Ontario

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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 erect a single family dwelling and storage building on lots numbers 448 and 449, Elm Street, in the Village of Drayton in the County of Wellington.

B E T W E E N :

BERT DOBBEN

Appellant

- and -

GRAND RIVER CONSERVATION AUTHORITY

Respondent

C. D. Trotter, for appellant.
J. Harris, for respondent.

The Conestoga River, a tributary of the Grand River, flows in a general southerly direction through the Village of Drayton in the County of Wellington.

In 1974 the appellant, a building contractor, acquired lots 448 and 449 on the west side of Elm Street according to the Village Plan. The only special condition of the offer to purchase related to the matter of a severance. There was no condition respecting building permits, permission to install septic tanks or permission to build from the respondent. The appellant understood that the previous owner had been assured that the village would issue a building permit and that there would be no difficulty in obtaining a permit for a septic tank from the Ministry of Health.

Each lot has a frontage on Elm Street of 66 feet. The depths of the lots are approximately 287 feet 10 inches. Lot 445

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lies at the rear of the two lots, and other lots lying to the south of them. Lot 445 is a large triangular lot with buildings on the westerly part. The apex of this triangular lot separates the subject lots from the Conestoga River. The distance across this apex to the river varies from approximately 75 feet to 150 feet. A municipal drain has been constructed along the northerly side of the lots and permits surface drainage to flow into the river.

Following the acquisition of the lots the appellant applied to the building inspector of the village for a building permit to erect a single family dwelling, measuring 28 feet by 64 feet and containing 1,792 square feet and a storage building measuring 40 feet by 80 feet and containing 3,200 square feet. The area of the two lots is 37,884 square feet. The appellant was referred to the respondent by the building inspector and he alleges that this was his first information that permission from the respondent was required to build on the lots.

Following a hearing by the executive committee of the respondent, the applications for permission to erect a dwelling and storage shed were refused. The refusal was appealed to the Minister of Natural Resources and pursuant to Ontario Regulation 1049/75 the power and duty of hearing the appeal was assigned to the Mining and Lands Commissioner.

At the hearing before this tribunal, the appellant abandoned his application in respect of the storage building and indicated that he would place fill on the property or meet other conditions that the respondent might wish or this tribunal would require in respect of the granting of permission. In this regard counsel for the respondent in argument took the position that such an application, i.e., an application solely for a single family dwelling and subject to the placing of fill or other conditions had

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never been considered by the executive committee of the respondent and that such application should be reviewed by the executive committee with the assistance of its technical advisers. There is considerable merit in this approach. The making of changes at a hearing gives the respondent and its officials, who have the best knowledge and abilities to deal with such matters, no opportunity of preparing for a hearing in respect of such revisions and in this regard I propose to dismiss the appeal for the reasons which will be hereinafter set out but the dismissal will be without prejudice to the appellant or his counsel discussing with officials of the respondent the considerations arising in respect of an application for a single family dwelling solely and alternatives respecting the placing of fill or other protective works on the property. Nothing in these remarks should be construed to infer that this tribunal on the evidence presented, would or would not have granted permission for a limited application subject to conditions.

Although no contour maps of the flood plain were available, the respondent caused to be prepared on the base of an aerial photograph an outline of the flooding that occurred in 1948, and in May 1974, and in April 1975. These areas were coloured in yellow and clearly encompass and extend beyond the subject property.

The applicant, who has lived in the area for 24 years and who was in the vicinity during the night of the 1974 flood admitted that there was at least two feet of water during that flood on the subject lands. Several witnesses gave evidence and while they disagreed with the sketch prepared for the respondent in minor degrees regarding the extent of the floods, admitted that the subject property had been flooded. One witness in particular, Alva Cherrey, the Fire Chief, who had been involved in rescue operations during previous flooding, indicated that the sketch was accurate and

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that the subject property had been under water of greater than three feet in depth in 1974. During his cross-examination by counsel for the appellant, he indicated that his son had reported to him that it was under water in 1976 and it appears to be without doubt that it was under water in 1975. This witness went further and indicated that the damage resulting from flooding in the past had extended beyond the limits shown by the sketch of the respondents.

