Appeal No. CA 017-92

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| Linda Kamerman | ) | Wednesday, the 17th day |
| Mining and Lands Commissioner | ) | of March, 1993. |

**IN THE MATTER OF THE CONSERVATION AUTHORITIES ACT**

**AND IN THE MATTER OF**

An appeal to the Minister under subsection 28(5) of the Conservation Authorities Act against the refusal to issue permission to construct an addition at the north side of the existing building, Lot 13, Plan 519, Township of Brock (formerly Thorah).

**B E T W E E N:**

DAVID CULLEN and BETH CULLEN

Appellants

- and -

LAKE SIMCOE REGION CONSERVATION AUTHORITY

Respondent

**ORDER**

WHEREAS the appeal was received on August 19, 1992 and a hearing was held on February 25, 1993;

AND WHEREAS the appellants were represented by Irving Gleiberman and the respondents were represented by Kenneth C. Hill, both lawyers;

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UPON HEARING from the parties' representatives and upon reading the material filed both prior to and at the hearing;

1. THIS TRIBUNAL ORDERS that the appeal from a refusal of the Minister to issue permission to construct an addition at the north side of the existing building, Lot 13, Plan 519, Township of Brock (formerly Thorah) is hereby dismissed.

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

DATED this 17th day of March, 1993.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER.

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DAVID CULLEN and BETH CULLEN

Appellants

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LAKE SIMCOE REGION CONSERVATION AUTHORITY

Respondent

**REASONS**

Background

The appeal to the Minister of Natural Resources was made concerning an application made on March 30, 1992 to construct an addition on the existing building, located on

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Lot 13, Plan 519, Township of Brock, in the Province of Ontario. Under Ontario Regulation 795/90 the power to hear and determine such appeals were assigned to the Mining and Lands Commissioner. The appeal was heard at Toronto on February 25, 1993.

Lot 13 is located on the southern bank of the Beaverton River within the mouth of the Beaverton Harbour. The main branch of the river flows through Beaverton at a relatively steep gradient until it reaches Beaverton Harbour, where the drop in grade is relatively flat. The main portion of the harbour is to the east of the subject lands and to the west, the harbour narrows. If left in its natural condition the entrance to Lake Simcoe would be approximately 500 feet downstream of the subject lands. However, two man-made spits have been constructed on both the north and south sides of the mouth of the harbour, which extend an additional 750 feet into the Lake.

The existing building is a two storey structure, the main floor of which is a restaurant. The entire structure is located within the flood plain. To the east is a parking lot fronted on the river by a concrete breakwater. In the northwest corner of the parking lot is a cedar shed which is used by the appellants. On the subject lands to the north of the existing building is a wooden retaining wall which is inset approximately 12 feet from the adjoining concrete breakwater. Moving westerly downriver towards Lake Simcoe are several other buildings with boathouses at river level. The one two doors to the west of the subject lands extends further into the river than its neighbours, although the extent is not clear from any information filed.

Three alternative designs were submitted with the initial application. The first contemplated the replacement of the existing retaining wall at its current location with interlocking steel. The proposed extension would be placed wholly within the land between the existing building and retaining wall. The second design involved reconstruction of the retaining wall with interlocking steel beyond its current location, in the direction of Beaverton Harbour, so that it would extend in an east west direction and effectively be a linear extension of the concrete breakwater of the adjoining parking lot to the east. Fill would then be placed behind the new retaining wall and the proposed extension would extend beyond the location of the existing retaining wall. The third design would require reconstruction of the retaining wall with interlocking steel at an angle, the eastern limit commencing at the adjoining concrete breakwater

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and moving southwesterly towards the property line and the boathouse located to the west. Fill would be placed behind the new retaining wall, and the proposed extension would be an irregular shape, rather than a rectangle.

