



The Mining and Lands Commissioner

In the matter of The

Act

CONSERVATION AUTHORITIES

G.H. Ferguson, Q.C.
Mining and Lands Commissioner

Monday, the 28th day of
March, 1988.

AND IN THE MATTER OF

An appeal against the refusal to issue permission to place fill for a residential subdivision and construct municipal servicing, roadworks and a headwall structure on Lot 24 in Concession I in the Town of Whitby in the Regional Municipality of Durham.

B E T W E E N :

FRANKLAND HOMES LTD. and
RAVINE DEVELOPMENTS INC.

Appellants

and -

CENTRAL LAKE ONTARIO CONSERVATION
AUTHORITY

Respondent

J.H. Wigley and J. Thompson for the appellants.
R.I.R. Winter, Q.C. and D. Jarvis for the respondent.

The appellants appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission to place fill for a residential subdivision and construct municipal servicing, roadworks and a headwall structure on Lot 24 in Concession I in the Town of Whitby in the Regional Municipality of Durham. 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 November 26 and 27, 1987

The site of the proposed subdivision lies on the east side of Blair Street which is the road allowance between Lots 24 and 25 in Concession I of the Township of Whitby. Pringle Creek flows in a southerly direction along the easterly side of the proposed subdivision. There have been a number of proposed subdivisions of the site in recent years and although the evidence suggests that the respondent had approved one proposed

draft, such is not confirmed by the evidence on behalf of the respondent. The allegedly approved plan was not placed in evidence before this tribunal.

The proposed plan of the area which measures 338.264 metres along Blair Street and lies approximately forty-four metres to the east contains sixteen building lots with frontages averaging fifteen metres approximately and depths of 30.5 metres. Three blocks are shown on the plan. Block 17 is at the north end of the subdivision and has twenty-six metres of frontage. This appears to be a reserve for a future street. Block 19 is a strip measuring 3.048 metres in width along the east side of Blair Street. The purpose of this strip is for street widening.

Apparently some of the earlier plans contained a service road the result that the lots extended a greater distance into the valley than the present proposal.

Block 18 is the area between the tenth and the eleventh lots. It has a frontage of 74.18 metres on Blair Street. It also includes the area lying to the east of Lots 1 to 16 measuring 11.085 metres in width

The regional flood elevation in the area based on the Hurricane Hazel standard contained in Regulation 161 of Revised Regulations of Ontario 1980 varies from 280.1 to 281.1 feet according to a study done by Dillon Consulting Engineers and Planners in 1974. Subsequent studies have shown an increase in the elevation of the regional storm and according to the evidence

the engineer for the appellants, G.M. Sernas and Associates Limited, hereinafter referred to as "Sernas", who have had considerable experience in this type of work, the regional storm elevation will traverse the rear parts of the lots on the proposed subdivision with the exception of the southerly four lots and otherwise will be located on Block 18. It is proposed that the elevations of the houses and their basements be raised so that they are above the elevation of the regional storm. It is further proposed that fill be removed from Block 18 and placed on the lots in order to raise the elevation of part of the rear

portions of the lots to an elevation above the regional storm elevation thereby filling in part of the existing flood plain.

Exhibit 11 prepared by Sernas shows that 1,250 cubic metres of fill will be placed below the regional flood line and 240 cubic metres will be excavated below the regional flood line in meeting the existing grading requirements provided by the Town of Whitby. The result is that there will be a net decrease in storage capacity.

One of the results of the removal of the fill from Block 18 is that steep slopes will be created along the southerly boundary of Lot 10 and the northerly boundary of Lot 11. There was no plan of the elevations of this block filed but Exhibit 8, which shows the approved grading indicates that there may be hazards other than those associated with the control of flooding associated with the removal of fill. Such matters may fall within the element of conservation of land but are not relied on by this tribunal in its consideration of this appeal.

The evidence indicates that the flow of Pringle Creek is an example of the historical problems of the development of flood plains which fall within the purview of the Conservation Authorities Act. The site in question lies between Highways No. 2 and 401. South of Highway 401, a long established embankment of the Canadian National Railways crosses the valley. The culvert in the railway embankment is not sufficiently large to discharge the flows of a regional storm. A street named Burns Street crosses the valley at a location south of the subject lands and although the Dillon study probably took into consideration the existence of Burns Street it was alleged by the appellants that its culvert would only permit the passage of the one in one hundred year storm. The evidence of the respondent could not confirm the capacity of the bridge at this crossing. Following the Dillon report in 1974 the firm of Totten, Sims, Hubicki prepared a storm water management study which apparently indicated an increase in the elevation of the regional storm and apart from the evidence of the appellants, which this tribunal is not assuming to disbelieve, there is no current study of the

respondent or of the Province indicating the present elevation of the regional storm. The tribunal cannot determine whether the change in the elevation is sufficient to encompass the sites of the proposed houses but on the evidence such does not appear to be the case.

Regulation 161 in dealing with the control of the placing or removal of fill prohibits filling on any part of 24 in Concession I without the permission of the respondent. The policy of the respondent appears to be that the control is only exercised within the part of the lot that is below the regional flood elevation. Consequently the present matter appears to deal solely with the issue of the placing of fill rather than the construction of buildings although it may well be that the sites of the buildings are within the regional flood plain as it might be determined today. The issue then becomes one of whether the placing of fill in this case interferes with the control of flooding or pollution or the conservation of land. Section 4 of Regulation 161 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.

