

Appeal No. CA 002-94

L. Kamerman
Mining and Lands Commissioner

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Friday, the 26th day
of August, 1994.

THE CONSERVATION AUTHORITIES ACT

IN THE MATTER OF

An appeal to the Minister under subsection 28(5) of the Conservation Authorities Act against the refusal to grant permission for the removal of fill and alterations to an existing building on Part Block PPP, Registered Plan 83, Township of Uxbridge.

B E T W E E N :

SAM KYRIAZIS

Appellant

- and -

LAKE SIMCOE REGION CONSERVATION AUTHORITY

Respondent

ORDER

WHEREAS an appeal to the Minister of Natural Resources was received by the tribunal on March 18, 1994, having been assigned to the Mining and Lands Commissioner (the "tribunal") by virtue of Ontario Regulation 364/82;

AND WHEREAS a hearing was held on August 23, 1994 in the Holland Room East, Town of Aurora Offices, 100 John West Way, Aurora, Ontario;

UPON hearing from the parties and reading the documentation filed;

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1. **THIS TRIBUNAL ORDERS** that the appeal from a refusal of the Lake Simcoe Region Conservation Authority to grant permission for the alterations to an existing building on Part Block PPP, Registered Plan 83, Township of Uxbridge be dismissed.

2. **THIS TRIBUNAL FURTHER ORDERS** that no costs shall be payable by either party to the appeal in respect of this appeal.

Reasons for this order are attached.

DATED this 26th day of August, 1994.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

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REASONS

This matter was heard in the Holland Room East, Town of Aurora Offices, 100 John West Way, Aurora, Ontario, on August 23, 1994.

Appearances:

Brian Bangay

Counsel for Sam Kyriazis

Mr. Kenneth C. Hill

Counsel for Lake Simcoe Region Conservation Authority

Preamble:

The appeal before the tribunal to the Minister under subsection 28(5) of the **Conservation Authorities Act** concerned the refusal by the Lake Simcoe Region Conservation Authority ("LSRCA") to grant permission to remove fill and make alterations to an existing building on Part Block PPP, Registered Plan 83, Township of Uxbridge (the "site"). The application (Ex. 2) for removal of fill and the construction of the proposed alterations was made by Sam Kyriazis on January 24, 1994. A hearing was held before the Executive Committee of the LSRCA on February 4, 1994 and a Notice of Decision dated February 21, 1994 (Ex. 5) refusing permission was sent to the appellant, which is in part reproduced below:

... The Executive Committee felt that your proposal to alter the existing building by construction of two doors and a window into the present basement which has no openings will affect the control of flooding due to the increased property damages from flooding which will result from this new construction.

The elevations taken on-site indicate that there is one existing doorway on the (Pond Street) south face of the upper storey of the building at an elevation of 265.8 metres above sea level. This doorway is 2.4 metres below the Regional Storm flood elevation of 268.2 metres above sea level. The proposed new openings into the basement will increase the exposure of the building to flood water at an elevation of 3.0 metres lower than the present opening. Therefore, the frequency of flooding into the basement of the building will increase compared to the present basement with no openings.

Mr. Kyriazis' appeal of the decision of the LSRCA Executive was received by the tribunal on March 18, 1994. An appeal pursuant to subsection 28(5) of the **Conservation Authorities Act** is to the Minister of Natural Resources. The Mining and Lands Commissioner (the "tribunal") is appointed by virtue of subsection 6(1) of the **Ministry of Natural Resources Act**. The Minister's authorities, powers and duties are assigned to the tribunal by Ontario Regulation 364/82, pursuant to subsection 6(6) of the **Ministry of Natural Resources Act**, Part VI of the **Mining Act** applies to the hearing of appeals, with necessary modifications.

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Facts not in Dispute:

The site is located at 38 Brock Street West in downtown Uxbridge. The authority of the LSRCA over the site is found generally in Ontario Regulation 179/80, with the site being contained within the lands described in Schedule 10 of Ontario Regulation 534/91. For purposes of determination of flood level elevations, the regional storm is Hurricane Hazel.

The site is set out on Sheet No. 6 of the Flood Plain and Fill Regulation Line Mapping, Uxbridge, having a scale of 1:2000, prepared by Marshall Macklin Monaghan Limited, dated December, 1979 and revised July, 1985 (Ex. 1) (the "map"). Located within the flood lines of Uxbridge Stream, shown entering the map from the south, it is downstream of the confluence of two tributaries described as the Mill and Electric Light Ponds.

