Box 330
24th floor, 700 Bay Street
Toronto, Ontario
M5G 1Z6

Ontario

The Mining and Lands Commissioner

In the matter of The CONSERVATION AUTHORITIES Act

G.H. Ferguson, Q.C.) Wednesday, the 25th day of
Mining and Lands Commissioner) February, 1987.

AND IN THE MATTER OF An appeal against the refusal to issue permission to place fill on the property municipally known as 510 Victoria Street East in the Town of Whitby in the Regional Municipality of Durham.

B E T W E E N :

MARKO DRAGICEVIC

Appellant

and

THE CENTRAL LAKE ONTARIO CONSERVATION AUTHORITY

Respondent

R.G. Zochodne, for the appellant.
R.I.R. Winter, Q.C., for the respondent

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to issue permission to authorize the placing of fill on part of Lot 25 in Concession I in the Township of Whitby, municipally known as 510 Victoria Street East, in the Town of Whitby. Under 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 February 12, 1987.

The subject lands comprise a one-half acre parcel of land lying on the north side of Victoria Street. To the north of the subject lands is a tract of land expropriated for the Go-Transit extension to Oshawa. Further to the north is situate Pringle Creek and to the north thereof is situate Highway 401 Some distance to the south is the right-of-way of the Canadian National Railway. The embankment of the right-of-way creates a considerable constriction in the Pringle Creek watershed with the result that the elevation of the regional flood on the subject lands is 279.4 feet above sea level and such elevation on the lands immediately downstream of the embankment is some twenty feet lower. The flood plain mapping which was filed as Exhibits

1 and 2 indicates that the subject lands are subject to 11.9 feet of flooding in the regional storm. The evidence for the respondent also indicated that the subject lands were subject to 5.9 feet of flooding in a one in one hundred year storm.

The appellant purchased the subject lands in February, 1986. His daughter owns the property to the east which is municipally known as 518 Victoria Street East. On March 21, 1986 the solicitor acting for the appellant on the purchase received advice from the respondent indicating that the land was subject to Ontario Regulation 161/80 and that applications for construction or the placing of fill are required. Reference was made to an earlier approval for a gravel parking lot subject to the condition that the existing ground elevations were not raised. A warning was added that it was unlikely that the site by reason of the depth of flooding in a regional storm could be approved for the construction of habitable dwellings

Fill was placed on the subject lands and on the lands of the daughter. It was agreed that the lands of the daughter are not in issue in this appeal.

The proposal appears to be that some thirty-three loads of fill measuring approximately 400 cubic yards that were placed on both properties be levelled in order that the land may be used as a parking lot. The appellant had received inquiries as to whether the land could be used for the parking of trailers on an overnight and weekend basis but was unable to make any arrangements therefor with the existing variations in the elevations of the subject lands. There was nothing to assist the tribunal or the respondent in dealing with the application with regard to the amount of fill involved or the depth to which it would be placed

The appellant described the land as being low land containing pockets which filled with water. He understood at one time a land fill operation had been conducted on the site or at least on the premises known as 518 Victoria Street East. His objective was to level the fill that had been dumped on the

subject lands in order that the pockets of water would disappear and the subject lands would have a constant elevation.

At the outset of the hearing, counsel for the appellant established four issues which he wished the tribunal to consider

The first issue was that the respondent in making its decision relied on future development of the area, particularly the future development of the Go-Transit system to Oshawa. The witness called on behalf of the respondent emphatically denied that such a consideration was taken into account in his recommendation to the respondent although he was not able to identify the thinking of each member of the Conservation Authority in this regard. For the purpose of this appeal, it may be noted that the tribunal has no knowledge of the proposals for the land lying between the subject land and Pringle Creek and hence, cannot take such matters into consideration, even if they were relevant. It may be noted in passing, however, that the tribunal understands that the practice of provincial bodies has been to comply with flood plain management principles in projects carried out in flood plains. However, if the matter were to go further and it were to become apparent that such was the sole reason for the refusal of the permission requested, it may be said that the appropriate tribunal for rectification of the matter, if such is the proper legal approach, would be an application for judicial review before the Divisional Court rather than an appeal to the Minister. It has been noted in many cases that an overriding federal, provincial or municipal interest is justification for the granting of permission but this, of course, is a different matter than the refusal of permission to a landowner other than the public body

The second issue was that the respondent had made an improper decision based on a misunderstanding of the zoning provisions. The evidence before this tribunal was very limited with respect to the zoning of the subject lands. The applicant felt that he was entitled to use the lands for industrial use, which in his understanding included the creation of a parking

lot. No by-law was produced to establish the status of the zoning law.

It may be said with regard to this issue that this tribunal has constantly distinguished between controls under the Conservation Authorities Act and controls under the Planning Act. The thrust of this distinction has been the fact that zoning by-laws, as a general rule and subject to some exception related to lands in flood plains, reflect a policy decision based on the public interest rather than based on the capabilities of the lands in question. The decision behind a zoning by-law is a political decision. In contrast the controls under the Conservation Authorities Act in respect of flood plain management reflect the inherent lack of capabilities of the subject lands for unlimited use and are in effect laws related to safety rather than a political decision. While this tribunal has on occasion acknowledged the desirability of uniformity of provisions from the point of view of applicants, the tribunal has in the past noted that a conservation authority creates little co-operation with the municipal officials if permission inconsistent with zoning by-laws is issued. However, this tribunal has not been unknown to grant permission where the tribunal is satisfied that the provisions of the Conservation Authorities Act can be met notwithstanding that the by-law is inconsistent with the proposal. A leading recent example of such a decision is the case of Hinder v. The Metropolitan Toronto and Region Conservation Authority.