A hearing was held by the Executive Committee of the respondent on April 3, 1992, where it was resolved that the requested approval not be granted. In a letter to the appellants dated April 22, 1992, a copy of the resolution along with reasons were given. The reasons for the refusal are reproduced:

> The Executive Committee noted that this property is entirely within an area regulated by this Authority. Your proposal to construct an addition onto the north side of the existing building is within an area of historically observed (1982 & 1990) ice jamming and flooding within the regulated area. Since the north side of the property is fronting on the harbour, it is the area of highest risk to damage as a result of future ice jamming in the harbour and the resulting flood level backing up behind the ice jam. Encroachment of further flooding by decreasing the available areas for passage of the ice jam and flood waters through the harbour.

The respondent filed a copy of the application, the refusal, a map of the respondent's jurisdiction and the Flood Plain and Fill Regulation Line Map for the Beaverton River, Pfefferlaw Brook and Zephyr Creek, Schedule 10, Map No LSR 10-61, having been drafted by Marshall Macklin Monaghan Limited. By way of observation, the Beaverton River flows into Lake Simcoe at Beaverton along the east shore of the lake. In addition to the flood and fill lines noted on the map, a flood limit due to ice jamming, March 13, 1990, has been drawn on the map to the east of the lands in question, being upstream a distance of about 50 feet.

The applicable regulation to the land in question is Ontario Regulation (O. Reg.) 179/80, with lands described in Schedule 10 having been added by O. Reg. 534/91. The regional

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storm for this area is Hurricane Hazel.

Preliminary Matters

On January 20, 1993, additional material was filed by the appellants, being a fourth alternative to the proposed addition. The replacement of the existing retaining wall with interlocking steel would be at its current location and the entire addition beyond the retaining wall being cantilevered, creating an overhang. The proposed length of the overhang is between 8 to 13 feet, although still within the existing lot line. Construction of the overhang would require steel piles to be driven at the limit of the existing building and immediately behind the retaining wall. This fourth alternative is referred to as the amended application.

During a pre-hearing conference held by conference call on February 23, 1993, Mr. Hill raised the issue of the tribunal's jurisdiction to consider an amended application. While his client was willing to submit to the tribunal's jurisdiction and proceed on the basis of opposing all four alternative proposals, Mr. Hill wished to ensure that the tribunal was apprised of this situation. Mr. Gleiberman took the position that the original application was for an extension to an existing building and, as the amended application still deals with a proposed addition, the tribunal has before it essentially the same application as was before the Executive of the respondent.

Both counsel agreed that there were no cases directly on point, but provided cases in support of their respective positions. Mr. Hill provided the following cases. **Re Kagda Holdings Ltd. and Norton**, 47 O.R. (2d) 493; **Re R.C. Lewis (Lucan) Ltd. and Director of Environmental Approvals & Project Engineering for Ministry of Environment**, 50 O.R. (2d) 23; **Jon-Wal Ltd. v. City of Peterborough**, 15 O.M.B.R. 332; **Pritchard v. Township of Mersea**, 14 O.M.B.R. 255; **Shellswell v. Township of Medonte Committee of Adjustment**, 25 O.M.B.R. 42 and **Murray v. Township of Erin**, 10 O.M.B.R. 156.

Mr. Hill submitted that **Kagda** stands for the proposition that this tribunal may only grant the approval or dismiss the appeal, referring to subsection 28(5) of the **Conservation Authorities Act**. In **Kagda**, the Divisional Court held that the Nursing Homes Review Board does not have the jurisdiction to order a probationary period which is not contemplated by the

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governing statute. Mr. Gleiberman submitted that cases decided pursuant to punitive statutes should be narrowly construed.

In **Lewis**, the Environmental Appeal Board confirmed a decision of the Director whereby approval was granted to operate a waste disposal site for a population greater than contemplated by the original approval, but also ordered closure of the site in 1984. The Divisional Court held that the Board lacked jurisdiction to order the closure, as the Director's Notice from which the appeal arose did not raise the issue. Mr. Hill submitted that **Lewis** supports the position that an original application cannot be enlarged on appeal.