The argument of the appellants was that the respondent has adopted a policy of exercising its jurisdiction in respect of the placing of fill only in the areas that are subject to regional storm determined in accordance with the elevations of a one in one hundred year storm which according to the evidence for the appellants is illustrated by the green line shown on Exhibit 8 and which, while it may cross the lands of the appellants including Block 18, does not reach any of the proposed residential lots in the subdivision. The evidence of R.D. Webster, an engineer with considerable experience in the relevant

matters and who has been with Sernas for some time, gave evidence that this policy had been adopted in some ten or twenty subdivisions with which he had been instrumental in arranging approval. He referred specifically to three subdivisions but mentioned that there were other subdivisions to the north and further upstream of Pringle Creek. These northerly subdivisions were not put in evidence and this tribunal cannot make any assumption in connection therewith. Reference was made to a subdivision lying to the southwest of the subject lands known as the Ladies College Subdivision. This subdivision, although it was laid out over part of the regional flood plain of Pringle Creek as shown on Exhibit 6 was laid out over a tributary of Pringle Creek. The evidence of the respondent was that fill was permitted on the basis that the waters of the tributary be passed through an underground culvert having capacity to pass the regional storm flow. However, the witness was unable to confirm that such a pipe had been placed but such was said to be the nature of the consent given.

A subdivision lying to the south of the subject lands was put in evidence and a copy of the plan of subdivision was filed as Exhibit 15. The conditions of the approval of the subdivision were filed as Exhibit 13 and among the ten conditions there were requirements for channelization of the creek, the enlargement of the Canadian National Railways' culvert to pass the flows of the one in one hundred year flood for the watershed and the amendment of the regulation to change the regional storm to the one in one hundred year storm. There was nothing to assure the tribunal that these conditions can or will be met.

A third proposal in respect of industrial lots lying further south was placed before the tribunal. This proposal dealt with industrial lots in a part of the flood plain that was quite wide and consequently would have lesser velocities in the more severe storms

In addition to Webster's evidence the appellants called Andrew Brodie who has had considerable experience in dealing with relevant matters. Mr. Brodie gave evidence on the effect of the

placing of the additional fill in the flood plain. His evidence was that the elevation of the regional storm might be raised by one-quarter of an inch as compared with the creation of the loss of 40,000 cubic metres of storage created by the Burns Street bridge and that the effect of the subject application would be insignificant in his opinion in respect of the control of flooding. One interesting aspect of his evidence was that increases in urbanization would have more effect in the one in one hundred year storm than in the Hurricane Hazel situation.

The evidence for the respondent referred to the cumulative effect of the placing of fill and the risk to property and life associated with the placing of residential subdivisions in flood plains. L.J. Benson, a professional engineer with experience in the relevant matters, gave evidence that the respondent had not been provided with the evidence respecting grades produced at the hearing and the inability to compare the proposed grades against the background material. Her position was that the figures provided in respect of loss of storage capacity had not been verified and she emphasized the problems relating to the placing of fill in flood plains. In her opinion there was an effect on life and property and she felt there would be an increased flood level particularly if landowners on east side of Pringle Creek were permitted to place similar amounts of fill.

Counsel for the appellants relied on their evidence of precedent in favour of their case and the de facto policy of the respondent granted to other owners in other situations. Counsel also referred to a number of decisions of this tribunal in which the tribunal had regard to the practice of conservation authorities in dealing with prior applications. In passing, it may be noted that in all of the cases referred to the tribunal the appeal was refused. More specifically it may be noted that none of the cases dealt with the creation of residential subdivisions. Counsel for the respondent relied on the precedential implications of placing a significant quantity of fill in a flood plain and submitted that the matter should be

dealt with on the basis of the existing law. He further requested costs.

While this tribunal has in the past had regard to the policy of conservation authorities as it appears or as it in fact exists, as contrasted with the stated policy, in none of the cases has this tribunal dealt with an application that is fundamental to the approval of a plan of subdivision, particularly a plan of subdivision of residential lots. As is well illustrated by the evidence in this case there is a need for the controlled and restricted development of flood plains and the Conservation Authorities Act is the instrument of the Legislature for the implementation of such controls. Perhaps the most serious problem of the past has been the construction of residences in flood plains and this tribunal was not brought evidence of any policy of the Province of Ontario supporting the creation of plans of subdivision in flood plains below the elevation of the regional storm. In the examples of the policy placed before the tribunal the last significant example contained a condition of change in the law. Such a condition is so extensive that it can only be treated as no permission in the existing circumstances. The Ladies College Subdivision apparently was expected to deal with the flows of a regional storm.

The proposal, while some removal of fill from the flood plain is envisaged, does not comply with the incremental balance theory which on occasion is used to create an exception to the regulation.

The tribunal is not satisfied that this is the last case that might be brought for more intensive development of the flood plain and cannot discount the principle of precedence. The evidence of the expert witnesses for the appellants dealt with the insignificance in their opinion of the increase in the problems resulting from the appellants' proposal but they did not deal with the hazards of creating subdivision lots that are partially within the flood plain of a regional storm. One of the witnesses assumed that the properties would be fenced and

children would not stray beyond the fences. There was no evidence to support this assumption. There does not appear to the tribunal to be any analogy between the industrial development of the lands to the south and the present case due to the nature of the use. This tribunal is satisfied that the use requiring the highest degree of control for flood plains is residential subdivisions and the tribunal is not prepared to reverse the position taken by the respondent in this matter. Succinctly and allegorically, it is not the policy of the Province of Ontario or this tribunal to change the name of Blair Street to Raymore Drive. Accordingly the appeal will be dismissed.

In the opinion of the tribunal the case does not fall within the seriously unwarranted applications and no costs will be awarded

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

SIGNED this 28th day of March, 1988

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.