Under regional storm conditions, the two tributaries exceed the capacity of the culvert which crosses under Brock Street and the building located at 34 Brock Street. Brock Street is overtopped by over one metre and the buildings are inundated.

Mr. Kyriazis' building has a one storey facade on Brock Street. The surrounding grade drops sharply through the depth of the building, so that from the back which faces Pond Street, basements of properties neighbouring Mr. Kyriazis' which are fully below grade on Brock Street are at ground level. These neighbouring properties, which were presented in Mr. Kyriazis' evidence, all have either doors at basement ground level, or a combination of doors, and garage doors or windows.

The grade behind 34 Brock Street is the one exception to this. There is a mound of earth located at the rear of the property which forms a ramp which extends part way up the outside basement wall. This ramp of earth drops away sharply to the east, where there is a shoe repair and shoe store, located at 36 and 38 Brock Street, respectively. The difference in grade is held by a retaining wall. To the west, the earth drops off more gradually. The surface of the land behind Mr. Kyriazis' building is not paved. There are stairs at the rear of the building and a door which permits entry into the main level. There are no windows at the rear of the building.

Issues:

1. Notwithstanding that the basement level proposed openings are below the regulatory storm flood line elevation, should the appeal be allowed on the basis that control of flooding to adjoining properties will not be adversely affected?
2. Should the tribunal take into account the fact that other buildings on the block have at least one opening at the basement level, thereby changing the extent of risk which should be deemed acceptable in the circumstances?

Evidence of Witnesses:

Sam Kyriazis, owner of the site, gave evidence on his own behalf. Approached by the Town of Uxbridge, he was asked to remove the earth ramp behind his building and put in parking. The removal of the earth would put his rear entrance on the second floor above grade with no access from the newly created parking pad.

In his Plan for the Proposed Renovations, prepared by The Gregory Design Group in January, 1994 (Ex 3), the rear of 38 Brock Street is shown with a new facade, having one large window centred in the back wall of the upper floor and two doors flanking a window centred in the back wall of the basement floor.

Mr. Kyriazis testified that the upper floor of his property has approximately 2400 square feet. Currently there is one tenant, Mr. Sub, which occupies most of the Brock Street frontage, but only leases 900 square feet of the available space. Mr. Kyriazis indicated that his proposed alteration would allow him to fully rent out his building. The proposed use for the basement would be storage.

Mr. Kyriazis stated that his proposal had been approved by the Town of Uxbridge, which is evidenced by a letter dated August 8, 1994, addressed to Linda Matthews, an articling student with Mr. Bangay's law firm, signed by Walter E. Taylor, Clerk, Town of Uxbridge (Ex. 10). In addition to supporting Mr. Kyriazis' proposal, subject to the provisions imposed by Zoning By-law No. 81-19, the Township indicates that it has recently purchased 34 Brock Street West with a view to implementing recommendations of a 1984 report by the Ontario Association of Architects, described as the CAUSE Report. These recommendations would see a demolition of the building

at that location and an opening up of the culvert containing the waters of Uxbridge Stream which runs under Brock Street and 34 Brock Street East. The result of this proposed course of action would see a lowering of the flood level elevations in the vicinity, but there is no indication of the extent. It was admitted under cross-examination that no further steps have been taken by the Township beyond the property acquisition.

Mr. Kyriazis stated that the only building which would be affected by the proposed alterations would be his own, so that the issue of adverse impact on the control of flooding would not impact on his neighbours. The reason for this is that the depths of flooding will inundate the upper floor of all of the neighbouring buildings so that all basement levels will be under water. This being the case, the extent of existing potential flooding is of such great magnitude that neighbouring properties are not likely to be measurably affected. Mr. Kyriazis stated that he was prepared to waive any blame on the part of LSRCA should damage from flooding occur. Similarly, he was willing to put a restrictive covenant on title prohibiting use of the building as residential premises.

Mr. Kyriazis described the contents of 38 photographs (Ex. 11), which show the site and neighbouring properties from Brock and Pond Streets, the location of the culvert under the parking pad at the rear of 34 Brock Street and showing the interior, outflow and downstream reaches of the culvert. Pictures were taken by a professional photographer, and Mr. Kyriazis was present while all pictures were taken, appearing in several.

