Box 330
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Toronto, Ontario
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The Mining and Lands Commissioner

In the matter of The CONSERVATION AUTHORITIES Act

G.H. Ferguson, Q.C.) Monday, the 14th day of
Mining and Lands Commissioner) July, 1986.

AND IN THE MATTER OF

An appeal against the refusal to issue permission to install a septic system and add to an existing structure on Part of Lot 6 in Concession III in the Township of West Garafraxa in the County of Wellington.

B E T W E E N :

JOAN KROPF

Appellant

\- and -

GRAND RIVER CONSERVATION AUTHORITY

Respondent

W.D. Watson, for the appellant.
J.M. Harris, Q.C., for the respondent

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to issue permission to install a septic system and make an addition to an existing structure on part of Lot 6 in Concession III in the Township of West Garafraxa in the County of Wellington. By Ontario Regulation 364/82, the power and duty of hearing and determining such appeals were assigned to the Mining and Lands Commissioner. The hearing was commenced in the City of Toronto on the 5th day of December, 1985 and following the hearing of the evidence of the appellant and some of the evidence of the respondent, counsel for the appellant moved that the hearing be adjourned sine die in order that a pending prosecution of an offence under the Conservation Authorities Act might be completed. Following the conviction of the appellant the hearing was continued in Toronto on July 3, 1986.

The appellant owns a summer cottage that is situate on the east bank of the Grand River on a parcel of land having a

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frontage of sixty-five feet and a depth of one hundred feet.

A cottage was erected on the subject lands in 1952. The appellant became the owner on the death of her father in 1968 and in 1972 the existing cottage was torn down and a new cottage erected. The existing cottage is situate, by scaling, approximately fifty feet easterly of the river and measures thirty feet by twenty feet and the proposal is to erect an addition at the easterly end of the cottage measuring sixteen feet by twenty feet and containing 320 square feet. The subject lands are situate approximately 3,500 feet southerly of the Shand Dam. Access to the cottage is through a right-of-way approximately 600 feet in length leading to a township road crossing the river. The right-of-way is parallel to the river.

The subject lands are within the flood plain of the regional storm and the flood plain of the one in one hundred year storm. The right-of-way also is within the one in one hundred year flood plain. The general area, both to the north and the south of the subject lands, is heavily treed.

The elevations of the existing cottage vary from 1,327.4 to 1328.5 feet above sea level. The elevation of the bank of the river is 1327.7 feet. The elevation of the regional flood which has a flow of 28,000 cubic feet per second is 1,335.3 feet, resulting in the existing building and the proposed addition being subject to 6.8 feet of flooding in a regional storm. The elevation of the one in one hundred year flood having a flow of 19,100 cubic feet per second is 1332.1 feet, resulting in 3.6 feet of flooding. In April of 1972 it was necessary to open the gates of the Shand Dam to permit a flow of 15,700 cubic feet per second. The elevation of this flow is 1330.6 feet, resulting in flooding of 2.1 feet at the proposed site.

Attempts were made to question the accuracy of the foregoing elevations and L.L. Minshall, a Professional Engineer employed by the respondent in the capacity of Manager, Water Resources Planning, who has had academic training in respect of hydrology as well as practical experience with the respondent since 1975, caused the existing information to be recalculated

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and confirmed, after having more elevations taken and a further cross-section established, that the elevations shown on the existing flood plain mapping that was filed as Exhibit 7 are accurate.

In refusing the application, the executive committee gave the following reasons which were filed as part of Exhibit 4,

> It is the opinion of the Authority that this proposal could increase the potential for loss of life and property damage in the event of a Regulatory Flood. In addition, increased public and private expenditure for emergency operation, evacuation, and restoration could also be incurred.

The approach of the appellant was that the respondent in other areas under its jurisdiction was granting approval for the construction of residences in areas in the floodway where the risk was equally as great as the risk in the present case. Reference was made to fifteen lots in the community of Plattsville on the Nith River and to the reconstruction of residences in the Village of Grand Valley following the 1985 tornado. No evidence was brought to the tribunal of permission being given in the immediate vicinity of the subject lands. The evidence of the respondent indicated that the situation in Plattsville resulted from an error in flood plain mapping which was not discovered until after the plan of subdivision had been approved and the services installed and that the applications in that area are being dealt with on the urban infilling principle which is justified on the basis of the existing need for protective works and evacuation procedures. In this regard, counsel for the appellant pointed to other landowners in the area who would require warning and evacuation in the event of a regional flood and the fact that the building as it exists would still attract such services in such an event.

