in with good swamp or forest management purposes.

There was considerable evidence as to whether the subject lands formed part of the Beverly Swamp which is partly situate in the area under the jurisdiction of the respondent and partly in the area under the jurisdiction of an adjacent conservation authority. In the view of the tribunal it is not relevant as to the application of the Regulation that the subject lands fall within the Beverly Swamp. It is sufficient to meet the requirements of the Regulation if the proposed site is in a swamp.

The appellants produced evidence of a number of buildings in various stages of construction that exist on sites that may be considered to fall within the Beverly Swamp. The evidence on cross-examination indicated that these buildings were either not permitted by the respondent or were constructed on high areas which were less likely to play a vital role in the function of a swamp. In this regard the tribunal is satisfied that the appellant has not been deprived of any existing policy of the respondent under which other applicants are granted permission to construct residences in a swamp. Even if it were

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to be construed that such evidence indicated a past policy of permitting such construction there is no reason why the respondent cannot change its policy and enforce the Regulation that it has made and raise the standard of preservation of swamps provided, of course, it is done uniformly.

Dealing with one of the preliminary issues raised by counsel for the appellants, namely, that assuming the lands are a swamp and that such a finding of fact must be made before either the respondent or the Minister on appeal has jurisdiction, the Regulation must contain a description of the swamp in the schedules to the Regulation. The tribunal is of the opinion that this is not a correct interpretation of the Act and Regulations. The question of describing lands in the schedules is dealt with in clause (b) and the jurisdiction in respect of construction in swamps falls under clause (a) of section 3 of the Regulation (above). Accordingly, the question of whether there is jurisdiction depends on the question of fact as to whether the subject lands are "in or on a pond or swamp". Accordingly, as indicated above, it would follow that there was no jurisdiction if the fact did not exist that the subject lands were on or in a swamp and the tribunal has no alternative but to make the assumption that was made at the outset of these reasons.

The general approach of the argument of counsel for the respondent was that the two reasons given by the Authority, namely, the concern for pollution and the reduction of the benefits of a swamp in connection with the storage and release of waters were met by the evidence. As indicated above the question of the risk of pollution is relatively minimal but the issue of loss of swamp characteristics is not viewed by the tribunal in a similar fashion. We dealt with the question of the adoption of the site in question for forest management purposes in our earlier decision and the subsequent attempts by the appellants to change the purpose of the site. The passage quoted from the evidence of Miller clearly illustrates the difficulties of permitting the change in use of the given site, particularly if a subsequent site were required for forest management purposes.

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The net effect of the approach of the appellants is that the entire swamp could be developed on a piecemeal basis by filling of individual sites for forest management purposes and subsequently converting their use to other purposes. The tribunal considers that this would be a complete reversal of the purposes of the legislation.

Counsel for the appellants argued that the effect of the policy of the respondent was such that it was applying the general principle that all construction of structures in a swamp would be prohibited. In this regard it may be noted that section 3 of the Regulation begins with a absolute prohibition which is subject to section 4 which reads,

> 4. Subject to the Ontario Water Resources Act or to any private interest, the Authority may permit in writing 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 to which section 3 applies if, in the opinion of the Authority, the site of the building or structure or the placing or dumping and the method of construction or placing or dumping or the straightening, changing, diverting or interfering with the existing channel will not affect the control of flooding or pollution or the conservation of land.

It will be noted that the power of issuing permissions is a discretionary one by reason of the use of the word "may". Further there was no evidence before the tribunal that the policy was such that matters which might not fall within the limited sphere of the present evidence, namely, residential construction, would not be considered by the authority. However, even if such were the case the matter in the view of the tribunal is one that has been transferred by the legislation to the conservation authority as a policy matter and a particular decision cannot be attacked on this particular ground. Reference was made to the local zoning and official plans and attempts to obtain amendments therein by the appellants. It is noted that the township official plan and the correspondence from the region are all conditional on the position of the respondent and this leaves the respondent with the overall duty of ensuring the preservation of swamps through its policy. The evidence contained references to

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the provincial policy and while these matters are matters of policy there was nothing in them that was inconsistent with the approach taken by the respondent, other than the fact that existing uses should be continued. However, the particular case is not an example of the continuance of an existing use. Reference was made to the evidence of Mr. Miller, who in referring to the property known as the Osler property, in the Township of Cartwright as it once was, suggested the size of the property justified the construction of a residence. The evidence of Mr. Miller very clearly was qualified by the extent of the size of the property involved. The Osler property contains a thousand or more acres and the economics of management of such a site are uncomparable with the fifty acre site owned by the appellant. The tribunal fails to see that this analogy is valid or that it provides any basis for overriding the decision that was made by the respondent.

It must be kept in mind that the Province, through the Legislature, has delegated the responsibility in the areas in question to the conservation authority. While there is power to review, that review must be made with the underlying concept of the responsibility being that of the conservation authorities. In this case there is nothing in the Provincial policies as they were outlined before the tribunal that are inconsistent with the policies of the respondent followed in this case and with the finding of fact being that there was no evidence to show that the appellants had been deprived of the benefit of any policy of the respondent, there is no grounds for interfering with the decision on the basis of overriding Provincial policy.

Counsel for the respondent requested that costs be awarded on a solicitor and client basis in view of the fact that there were considerable expenses involved in the obtaining and bringing of expert evidence. The case is not one of such flagrant abuse of process that the tribunal considers that costs should be awarded on a solicitor and client basis. The tribunal is satisfied that the case for the appellant has not changed in any significant fashion from the case previously heard by this

tribunal and under the circumstances is prepared to award costs on a party and party basis.

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

2. THIS TRIBUNAL ORDERS that the appellants shall pay to the respondent its costs of this appeal assessed by the local assessment officer on the basis that the case involves less than $25,000.

SIGNED this 16th day of September, 1986.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.