In **Jon-Wal**, the Ontario Municipal Board considered changes to a by-law presented to council, whereby the original application proposed a convenience store with a second storey residential use, and the revised application deleted the second storey use entirely. The Board found that the principal reason for the by-law was the convenience store use, and that the proposed second storey use was not a major factor in the controversy. It was found that the application was essentially the same as before council. Mr. Hill submitted that the issue to be determined by the tribunal is whether there is a significant change in the current application or whether the application and proposed amendments are essentially the same. Mr. Gleiberman submitted that the fourth alternative for construction is essentially the same.

In **Pritchard**, the Ontario Municipal Board considered an application for a site-specific by-law, where particulars were lacking from the original application. The Board held that it would be irresponsible to consider an application which, due to the lack of particulars, was not before council. The Board found that the appeals were premature. Mr. Hill submitted that **Pritchard** stands for the proposition that the same application which is before the Conservation Authority should come before the tribunal.

In **Shellswell**, the Ontario Municipal Board considered an appeal from two of three applications for severance, where one severance had been granted. It was held that the appeal did not involve the original application, where under the constituent legislation, being subsection 52(17) of the **Planning Act, 1983**, S.O. 1983, the Board's jurisdiction arises under the original application. Mr. Hill submitted that this case is indicative of the lack of authority in a tribunal to consider amendments.

In **Murray**, the Ontario Municipal Board considered an appeal pursuant to the

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**Planning Act**, which differed from the original application in that only one half of the subject lands were to be dealt with on appeal. In dismissing the appeal, the Board considered that the decision of council may have been different only because of the size of the lands involved in the application. The decision recognizes that the Board may enact a by-law different in form and content than was proposed on the original application. However, the Board goes on to state that the matter under appeal should be identical to what was considered on the original application.

Mr. Gleiberman provided the following cases, the first of which involved the **Pits and Quarries Act, 1971**. **Re Horan and Minister of Natural Resources**, 3 O.R. (2d) 533; **Re City of Kingston and Mining and Lands Commissioner**, 18 O.R. (2d) 166;

In **Horan**, a decision of the Divisional Court, the Minister of Natural Resources set out five reasons for proposing to revoke a licence under the **Pits and Quarries Control Act**. In a stated case, the Ontario Municipal Board sought direction on whether it could consider evidence concerning revocation of a licence in addition to the grounds listed on the Minister's notice. Referring to the constituent legislation, the Court determined that all grounds relevant to a proposed revocation could be considered. The result of this decision was that parties were added to the appeal and additional issues were considered. Mr. Gleiberman submitted that the addition of parties allows the tribunal to consider issues which do not comprise part of the original application, but nevertheless touch on evidence relevant to the issue to be determined.

In **City of Kingston**, where the Commissioner made an order pursuant to a settlement between the parties which mistakenly involved an area greater than in the original application which was owned by a third party, the Divisional Court held that, as the lands affected by the order were within the jurisdiction of the conservation authority, and the parties consented, the area involved could be enlarged from what had been considered on the original application.

Prior to the commencement of the hearing, it was agreed by counsel that no determination could be made on the issue without hearing the specific details, to determine whether the fourth design would sufficiently change the application to make it a new application. It was agreed that the hearing would proceed with all of the relevant evidence being presented.

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In the event that the tribunal should find that the application was substantially the same as was originally presented, considerable discussion ensued as to whether an order might be made with conditions attached. The tribunal expressed strong reluctance to issue an order with conditions, and proposed in the alternative, to grant a preliminary approval of the application, should the facts be found to warrant, and adjourn the matter **sine die** where upon the parties could attempt to arrive at the terms of the construction. Should the parties fail to reach agreement regarding construction, the hearing could be reconvened to proceed with a determination of this issue. Mr. Hill was agreeable to this, but suggested in the alternative that, with the proper wording, the tribunal's order could, upon the failure to reach an agreement, amount to a refusal. With these possibilities, the hearing was convened and heard on the merits.

