



The Mining and Lands Commissioner
In the matter of The CONSERVATION AUTHORITIES Act

AND IN THE MATTER OF

An appeal against the refusal to issue permission to build a second storey on a residence situate on part of Lot 2 in Concession IX in the Township of Puslinch.

B E T W E E N :

HENDRIC OOSTERVELD and
ALISON OOSTERVELD

Appellants

- and -

GRAND RIVER CONSERVATION
AUTHORITY

Respondent

K.W. Hogg, for the appellants.
J.M. Harris, for the respondent.

The appellants appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission to reconstruct the roof of their residence on part of Lot 2 in Concession IX in the Township of Puslinch. 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 June 23, 1983 with the consent of both parties and without the issue of a notice of hearing.

In 1979 the appellants acquired the subject lands, including the residential building now erected thereon at a price of \$33,300. There was no evidence as to the date of construction of the residence although there is an inference from an earlier sale in 1941 at a price of \$35 that the building probably was not erected at that time. The subject lands have a frontage of approximately seventy feet on a road that is at an angle to the sidelines of the subject lands. The sidelines of the subject lands are 103 feet and 145 feet in length and extend in a northerly direction from the road and cross a tailrace of the Eramosa River.

The residential building is an L-shaped solid brick building erected on a concrete block foundation. The building is

approximately fifty feet from the tailrace. The building has a flat roof and the purpose of the application was to replace the flat roof which is leaking with a peaked roof of sufficient slope to permit the change of the building into what may commonly be called a storey and a half building. In this regard there was some confusion before the executive committee of the respondent at the time it held a hearing as to whether the proposal was to construct a complete storey or a half storey and as to the cost of the proposed change. There was an additional area of confusion before the executive committee in that it was understood that the regional flood elevation was considerably higher than it appeared to be before this tribunal. It may well be that the respondent would reconsider the matter if full cost estimates and plans were submitted to it but this tribunal makes no comment in that regard.

The subject lands are situate at the approximate centre of the regional flood plain as recalculated since the hearing before the executive committee. The evidence before this tribunal indicated that in a regional storm the subject lands would be inundated with flood waters of a depth of eight and one-half to nine feet which would be moving at a velocity of seven to eight feet per second. As the engineer for the respondent indicated this is a serious flow and there is no assurance that the basement walls or the foundation would withstand such a flow, even though the proposed reconstruction is above the level of the regional flood. It is also apparent that the building is situate in the floodway as contrasted with the flood fringe.

The existing residence contains two bedrooms and as the appellants have two children and are expecting a third child they require additional residential space. The existing floor area is 750 square feet and it appears that the proposal would increase this square footage by approximately sixty-five percent. The appellants have obtained an estimate of the market value of the subject lands of approximately \$50,000 but their preference would be to enlarge the accommodation rather than

sell the premises and look for a new house. The amount of the cost of the renovations was not apparent. At one time the appellants had obtained an estimate but it was not presented nor was it clear as to whether it was a sound estimate particularly as the evidence indicated that it was obtained for the purpose of considering construction in respect of a federal grant under which a minimum expenditure of \$10,000 was required.

The property to the immediate northwest of the subject lands contains a residential building which is situate at the edge of the tailrace. A second storey was added to this building last year. However, it appears that this action was taken without permission of the respondent and that the matter did not come to the attention of the respondent until after the expiry of the limitation period. While this property creates the impression that a landowner who acts without the required permission may be in a better position than a landowner who acts within the legal framework, the case affords no precedent as far as this tribunal is concerned and the significant aspect of the construction on the neighbouring property is that in the event of a regional storm there will have been no consideration of the principles of flood plain management. Apart from any legal implication that may arise from the construction of the second storey, the owner has in effect breached the purposes of the Act and has destroyed the beneficial purposes of the Conservation Authorities Act as they are applicable to that property.

In its refusal of the application the respondent referred to the potential loss of life, the increased risk of damage to property and the increase of the cost of providing protective works. These reasons were attacked by counsel for the appellants who submitted that with reference to potential loss of life there is an existing potential. With respect to damage to property there again is an existing potential and he elicited from the respondent's witnesses that there was no existing or contemplated program for the construction of remedial works

although one witness indicated that if such were requested by the local municipality the conservation authority would have difficulty in resisting such a project. In response to the three arguments it was pointed out that while there is an existing potential risk of damage to life and property the proposal increases the potential by providing residential accommodation for an increased number of persons and by increasing the value of the property that is situate in the floodway. On the third point it was submitted that the increasing of the number of occupants of the flood plain and the increase in value are matters which build up the requirements for remedial works.

The policy of the respondent permits certain additions and renovations to existing development in flood plains. These principles are contained in paragraph 3.4.5 of a copy of the regulations and policy of the respondent filed as Exhibit 5 which reads,

3.4.5 Additions and Renovations to Existing Development

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".

Assuming that the cost of the proposal is less than fifty percent of the existing market value the qualifications raised by paragraph 3.4.8 read,

3.4.8 Additional Criteria Considered in the Review of Basements, Renovations, Additions and Rebuilding

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.

With regard to these considerations counsel for the respondent referred to the depth of flooding of eight to nine feet and the velocity which could have a serious impact on the building as it is presently constructed without the addition of a further half storey. The absence of any method of flood proofing and providing access from the subject lands in the event of a regional storm were pointed out and the view of the witnesses for the respondent was that even if the present case were to be considered on the basis that it is an alteration costing less than fifty percent of the market value, with the consideration of these other factors permission should be refused.

In the opinion of this tribunal the existing building of the appellants is subject to a serious flood risk. The depth of flooding and the velocity of flooding in a regional storm are serious and this tribunal is not aware of any policy of any conservation authority or of the Province that recommends the construction of residential premises in a floodway with depths of flooding of this extent and in connection with which there can be no steps taken to provide access thereto or egress therefrom in the event of a regional storm.

The evidence indicated that the appellants had been given the full benefit of the policy of the respondent and had not been denied permission in circumstances where other landowners had been granted permission so that it may be said the appellants' application has been given consideration not only within the express policy of the respondent but also the existing policy of the respondent as it appears from the permissions granted in other cases.

While there has been some lessening of the standards recommended by the Province in connection with flood plain management these new policies do not extend to authorize the

creation of new or additional residential premises in the floodway of a regional flood plain. The fact that existing hazards are present provides no reason to increase the extent of these hazards and the appellants have not provided this tribunal with evidence, either through qualified expert evidence of witnesses called by them or through cross-examination of the qualified experts of the respondent, of any principle of flood plain management that permits the construction of residential premises in a flood plain in which the depths and flows of water in a regional flood are as significant as the depths and flows that are to be expected in accordance with the evidence produced in this case. This tribunal cannot find that there is a principle of flood plain management under which the permission should be granted.

IT IS ORDERED that the appeal in this matter be and is hereby dismissed.

AND IT IS FURTHER ORDERED that no costs shall be payable by either party to the appeal.

DATED this 26th day of August, 1983.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.