Room 569, Fifth Floor
Mowat Block, Queen's Park
Toronto, Ontario M7A 1A2

Ontario

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 place fill and construct a wall on part of Lot 22 in Broken Front Concession in the Town of Stoney Creek in The Regional Municipality of Hamilton-Wentworth, formerly in the Township of Saltfleet in the County of Wentworth.

B E T W E E N :

W.W.W.S. LIMITED

Appellant

- and -

HAMILTON REGION CONSERVATION AUTHORITY

Respondent

R. E. Inglis, Q.C., for the appellant.
G. W. Howell, Q.C., for the respondent.

The appellant appealed to the Minister of Natural Resources from the decision of the respondent made on September 25, 1979 denying an application to place fill and construct a wall on part of Lot 22 in Broken Front Concession in the Town of Stoney Creek. By Ontario Regulation 847/79 the powers and duties of the Minister to hear and determine the appeal were assigned to the Mining and Lands Commissioner.

The appellant, a developer, proposes to subdivide under The Planning Act a parcel of land fronting in part on the south shore of Lake Ontario and containing in excess of twenty acres. The easterly boundary of the parcel owned by the appellant is the centre line of a pond. Following a number of attempts at preparing a proposed plan of the parcel of land the advisers of the appellant have concluded that the best approach is to lay out what was referred to as ring roads having lots on both sides of the ring roads. The present proposed plan

.....2

which has been prepared by MacKay, MacKay and Peters Limited, O.L.S., a copy of which was filed as Exhibit 14, shows some of the easterly lots in the proposed subdivision extending part way into the pond in order that adequate lot size can be achieved. In order to have sufficient tableland on four of the proposed lots the appellant requested permission to place fill on part of the pond measuring approximately 2,550 square feet. This fill would make the land portion of the lots approximately 100 feet in length. No buildings would be erected on the filled portion but the filled portion would permit the lots to have an adequate backyard to meet the municipal requirements. Accordingly the subject lands of the application are approximately 250 feet in length and vary up to twenty-five or thirty feet in width. At either end the subject lands narrow to no width. This format has been adopted because in the past fill of a nature that prevents the filled areas from being proper building sites has been placed in the ponds on the westerly side of the appellant's lands necessitating an easterly movement of the location of the ring roads including the lots on the east side of the ring road to be known as Lakegate Drive.

The pond appears to be one of several in the Stoney Creek area. It is not at present part of a permanent watercourse but is more in the nature of a drainage area with the source of the water being rainfall and other groundwaters. A sandbar along the northerly end of the pond separates it from Lake Ontario but on occasion the sandbar is washed out. A regional floodline has been established for the pond and this varies from 249.7 feet immediately south of the sandbar to 250.7 feet at the southerly end of the pond. The pond at one time extended a greater distance in a southerly direction. Frances Avenue, the southerly boundary of the appellant's lands, has divided the pond into two parts. The fill line for the purposes of a schedule in the regulation made by the respondent, i.e. Regulation 118 of Revised Regulations of Ontario, 1970, as amended, lies a short distance above the regional floodline. Accordingly the subject lands fall both within the floodplain and the scheduled areas.

In addition to the filling that was mentioned along the westerly side of the appellant's land, a portion of the pond in

.....3

question was filled in 1974 under the authority of a fill permit issued by the respondent. This area was closer to Lake Ontario and substantially larger in size than the subject lands.

In support of its appeal the appellant called William L. Sears a professional engineer specializing in water related matters. His evidence was that the area to be filled measures 0.06 acres and the effect of the proposed placing of fill on the storage capacity of the pond in the event of a regional storm would be so insignificant as to be incapable of measurement. He also provided evidence respecting the effect of the grading and storm sewage proposals in connection with the subdivision which would have the result of diverting a portion of the natural runoff into the pond directly into Lake Ontario. His evidence was that approximately forty percent of the 20.6 acres that would be included in lots presently drains towards the pond. With grading and storm sewers this forty percent, i.e. approximately eight acres, would be reduced to 1.6 acres and as this small area would be backyards or lawns there would be little effect on the roughness coefficient. Accordingly his evidence was to the effect that there would be a reduction of approximately 75 percent of the existing flow into the pond by reason of the storm sewer construction and grading.

Sears' evidence was supported by the evidence of Dr. Roy J. Planck an expert in ecological and related matters with an undergraduate degree in physics and postgraduate degrees and experience in zoology, mathematical ecology, comparative psychology, environmental physiology, electro-neuro physiology, population biology and water related problems. Dr. Planck provided evidence as to the comparative effect of a regional storm on the lands of the appellant in their natural state and as they would be developed and concluded that there would be a substantial reduction even in the worst possible situation of a regional storm of the amount of water flowing into the pond.