The Issues

The issue for determination is whether the proposed extension is likely to have an effect on flooding. Focus of this issue was primarily on the flooding which was the result of ice jamming rather than possible flooding during a regional or lesser storm. The tribunal considered whether the proposed extension, with or without the placing of fill, would result in constriction of the watercourse, loss of storage capacity, and would have a cumulative effect on flooding of the Beaverton River.

Evidence and Submissions

R.E.L. (Dick) Seal, a professional engineer with a masters degree in engineering gave evidence on behalf of the appellants.

Mr. Seal stated that, with the original application which included the placing of fill, the expected impact on the flood plain and its flood retention capacity would be small, being approximately 150 to 200 square feet. In his estimation, this impact would be negligible and not measurable, although he had not performed specific calculations of potential increases in flood depths. In his opinion, neither design would significantly aggravate flooding, nor would there be significant impact on ice damming.

Ice damage was not, in Mr. Seal's estimation, of great concern. He stated that the original proposal would not aggravate possible ice damage as the existing line of the breakwater

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would be extended by the interlocking steel retaining wall. Any whirlpool effect created by this extension, in his estimation, would be minimal.

In Mr. Seal's opinion the original design is more practical and economical and would adequately address the concerns of the respondent. Although within the flood plain, the construction of a steel retaining wall would afford additional protection to the proposed structure than the wooden retaining wall offers to the existing structure.

The 1990 ice jam had occurred down river, closer to the mouth of Lake Simcoe. The jam caused the water within the river basin to start swirling upstream from the appellant's property, which resulted in ice being "dumped" on both the north and south sides of the harbour. Mr. Seal pointed out that the north side of the existing building, which fronts on the harbour, was not affected, while considerable ice was deposited on the east side of the building, in the adjacent parking lot. Mr. Seal suggested that the storm which caused the ice damming, along with the sudden rise in temperature, was as severe as could be contemplated.

Concerning the proposed height of the cantilevered design, Mr. Seal stated that the overhang was in excess of the recorded ice build-up. With the interlocking steel retaining wall, it is his opinion that greater flood protection would be available than exists now.

In conclusion, it is Mr. Seal's opinion that the new proposal is feasible from an engineering point of view while dealing with the concerns of the respondent.

Referring to the fact that the application had been refused without the usual deferral, discussions and revisions before the Executive which he had experienced on previous applications, Mr. Seal stated that he was surprised at the immediate refusal of the application by the respondent. It had been his experience that application were deferred and modified through discussions with staff before the Executive made a final resolution.

Under cross-examination, Mr. Seal stated that he has no experience in hydrology, being a construction engineer. His information on flooding and ice is as a result of his

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experience on other projects. He has also relied on the Technical Guidelines on Flood Plain Management put out by the Ministry of Natural Resources.

The information of the level of ice, which is accounted for in the amended design, is based upon the 1990 ice levels. Mr. Seal stated that the final designs would have to be further researched, although if the 1990 ice levels were the highest which could be expected, the design would suffice. He stated that the further study would include hydrology of the harbour. The only question to be determined would be the impact of potential ice damming on flooding levels. Mr. Seal reiterated that the application and diagrams encompass the basic concepts only. Further study would be required to determine the impact on the floodway and flood plain lands in the event of another ice jamming incident. With this additional study, it could be determined whether the levels of flooding experienced in 1990 were extreme or not.

Mr. Seal agreed that the March, 1990 storm was not a regional storm. He stated that the ice jamming and regional storm were unlikely to occur at one time because of climactic conditions. This opinion is based upon the Technical Guidelines.

Referring to the amended application, that part of the addition which is not cantilevered would be constructed at ground level. Mr. Seal stated that this would be a crawlspace.