Mr. Kyriazis described the height of the culvert as being eight feet from its base to street level above. The water levels shown in the photographs demonstrate water levels after a storm. Mr. Kyriazis stated that he had been told by his neighbours that they have not experienced flooding in the 22 years during which they were occupants of the adjacent building. Nor is there any evidence of water damage from the outside of the building at the basement level.

Under cross-examination, Mr. Kyriazis stated that his contractor had examined the back wall of his building and advised that footings go down three and one half feet. The height of the basement is 10 feet. The manner of construction to be used would involve reinforcement of the rear wall through the installation of steel beams, so that the force of flooding could be withstood.

Mr. Kyriazis stated that he did not intend to use either the basement or the upper

floors as an apartment. Although it was not his intention to sell, Mr. Kyriazis was unable to answer whether or not a prospective purchaser would wish to convert any of the space to residential use. He was unsure of what would be done with the basement, although he speculated that it could be used for storage. His rationale for wanting an entrance from the rear revolves around wishes to maximize the rental of the upper floor. Having its own entrance is preferable to having entry from the sub shop.

Mr. Kyriazis stated that he is prepared to change or modify his plans for purposes of installing a retaining wall of railway ties on the west side of his property. Currently, his plan is to build planters out of wood which would perform this function.

Daniel Clemens Frank, Regulation Officer with LSRCA, gave evidence on behalf of the respondent. He stated that he is familiar with the property having attended twice in April, 1994 and again this summer. He shot elevations of the site and surrounding grades and provided the following evidence. The entire building located on the site is below the regional storm flood level elevations, the upper storey by several metres. Using the crown of Pond Street as a reference point of 263.6 metres, he found the sill of the existing rear door above the earth ramp to be at 264.8 metres. With the regional flood elevation of 268.8 metres, the door will be 2.6 metres below flood level.

Asked to describe the impact on flooding if the appeal were allowed, Mr. Frank stated that installing doors and windows in the basement would cause flooding of the lower level. Where the depth of flooding is greater than one metre on any wall, the LSRCA requires an engineering report to show that the wall and floor could withstand the hydrostatic pressures of flooding.

The policies of the LSRCA for proposed alterations to existing buildings require that all opening be above the regional storm elevation. Mr. Frank stated that it is impossible to meet the policies with this structure, given the extreme depths of flooding.

Asked to comment on the adjacent buildings located on this stretch of Brock Street West, Mr. Frank stated that he was unaware of permission being given to install doors, garage doors or windows and suggested that it was likely that this construction had taken place prior to the regulation of this area.

If constructed openings to this structure are permitted below the regional storm level, the LSRCA is concerned that the building will be exposed to more frequent instances of

flooding and that the depth of flooding will increase. Without an opening to the basement level, less flood waters will enter into the lower level than would be the case with the installation of doors and a window. Mr. Frank stated that he could not see any possible changes which could be made to the proposal which would provide a solution and permit some sort of alteration, owing to the extreme flood depths.

Mr. Frank reviewed the letter from Mr. Taylor, Clerk of the Township of Uxbridge (Ex. 10) and stated that to date none of the proposed changes to the culvert had taken place. All flood lines on the map are therefore currently up to date. He stated that the issue had been on a recent agenda of Council for the Township, but was not addressed at the last meeting and had been put over. To date no meeting has taken place regarding proposed changes to the culvert.

Under cross-examination, Mr. Frank agreed that all of the lower level openings of adjacent buildings would be completely underwater. In the case of the Pro Hardware store (Ex. 11, photograph 13), the windows above the sign, next to ground level, would also be under water.

Mr. Frank agreed that the impact of Mr. Kyriazis' proposal would affect only his own property. However, the LSRCA is not prepared to accept a waiver of responsibility as it would conflict with their mandate of ensuring compliance with the regulation.

Mr. Frank agreed that there is no evidence of structural damage to the cinder block walls of the basement. Being held by mortar, he agreed that a crack would operate the same as a doorway. However, there is no evidence that Mr. Kyriazis' basement has ever been flooded. Nor could he provide evidence of recent flood warnings in the Township of Uxbridge.