R.P. Emerson, the Flood Plain Inspector of the respondent, gave evidence that it was the policy of the respondent to not allow the construction of residences in the floodway but it would allow additions above the elevation of the one in one hundred year storm subject to the considerations set out in item 3.4.5 of the pamphlet entitled "Policies, Guidelines

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and Procedures for the Administration of Fill, Construction and Alterations to Waterways", a copy of which was filed as Exhibit 5 and which section reads,

> 3.4.5 Additions and Renovations to Existing Development
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> Construction of additions or renovations which are estimated to be equal to fifty percent (50%) or more of the market value of the structure or works shall be constituted as major repairs or alterations and not as maintenance of such structures or works and will be subject to the same policies as those applying to construction of new structures or works.
>
> Construction of minor works valued at less than 50% of market value will be reviewed taking into consideration the provisions of section 3.4.8, "additional Criteria Considered in the Review of Applications for Basements, Renovations, Additions and Rebuilding".

He noted that as the area of the addition was more than fifty per cent greater than the area of the existing building the proposal fell within the first paragraph and hence, was excluded from the policy of the respondent as new residential construction is not permitted in floodways. The witness pointed out that if the proposal fell under the second paragraph it was essential to consider paragraph 3.4.8 which reads,

> 3.4.8 Additional Criteria Considered in the Review of Basements, Renovations, Additions and Rebuilding
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> Applications for basements, renovations, additions or rebuilding may be given due consideration by the Authority after taking into account:
>
> a) the existing flooding depths and associated hazards.
> b) the potential impacts of flooding and associated hazards.
> c) the proposed methods by which these impacts may be overcome in a manner consistent with accepted engineering techniques and the adjacent site grades and drainage.
> d) the feasibility of re-establishing the proposed works in a different location on the same property where there are improved conditions.

It was not the policy of the respondent to grant permission for residential construction in areas subject to 6.8 feet of flooding.

Counsel for the appellant suggested that the application should fall within the second paragraph of section 3.4.5 as the subject matter of the paragraphs is market value rather than area and as the witness for the appellant indicated that, apart from

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his labour, the costs of the materials for the bathroom and kitchen would not exceed $9,000. It would seem to the tribunal that having regard to the evidence of Emerson, the respondent had given the appellant the benefit of such a consideration.

The witnesses for the respondent emphasized the increase in risk from the change in the nature of the building from a summer cottage to a permanent residence and reference was made to the intention of the appellant and her husband, on his forthcoming retirement to live in the building from late March until November or even Christmas. Counsel for the appellant cross-examined the witnesses for the respondent on this issue with a view toward establishing that no greater risk would be created by the addition as such use can now be made of the existing cottage. Counsel for the respondent pointed out that regard should be had, not only to the intent of the existing occupants but the potential use of future owners.

With reference to the precedents relied on by counsel for the appellant, the tribunal is satisfied that neither situation is analogous to the present case. While the risks may be comparable there are other factors which are not applicable in the present case. In the Plattsville situation there was an application of the infilling principle and an error in the flood plain mapping, neither of which are applicable to the present case. The Grand Valley situation could fall under paragraph 3.4.6 of the policy which reads,

> 3.4.6 Rebuilding of Damaged or Demolished Structures or Works
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> Structures or works which have been damaged will be subject to the policies of section 3.4.7 and section 3.4.8. Structures or works which have been demolished or damaged to the extent whereby rebuilding is necessary shall be reviewed on its own merits and may be considered as exceptions to the policies regarding new development.

There is no element of natural calamity in the present case as existed at Grand Valley.

The tribunal is satisfied that the respondent in refusing the permission requested dealt with the appellant on the

same basis as other applicants in similar circumstances are dealt with. There was no evidence that the appellant had been denied the benefit of any express or implied policy of the respondent. With reference to the latter aspect, there was no evidence of the granting of permission in the area or areas that could be considered similar to the area in which the subject lands are situate.

There was no evidence of any overriding provincial or federal requirements that would warrant the overriding of the decision of the respondent. The tribunal is not aware of any generally accepted principle of flood plain management that permits residential construction in a floodway that is subject to 6.8 feet of flooding. The policy of the Province of Ontario in respect of areas that are subject to a two-zone concept is that no construction shall be permitted in the floodway. The tribunal concurs with the reasons given by the respondent and cannot find any basis on which the decision of the respondent should be reversed.

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

2. THIS TRIBUNAL ORDERS that no costs shall be payable by either party to the matter.

SIGNED this 14th day of July, 1986.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.