Mr. Seal agreed that ice had come onto the parking lot to the east of the existing building. He disagreed that the addition would impede the movement of ice, stating that ice would only go on the parking lot.

Referring to the concept of stage storage, where a new structure would replace water by the volume of the structure below water level to some other location, Mr. Hill suggested that the water, in the form of ice, would have to be stored on some other land.

When asked about the potential of restriction of the flow of the water and ice, Mr. Seal maintained that this problem would not occur due to the cantilever which would raise that portion of the structure likely to impede above the ice. When asked for details of the angles of the beams, Mr. Seal stated that there is no detailed design. He stated, if required, the cantilever could be built without beams, thereby removing the possibility that ice would reach them. Again,

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at the suggestion that the beams could cause the ice to become "hung up" Mr. Seal stated that they could be left out of the design. However, should they remain, Mr. Seal agreed that the possibility did exist that they could be knocked out or that flow of ice could be impeded.

Referring to another house 200 feet upstream which had been destroyed by the ice in the same storm, Mr. Seal indicated that, through negotiations with the respondent, reconstruction had been permitted. He agreed that the location of the reconstruction had been further from the bank, that the house had been elevated and was oriented to the flow of the river. Mr. Seal's interpretation of the circumstances surrounding the reconstruction was that the new location would afford the owner a better backyard.

Mr. Seal stated that the only loading considerations taken into account in his design were those contemplated by the Ontario building code. However, before final plans are submitted, further study would be required to determine the anticipated pressures.

In redirect, Mr. Seal stated that in his opinion, an engineered solution could meet the concerns of the respondent. With respect to the reconstructed house, Mr. Seal pointed out that all of the requirements of the respondent were met and the reconstruction still took place within the flood plain. The existing building is further from the bank than the damaged house. Asked whether there are existing impediments to the ice with respect to this application, Mr. Seal stated that ice would be pushed up on the adjacent parking lot.

Under further cross-examination, Mr. Seal stated that he did not know whether the damaged house was reconstructed in the flood plain above the regional storm or within the floodway.

Beth Cullen, one of the appellants, whose full name is Bertha Evelyn Cullen, was called as a witness. She stated that she has owned the subject property since 1986. She lives across the harbour in a house which fronts on the water. Describing the damage which occurred to the subject property, Mrs. Cullen stated that she got wet feet. There was no damage to the north face of the existing building. There was no ice within 15 to 20 feet of the posts which support the porch on the outside of the building. A number of photographs taken during the

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week of February 22, 1993 were submitted as exhibits.

Mrs. Cullen stated that she was at a meeting concerning the removal of the Beaver Dam, attended by the respondent, the council of the Town of Brock and an engineer, whereby an opinion was expresses that the removal of the dam would alleviate at least some of the flooding problems. Mr. Hill objected to this evidence along with the filing of two newspaper clippings, on the basis that he was unable to cross-examine either those who were speakers at the meeting or the authors of the articles. The newspaper clippings were permitted on the basis of being public documents, and the tribunal determined that the issue to be determined would be the appropriate weight to be given.

Mrs. Cullen stated that the capacity of the existing building is seating for 40 patrons. If the application is permitted, up to an additional 30 seats would be possible. The amended proposal would allow 40 seats. The restaurant currently employs up to 6 people, with 1 or 2 employed during April and November. She stated that the current facility is not handicapped accessible and that the 2nd floor could not be converted to a restaurant. Therefore, the extension is the only available option on the lot. The restaurant and the marina across the lake are the only employers in Beaverton.

Mrs. Cullen stated that there was no ice build up during the 1990 storm on the subject property over the top of the wooden retaining wall. A boathouse two doors to the west had been damaged, but it was not protected by an interlocking steel retaining wall.