Mr. Frank reiterated that the LSRCA must be concerned with storm events of lesser magnitude than the regional storm which are likely to impact on property damage. Therefore, notwithstanding that the extent of damage in a regional storm to the site is unknown, refusal to grant permission may result in no breach in the walls of the building in lesser storm events.

Final Submissions:

Mr. Bangay stated that when he was initially approached by Mr. Kyriazis, he could appreciate why the LSRCA was concerned. However, the conservation authority does have discretion in applying the regulations. Based upon the facts in this case, Mr. Bangay submitted that the tribunal should exercise this discretion in favour of the appellant.

Mr. Bangay submitted that Mr. Frank's concerns should not be applied. There is no evidence of flooding, even at the lowest areas. There is no evidence of how often flooding occurs or whether it will in fact occur. According to the provincial standards of the regional storm flood level elevations, the entire block would be under water up to the roof lines. However, there is no evidence of flood damage on the exposed walls, nor has the adjacent shoe repair shop ever been flooded.

Regarding the evidence of Mr. Frank, Mr. Bangay submits that the proposal does not represent a breach in the wall. The Kyriazis building is the exception, not the rule. The rule is that all buildings have openings at or below grade. Mr. Frank has not suggested that by allowing the opening, flooding will be caused in other buildings on the block. If Mr. Kyriazis were seeking to become an exception to the rule, one could understand the LSRCA's opposition. However, this is not the case. What is proposed is going to affect only his tenants and himself.

The Township of Uxbridge has approved the proposal and Exhibit 10 is evidence of this fact as well as of its appreciation of the flooding problems. However, the site remains an eyesore, is dilapidated and is not consistent with their plans for the downtown.

Should the area be hit by a storm having Hurricane Hazel's magnitude, the basement of the site will be flooded as all openings are below the regional flood level elevation. It is unlikely that cinder block walls held by mortar will not be impacted by the flood.

Mr. Bangay submitted that the evidence is straight forward and what is at issue is the blind application of the regulation. There is little or nothing to be gained by disallowing the appeal. LSRCA does not stand to gain, but allowing it would be a benefit

to the commercial area of town, his neighbours and Mr. Kyriazis. There is already evidence in the form of Mr. Taylor's letter (Ex. 10) of the Township's intention to reduce flooding. However, even if the culvert is not removed, the evidence does not create a compelling reason to withhold the giving of permission.

Mr. Bangay addressed the steps to which Mr. Kyriazis would agree in order to obtain permission, including a willingness to affect title through, restrictive covenants, waive liability of LSRCA or eliminating some of the openings thereby changing the proposal. In the end, all that Mr. Kyriazis wants is one door.

Mr. Hill stated that it is apparent that the Township would like to see improvements made to the rear of Mr. Kyriazis' building and the area in general. However, it cannot be presumed that the Township has considered all of the flood risk factors inherent in its plans. It is clear that Mr. Kyriazis was referred to the conservation authority by the Township and it is apparent that the Township is relying on the conservation authority to take into account concerns of flooding.

Mr. Hill submitted that just because there is no evidence of flooding in the past does not mean that flooding cannot occur. The regional storm has been defined according to records of an actual storm event applied to the watercourses of this area. Both the LSRCA and the tribunal must apply the regulatory flood levels in their determinations. Major storm events the magnitude of Hurricane Hazel have occurred in southern Ontario and could occur at any time.

The map (Ex. 1) is the best evidence of the extent of projected flooding. Moreover, it is current. There is no evidence which challenges the mapping or extent of flooding.

Mr. Hill submitted that the tribunal must rely on the best evidence from the hearing. This evidence clearly indicates that the real problem is the substantial depth of flooding. LSRCA is concerned by property damage, which is one of the two basic reasons behind its mandate to control flooding, the other being risk to loss of life. Prevention is one of the purposes behind the **Conservation Authorities Act** and the regulation.

It is not enough that a property owner is willing to accept risk, which is a position frequently taken and disallowed both before the various conservation authorities and the tribunal. The potential risk does extend beyond Mr. Kyriazis and his tenants to future owners and taxpayers

who finance the provincial flood relief claims. The issue of waivers or restrictive covenants has been raised. LSRCA is not prepared to enter into such agreements, as its mandate is to apply the regulation to the facts of each individual case. Mr. Hill stated that he was concerned about enforceability and the ability to register a restrictive covenant on title.