In particular, his residence lay outside the area coloured in yellow, and he sustained $1,000.00 damages to his goods, as a result of back-up of the flood waters through the drains that have been connected to the storm sewage system of the village. He referred to damage sustained by other owners outside the area coloured yellow.

Before leaving Cherrey's evidence, it is interesting to note that his view, although he was not qualified as an expert witness on the subject of the effect of floods, was that if a house were raised beyond the flood level with adequate protection from the floods there should be no objection to the granting of a permit. His reason for this was that with such protection and such elevation the occupants could remain in the house without the officials conducting evacuation or rescue operations being involved in their removal. I find this approach somewhat difficult to accept in the light of his evidence that one of the serious aspects of evacuation procedures is the panic that strikes the persons in flooded areas and particularly in the darkness. He vividly recalled one woman who was an example of such panic. However, this consideration involves the possibility of placing fill and other protective devices on the property.

Charles William Stevens, the operations engineer of the respondent, gave evidence on a number of calculations that he had made regarding the subject property. Based on recorded data and

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engineering principles, he concluded that the elevation of the subject lands was 1,310 feet above sea level. Based on a flow of waters in the Conestoga River of 13,500 c.f.s. he calculated that the elevation of the water on the subject lands in the May 1974 flood was 1,314 feet. The flows also indicated that there would be a similar elevation in 1975 and a slightly less elevation in 1976. The overall result of his calculations were that in his opinion the subject lands would have been flooded fifteen times in the last sixteen years.

This witness gave evidence on the effect of the proposed erection of a building at this location. He stated that in his opinion while the volume of the house itself might not have any great effect on the channel capacity, he was concerned that the construction of the house would double the "mean velocity of the flow of the river" and for this reason should not be permitted. He calculated the elevation of the regional flood line in respect of the subject lands at two to two and half feet above the 1,314 foot level and this would place it at the 1,316-1,317 foot level. Accordingly, in the event of a regional storm, there would be from six to seven feet of water on the subject lots. The witness also indicated that this determination was a very minimal one as he did not take into account the effect of backwater from the two bridges crossing the river.

The Village of Drayton does not have a sewage system. Septic tanks are required for each building. The village has no zoning bylaws and is not subject to an official plan. Its policy in the past, as established by its clerk-treasurer, Jean Campbell, was to refer applications to the Wellington-Dufferin Health Unit or, if the application was made in respect of lands that are subject to flooding, to the respondent and the issue of a building permit would

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depend on the recommendation received from these authorities. A zoning bylaw has been prepared which will zone the subject lands in an A2 category, i.e. an agriculatural category, which would permit the erection of the proposed house. However, a further provision of the proposed bylaw establishes the area as a Defined Area. Under this provision new buildings in the flood plain would be required to have no opening below an elevation of 1,313 feet. The planning officer of the respondent, Jane Isabel DeVito, gave evidence that recommendations were being made to amend this qualification so that the consent of the respondent would be required. This concept is found in the proposed official plan for the area and it may well be that some changes will be made in the bylaw. In dealing with municipal bylaws it must be remembered that the provisions of a regulation of a conservation authority are related to safety matters resulting from flooding and while no conservation authority wishes to issue permission in contravention of a bylaw, surely those laws relating to safety should prevail over those laws of a purely zoning nature.

The argument of the appellant was that in the absence of evidence of extreme property damage or injury to life or limb, this argument being made in spite of evidence that a boy drowned during Hurricane Hazel, the issue of a permit to the appellant should not be refused particularly in light of the general acceptance of the residents of the village of the recurring flooding of their properties.