Under cross-examination, Mrs. Cullen described damage which had occurred during the 1990 storm and ice jam. Four buildings had been damaged, including the building which had been destroyed, damage to the neighbour's boathouse, damage to one other boathouse and possible corner of the building and one building at the mouth of the marina sustained damage.

Asked about the extent of flooding in the restaurant, Mrs. Cullen stated that 1 1/2 " of water had been experienced on the main floor. In the crawlspace below, the heater had been damaged. The shed located on the adjacent parking lot sustained little damage, as a freezer

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located in the shed worked when plugged in. There is no possibility of making the second floor wheelchair accessible, so that an alternative method of obtaining the same result, namely conversion of the residential portion of the structure, is not tenable.

Daniel Frank, regulation officer with the respondent, was called as a witness. He described the topography surrounding the subject lands and their susceptibility to flooding. The Beaverton River has a steep gradient through Beaverton, with the exception of the harbour area just before it drains into Lake Simcoe, where the gradient is about one metre. Under normal flood conditions, the area surrounding the harbour is not severely affected by flooding. However, in the spring, if there is a rapid rise in temperature and a quick thaw of the ice, the result is blocks of ice piling up in the harbour which create ice jams. In turn, water cannot get beyond these jams and floods over the banks of the river. Mr. Frank stated that there are a number of factors which aggravate the problem. Due to the size of the harbour, being 100 feet wide, and the thickness of the ice, the harbour ice is unlikely to be broken either by the flow of water and ice from the river or the rise in temperature. The ice on the river is subject to breakage due to the rise in temperature much more quickly. This is due to the rapid flows upstream and the fact that ice on the rapidly moving river has not formed as thick as on the harbour below. Adding to this jamming is the spit at the mouth of the harbour which extends into Lake Simcoe, thereby preventing rapid dispersal of the ice jams.

Mr. Frank stated that the storm in March of 1990 saw only a couple of inches of rain, which was accompanied by a rise in temperature of 20 degrees centigrade over 12 hours. Mr. Frank had occasion to view the Beaverton area one day after the storm, being March 14, 1990.

Photos and a video were introduced as exhibits, although neither had been taken by Mr. Frank. Mr. Gleiberman objected to their introduction, but Mr. Hill submitted that, as the witness had been in Beaverton on the date the photos were taken, although not present, the evidence of extent of ice jamming and flooding were corroborated. The tribunal directed that an affidavit of the photographer be filed and allowed the exhibits.

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The photos show the extent of the ice observed on March 14, 1990. A number of very large blocks of ice are shown an the parking lot adjacent to the subject lands. No dimensions were given for the blocks of ice, but based upon one person in the vicinity, the ice appears to be between eighteen inches and two feet thick and some blocks could be as large as eight or more feet across. The storage shed on the lot appears undamaged. One photograph showing the Cullens' home shows ice pushed up onto the banks of the river containing debris. The ice chunks in this photograph are considerably smaller than those on the parking lot.

The video tape shows ice jamming through the river, with ice pushed up onto itself. Flood levels are shown in several locations in Beaverton. Mr. Frank stated that the subject property is between 20 to 30 metres north of the southerly limit of the flood limit recorded due to ice jamming, shown on the flood plain map.

The respondent's concerns with the first design was that the proposed construction would extend toward the harbour, and with the potential additional restriction of flow, could result in additional damage due to flooding. Also of concern is the loss of flood storage, due to the placement of fill. In his opinion, the extension would create an obstruction, as the north side of the property is the closest to the past reported jamming on the river. With respect to the cantilever plan, Mr. Frank voiced similar concerns and stated that the amended plan does not alleviate the respondent's objections.

Asked whether there would be a small impact as a result of the proposed construction, Mr. Frank stated that the impact could be cumulative in the area. He reiterated that the respondent had substantial concerns regarding control of flooding in the area and potential damage to buildings as a result of ice jamming.

Mr. Frank stated that the upstream dam is not owned or controlled by the respondent. Also, no studies have been done or are contemplated concerning flooding in Beaverton Harbour.