Mr. Kyriazis wishes to improve his building. The investment in the structure is for the purposes of increasing its use. This in turn will increase the risk of property damage over the present situation. As the new openings are all in the lower level, the building will be subjected to flooding more frequently so that there will be greater likelihood of damage.

Another issue which was not raised, is that of the potential of increased risk of loss of life. There is no evidence that anything would prevent a future owner from changing the use of the premises to residential.

Mr. Hill submitted that there is hope or potential for flood relief by the municipality. He submitted that while there may be possible flood relief in future, it has not been achieved to date. Therefore, the application is premature.

Mr. Hill stated that although there are existing buildings, which are exposed to considerable flood damage, it is an irrelevant consideration. Just because there is an existing condition elsewhere which exposes others to risk does not entitle Mr. Kyriazis to the same conditions.

In conclusion, Mr. Hill submitted that the depth of flooding during a regional storm is of such magnitude that the control of flooding will be affected. For this reason, the appeal should be dismissed.

Findings of Fact:

There is no disagreement regarding the flood level elevation of the site in a regional storm, nor is there any dispute that the building will be inundated by flood waters. The only issue to be determined by the tribunal is whether the facts in this case are such that the control of flooding will not be adversely affected. Ancillary to this issue is whether, by virtue of the situation with adjoining properties, the policies of the LSRCA with respect to openings below the flood level elevation should be allowed.

The tribunal finds that evidence concerning recent flooding or lack of flooding is irrelevant for purposes of consideration of this or any other appeal. The regional storm is statistically considered to be a 1:250 year storm. This does not mean that storms of this magnitude happen only once every 250 years. It means that there is a one in 250 chance in any given year that a storm of this magnitude may occur. Once a major storm event has occurred, it does not mean that it cannot happen again in the near future. Given that the flood elevations are plotted using a given watercourse, surrounding topography and statistics regarding the predicted rainfall in the major storm event, it is not a relevant consideration to present evidence that in recent or not so recent memory, flooding of the predicted magnitude or even a lesser magnitude has not occurred. The purpose behind the schedules to the regulation is to ensure that development is not allowed which would present a danger to life or property during a major storm event.

The tribunal finds that the appeal must fail as it is currently formulated. Although Mr. Kyriazis is prepared to omit all openings except one door on the basement level, the absence of an engineering report providing favourable hydrostatic analysis is significant. Without evidence of the inherent stability of the existing rear wall, or of the proposed reinforced wall, very serious consequences could result from a complete failure of the wall to hold in a severe flood event.

The requirement of the Township of Uxbridge that Mr. Kyriazis remove the earth ramp to the rear of his property has severe consequences for its continuing use. Without rear access much of the inside of the building becomes inaccessible. Ideally, the Township should make good on its intention to create an open channel, thus lowering existing flood levels, before Mr. Kyriazis should be required to remove the earth at the rear of his property. This avenue should be more fully explored, focusing on the resulting flood level elevations to adjoining properties such as that of Mr. Kyriazis.

In the absence of further action on the part of the Township, and conditional on a favourable hydrostatic analysis from an engineer, the tribunal would be prepared to grant a prospective appeal should certain additional changes be made. The most important change would be that there can be only one opening at the rear of the building, being a basement level entrance constructed to withstand severe hydrostatic pressure caused by flooding. While there was no evidence at the hearing on this issue as to what may exist in the marketplace, it should be clear that neither the presence of glass nor a hollow door would be sufficient. There should be no other openings on the rear face of the building. The feasibility of this will depend on whether or not skylights can be safely

installed to provide adequate lighting. Finally, it must be proved that zoning for the building is such that only commercial and no residential uses will be possible.

The willingness of the tribunal to grant permission on a prospective appeal should not be construed as a precedent for other appeals. The facts of this case are unique in that all of the buildings on this stretch of Brock Street West are subject to inundation by flooding. Any prospective granting of permission to Mr. Kyriazis is to allow him to use an existing structure. By allowing him a basement level door, he would be confined to one opening at the rear of the building. It should be clear that, were this a vacant lot, infilling would not be permitted.

Conclusions:

Based upon the findings that there is no evidence that the building on the site could withstand the hydrostatic pressure of flood waters and the number of openings proposed at the rear of the building, the appeal will be dismissed.