The evidence clearly establishes that there is a potential flood elevation of six to seven feet in a regional storm. The purpose of the regulation is to prevent the occurrence of situations such as the situation that occurred in Weston during Hurricane Hazel. The test of whether permission should be granted

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is found in section 4 of Ontario Regulation 356/74 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 key words of the section as related to this application are ".....if, in the opinion of the Authority, the site of the building or structure.....and the method of construction.....will not affect the control of flooding or pollution or the conservation of land." The evidence of the witness Stevens indicates that the construction of a house at the site in question would have a serious effect on the velocity of the flow of the river in the event of a regional flood and would double the mean velocity in such circumstances. Undoubtedly this would effect the control of flooding.

There was evidence of erosion problems during Hurricane Hazel which according to the evidence did not have the intensity of a regional storm in the village. With an increased velocity of flow in the river resulting from the proposed construction, it is most difficult to conclude that there would be no effect on the river banks and the flood plain from the construction.

Also keeping in mind that I am directing my thoughts to a situation where no fill would be placed on the lots, there would be flooding of lands that contain septic tanks and tile beds not only in regional storms but annually. In view of this evidence it

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is difficult to conclude that there would be no effect on the control of pollution.

In my opinion the evidence clearly establishes that there were and are good and sufficient reasons for the respondent refusing to grant the permission sought by the appellant and that the construction of a residence in the facts of this case does not fall within the exception to the prohibition contained in Ontario Regulation 356/74.

Counsel for the appellant also argued that the granting of the permit would not set a precedent as the Dobben lots are the last building lots in the flood plain. In this regard he pointed out that while there were properties to the east of Elm Street, the Dobben properties would be the closest properties to the river. I have difficulty following this argument relating to precedent. It seems to me that if permission were granted to a property owner who is, for all intents and purposes on the riverbank, it would be difficult to argue that those who own land that is further away should be refused, assuming the theory of precedent is relevant.

Counsel for the appellant further argued that there was a need for additional housing in the village. The evidence in this regard was conflicting. Some witnesses felt that any needs would be met in the near future by the development of new subdivisions on higher ground that were nearing approval. Regardless of the need, I cannot accept this principle as a ground for granting permission. It does not relate to the exception contained in the regulation and the granting of permission on such ground would surely defeat the purpose for which the regulation was made and its intent.

Counsel for the appellant further argued that it was not the role of the respondent to "stymie" the development of the village. No one would object to this statement <u>per se</u> but it

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appears that the village in fact is developing and new subdivisions on land that is not subject to annual flooding are being developed. This certainly compensates for any loss that may result from the non-construction of a residence in a flood plain.

Counsel for the appellant also argued that it was solely the appellant's concern if he chose to spend a substantial sum in the construction of a house on the flood plain. It is apparent from the evidence that the situation cannot be resolved on this basis. This existence of a house causes concern and need for evacuation in times of flooding. More seriously the public interest or more precisely the interests of other landowners in the flood plain are affected by the increased effects on the flooding hazards from the construction of a house and the matter cannot be viewed solely from the outlook of the applicant.

Counsel for the appellant also argued that in view of the hazards to existing housing and other buildings in the flood plain, these buildings and vacant lots among them should be treated on a nonconforming basis and suggested that the need for protective works currently exists and such need is not increased by the attribution of a nonconforming status to new buildings within the affected area. The general concept of a nonconforming doctrine as it is applied in zoning law is not to extend the doctrine to new housing or new construction of a nonconforming use and here, particularly, the evidence indicates an increased hazard would be created and on this basis in my opinion, the situation is not analagous to a nonconforming use situation. Further there was no suggestion or assurance that public funds would be available for protection devices either now or in the future.

Counsel for the appellant also referred to the lack of knowledge of the appellant of the law in acquiring the property and

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his expectation of building when he acquired the lots and the resultant loss of expectation with its loss of capital outlay for the lots and the continuing obligation of tax payments in respect of land that cannot be revenue producing if development is not permitted. While these issues tend to create sympathy toward an appellant, the overriding considerations in this type of situation are the safety aspects of the proposal as related to the particular property, other properties in the flood plain and the public generally. I cannot conclude that the respondent was in error in refusing to grant the permission requested.

I DO HEREBY ORDER that this appeal be and is hereby dismissed.

No costs shall be payable by either of the parties.

DATED this 11th day of May, 1976.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.