Under cross-examination, Mr. Frank agreed that he is a biologist and has no engineering expertise. His opinions on the application are based upon his experience in the field. Mr. Frank was asked whether the concerns he expressed with the application were specific to the facts of the case or were based upon fear or inundation of similar applications in the future. Mr.

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Frank stated that the cumulative impact of the application and similar applications is of concern.

Mr. Frank agreed that he does not have the requisite expertise to determine whether the proposed extension meets the criteria of the respondent concerning flooding. However, the location is likely to affect flooding. Mr. Frank did not have any evidence that the northern face of the existing structure had been flooded or was subject to ice damage. Mr. Frank stated that damage occurred to several buildings fronting on the river because their faces encroached on the harbour. Mr. Gleiberman suggested that the damage to the boathouse two doors away was as a result of there being no retaining wall. Mr. Frank questioned what the likely outcome would be if ice were forced over top of the retaining wall.

Mr. Frank stated that the proposed construction is likely to increase the susceptibility of structures in the area to flooding, and that 500 to 600 square feet of lost storage capacity is significant, particularly when it is unknown where it is likely to occur. Similarly, it is unknown how high the ice jamming would be during the next storm, although he did agree that this was the most serious incident of ice jamming within 40 years.

Concerning ice obstruction and ice damage, Mr. Frank stated that buildings along the north side of the harbour are more at risk because they are closest to where the ice occurred. When it was pointed out that the subject property had not been damaged, while others had, Mr. Frank stated that the others were closer to the harbour. Mr. Frank suggested that the subject lands, and others, might have gotten off lucky last time.

Mr. Gleiberman submitted that both applications meet the concerns of the respondent with respect to flooding and ice damage, although the initial application is more economical. The proposed fill is minuscule and cannot be found to have any bearing on flood levels. Any threat of ice damming would be handled by the steel retaining wall. Pointing out that the existing wooden walls handled the ice threat of 1990, he suggested that a steel wall would offer better protection.

The cantilever design is within the confines of the existing retaining wall, although it would be replaced, so that no fill would be necessary. There could be no associated

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loss of storage capacity as the proposed height would be above the recorded ice levels.

Mr. Gleiberman submitted that all of the concerns of the respondent can be met with detailed drawing which would be provided. Either design is feasible, logical and practical from an engineering point of view.

Mr. Gleiberman submitted that the only criteria which can be considered is whether the design meets the concerns of the respondent or creates additional concerns. He suggested that, with an open mind, it could be found that either design meets the concerns discussed.

Mr. Gleiberman touched on economic concerns of the community, which he submitted could not be ignored but must be weighed in reaching a decision.

Pointing out that with the original application as with the amended application, final drawings have not been prepared pending the granting of permission, Mr. Gleiberman requested that, should permission be given, the opportunity be granted to work out details with staff of the respondent, ensuring that requirements of the agencies are met as well. He submitted that should difficulty be encountered, the matter could be brought back to the tribunal on 30 days notice by either side.

Regarding the **de novo** jurisdiction of the tribunal, Mr. Gleiberman submitted that, should the tribunal find that it does not have jurisdiction to consider the amended application, that it is seized with the initial one.

Mr. Hill submitted that economic considerations are irrelevant to the tribunal's jurisdiction.

Referring to section 4 of O. Reg. 179/80, Mr. Hill submitted that the test concerning either the placing of fill or construction of a structure is whether "in the opinion of the Authority" such activity would affect the control of flooding. Control of flooding is the only issue before the tribunal.

Mr. Hill submitted that either proposal would have an adverse impact. Mr. Seal is not a hydrologist, and having relied on the historical information provided by the respondent as

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the basis for his opinions, is in no better a position to comment on the likely impact of possible ice jamming than Mr. Frank.

Similarly, Mr. Seal was not able to give evidence concerning the effects of loss of storage capacity or the proposed construction on properties upstream.