The evidence of the respondent was to the effect that there are four reasons why the permisson ought not to be granted. Firstly, it was said that the filling and wall construction are not required for shoreline protection and erosion control. Secondly, it was said that the filled portion would reduce the surface area of the pond resulting

.....4

in reduced storage volume and the possibility of increased flood levels until such time as the sandbar at the beach is overtopped. Evidence to provide some measure of support for this point was two photographs filed as Exhibit 18 showing that in April, 1973 land on the easterly side of the pond had been under water and accordingly additional filling in of the pond would increase an already established flooding condition.

Thirdly it was said that there would be increased risk of siltation and an alteration of the pond environment. This concern appears to arise from the 1974 filling which had the result of moving the light sediments of the filled area further into the pond lowering the depth of the water immediately beyond the filled area and with the result, not to well proved, that lilypads and other aquatic vegetation had started to grow as a result of the reduction of the depth of the water. The only evidence in respect of siltation was that such would be very temporary in nature and should settle within a day or so of completion of filling operations. With reference to whether the change in vegetation was useful or detrimental to the pond, the only evidence was the evidence of Dr. Planck which indicated from the point of view of the scientific aspects of the pond this type of vegetation was a benefit. It is appreciated of course that there may be conflicts between the best type of vegetation for a pond and the expectations of owners of residential housing lands in respect of their backyards.

Fourthly, the respondent raised the issue of precedent and the risk of owners along the easterly side of the pond requesting permission to fill if permission were granted in the present case. It may be noted in passing that the proposal of the appellant, based on an understanding, or perhaps misunderstanding, of the requirements of the respondent, included a concrete wall along the outer edge of the fill. It may well be that the application should be amended to remove this wall as there was some evidence that sodded slopes would be equally effective for the purpose of retaining the fill if permission were issued.

As part of the evidence for the respondent there was filed as Exhibit 21 a statement entitled "Plan Review Guidelines" which was said

.....5

to include the policy of the respondent in respect of the placing of fill. Particular reference was made to paragraph 5(b). However it is apparent that paragraph 5(b) is not applicable to this case as it is only applicable to floodplains and drainage areas that are larger than one-half of 2.5 square kilometres but less than or equal to 2.5 square kilometres.

There was very little evidence as to the size of the watershed or more properly the drainage area of which the subject lands form part. Some of the witnesses treated the drainage area as containing approximately fifty acres and being primarily the lands immediately surrounding the pond to the closest streets. William L. Sears indicated from his knowledge of the area which extends over a period of twenty-five years in a professional capacity that at one time the maximum length of the drainage area was approximately one-half mile with the drainage area extending southerly to a railway line and the width was two or three hundred yards on either side of the pond. It does not appear that the drainage area prior to development in the area was in excess of one-half of one square mile and in effect is quite small.

In view of the area of the drainage area in question being much smaller than one-half of one square mile, the policy contained in paragraph 5(b) cannot apply to the present case. An examination of other paragraphs fails to disclose any express policy prohibiting the placing of fill in such small drainage areas and perhaps the respondent follows a principle similar to a provincial policy of leaving enforcement in drainage areas of less than one-half square mile to the municipal authorities. I cannot conclude that the refusal of the present application fell within the documented policies of the respondent.

The submissions for the appellant were that the expert evidence established that the reduction of the amount of storage capacity in itself was insignificant and secondly that with the grading and installation of storm sewers the reduction of the flows into the pond would be significantly greater than the effect of the loss of

.....6

storage capacity.

On the other hand this tribunal is of the opinion that an application could be brought by the appellant which would resolve some if not all of the concerns of the respondent. While the principles of the stage storage doctrine or the incrimental balance doctrine are normally related to a cross-section of a floodplain the fact that the body of water in the present case is a pond provides some ground for applying an analogous principle in respect of the present situation. Such an approach would also have a secondary benefit with reference to flood control of permitting opportunities to reduce the roughness coefficient of the particular cross-section so that at the times of high flows, a greater flow could pass through the floodplain without increasing flooding.

W. R. Sinclair the secretary-treasurer of the appellant, indicated on questioning from the Bench that the fill placed in 1974 extended beyond proposed lot lines. In addition immediately to the south of that area there is a fairly substantial point which could have a constricting effect and benefits related to flood control could be obtained from reducing the size of the point. This tribunal is of the opinion that the requirements of the appellant could be met by removal of part of the 1974 fill or part of the point and if it is satisfactory fill, its use as a source of fill for the subject lands. Such an approach would not reduce the existing storage capacity of the pond and would satisfactorily meet any implications of precedent. As this tribunal is not in a position to design the transfer of such fill it can only dismiss the appeal without prejudice to the right of the appellant to make a further application to the respondent along the lines suggested.

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

IT IS FURTHER ORDERED that no costs shall be paid by either of the parties to this matter.

DATED this 25th day of March, 1980.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.