The third issue was that there had been an exchange of correspondence between the respondent and the solicitor for the appellant at the time of closing of the purchase and that the respondent, in effect, had intimated to the solicitor that permission might be forthcoming, particularly as permission had been granted to a prior owner for a parking lot. The letter was filed as Exhibit 8. The paragraph referred to read as follows,

> An application (W81-24-F) to create a gravel parking lot on this site was approved by the Authority in 1981 subject to the condition that the existing ground elevations were not raised.

The oral evidence indicated that the permission issued

solely for a parking lot for one vehicle to be used in conjunction with the existing residence on the property. The tribunal has no knowledge of the discussions between the official of the respondent and the solicitor for the appellant at that time. The letter appears to cover a number of possible uses of the subject lands and indicates the seriousness of the use of the land by reason of its being in the flood plain and subject to the extreme depths of flooding in the event of a regional storm.

The argument in respect of this issue appears to the tribunal to be a matter of some sort of an estoppel. The tribunal is not aware of any legal grounds by which estoppel has been used to entitle an applicant for an administrative discretionary remedy to have the remedy issued particularly if the consideration of the facts of the application indicate that it should not issue.

The fourth issue was one that is frequently put forward by appellants in this type of appeal. The respondent in its reasons referred to the precedential implications of granting permission in the present case. Counsel pointed out the inconsistency of this approach and the position that each case is determined on its own merits. It is perhaps unfortunate that officials of conservation authorities adopt the latter language in discussing applications. There is no doubt in the mind of this tribunal that precedent is a highly serious matter for consideration by conservation authorities and that it is not appropriate to adopt language that an individual case can be dealt with on the merits thereof. The doctrine of cumulative effects is sometimes considered in relation to the doctrine of precedents. It is the understanding of this tribunal that the doctrine has greater implications than the concept of precedent. It is the understanding of this tribunal that unlike other safety legislation there is no margin of safety built into the legislation and consequently every intrusion into the flood plain, whether it results in loss of storage capacity or constriction of the flow of the regional storm or both, has the effect of increasing the elevation of the regional flood and conservation authorities should, in creating exceptions to the

general prohibition contained in their regulations, have regard to principles of flood plain management in determining whether permission should be granted.

Counsel for the respondent referred to the evidence respecting the amount of fill, the depth of flooding in a regional storm, the loss of storage capacity, the constriction of the flow of a regional flood and the risk of further constriction of the floodway if the trailers or debris therefrom blocked the outlet through the C.N.R. embankment which would cause flooding beyond the established elevations of the regional flood.

Regarding the present application from the point of view of flood plain management principles the tribunal has little relevant evidence on which it can make a decision in favour of the appellant. There was no evidence of the nature of the soil on the subject lands or the depth of such soil and the effect of placing fill thereon. The subject lands may or may not have been the site of a land fill operation. The tribunal has attempted to co-relate the description in the copy of the lease issue for that operation (Exhibit 5) with the present survey (part of Exhibit 3) and has been unsuccessful in establishing the boundaries of the land held under that lease

It is apparent from the flood plain maps that there is no room for the application of the stage storage doctrine as it presently exists. There was no evidence that the appellant owned lands in the flood plain at the same elevation that could provide an alternative quantity of storage. There was no evidence placed before the tribunal to indicate the extent of the fill or the effect, if any, of the placement of fill in the flood plain. It may well be with compacting or with removal of unstable soils, if such exist, or with decreased friction in the flood plain that the proposal might not affect the control of flooding. The appellant brought no such evidence to the tribunal and the respondent has no expertise within its officials to deal with these implications.

The respondent looked at the matter as a large number of piles of fill with a considerable depth which would have the appearance of creating a significant loss of storage capacity and

an unknown amount of restriction of the flow. It appeared that the respondent might have considered a levelling operation without the placement of fill and it may well be that the appellant and the respondent might find some grounds on which the existing fill could be used either through some method of compaction or through removal of unstable soils if such exist. However, the respondent, as the tribunal views the evidence before it, which undoubtedly was similar to the evidence before the respondent, could not on the evidence available consider that there is a principle of flood plain management which would warrant the granting of the permission sought in this case.

There was no evidence before this tribunal that the subject application could be justified on the basis of any overriding federal, provincial or municipal need or priority. There was no evidence that the respondent had granted permission to other landowners in circumstances that were analogous to the present case. It cannot be said on the evidence before the tribunal that the appellant was denied permission in circumstances in which other applicants were granted permission.

In the absence of any policy of the respondent or any principle of flood plain management provincially accepted, the tribunal has no alternative but to dismiss the appeal.

Counsel for the respondent requested costs. The tribunal has in the past awarded costs in exceptional circumstances. One of the conditions precedent of the awarding of costs has been the notification of the appellant that such costs would be requested. There was no indication that such was the situation in the case at hand and accordingly the request of the respondent for costs is denied.

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

2. THIS TRIBUNAL ORDERS that no costs shall be payable by either of the parties to the appeal.

SIGNED this 25th day of February, 1987.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.