Mr. Hill submitted that the patterns of ice breaking in the spring are unusual and difficult to predict. The subject lands are adjacent to a watercourse at the mouth of a narrow harbour which, in turn is at the mouth of the river. The impact of the ice on Lake Simcoe is another unknown on the movement of ice through the watercourse. However, where the lake remains frozen longer, it is clear that the ice coming down the river along the steep grade into the harbour has nowhere to go. Coupled with snow melt, temperatures and amount of rainfall, all of which are difficult to predict, the likely or potential impact cannot be underestimated. The subject lands are located within a narrow channel with restricted ice movement in spring, which causes overpiling and damming. This causes flooding on adjacent properties.

Ice flowing in a watercourse carries a great deal of force. There has been no analysis of these forces with the application and no calculations of the standards of construction necessary to withstand such force.

Mr. Hill pointed out that the storm of March 1990 was not in the order of magnitude of the regional storm, having been only a couple of inches accompanied by a rise in temperature. It is not certain that a more severe storm could not occur at the time of ice jamming.

Mr. Hill argued that cumulative effect is a recognized principle of flood plain management. It is not simply a method of preventing an onslaught of applications. The real issue to be determined is whether the impact of the placement of fill or proposed construction can withstand the forces of flooding and ice to which these lands are subjected. He submitted that the result of the construction would be to impede the passage of ice, narrow the channel and result in loss of stage storage.

Mr. Hill submitted that the application is premature. While it is reasonable to anticipate that the extension might interfere with the flow of water, the elevation which the ice jams might reach is unknown. There is no hydrological study to provide this or other relevant

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information. The respondent does not have the funds to study this issue and therefore the responsibility would rest with the appellants. However, unless the respondent can be satisfied that there would be no interference with flows or flooding, the application should be refused.

While the amended application is preferable to the initial application, having less of a profile in the path of possible ice jams, it is nonetheless a projection. Mr. Hill submitted that the concerns of the respondent with the amended application are essentially the same as with the original application.

In the event that the tribunal is prepared to grant the permission, Mr. Hill requested that conditions be imposed so that the respondent's concerns could be addressed.

In reply, Mr. Gleiberman reiterated that the concerns of the respondent have been addressed. To disallow the appeal on the basis of cumulative effect, he submitted, would be abhorrent to the Rules of Natural Justice. The role of a conservation authority is to provide guidelines for development, not to take the position of out right prohibition. As long as the criteria and concerns have been met, there should be no reason to deny permission.

Mr. Gleiberman submitted that an anti-development stand is not indicative of good water management. Stagnation should not be allowed. With respect to the application, the size of the extension is minimal, and should not be prohibited based upon current policies.

Findings of Fact

It is impossible to determine, from the facts presented at the hearing, whether the application is premature. The suggestion of Mr Seal that, upon the granting of permission, hydrological studies would be carried out to determine the potential location, extent and attendant height of ice jamming would provide the very information needed to determine whether the proposed extension would likely affect flooding. Absent this information, the opinion of the respondent that the proposed extension is likely to effect flooding meets the requirements of the legislation for permission to be denied. There is no requirement that the respondent be certain

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that flooding will be affected. The burden of proof is upon the appellants to alleviate this concern.

Questions which have not been answered through the evidence at the hearing are of grave concern. The force and flow of water in the harbour during spring melt are unknown. There is no evidence of what is necessary to create a whirlpool effect, let alone how common or powerful such an effect might be. The likely force of ice caught in a whirlpool in this harbour is unknown.

Concern is raised by the evidence with respect to two separate occurrences with respect to the ice jamming in March of 1990. There was no evidence to explain why such a large volume of ice would overtop the concrete retaining wall adjacent to the subject property. The properties of the shoreline upstream are unknown as is the specific hydraulic information of flows in the harbour immediately adjacent. It is unknown how these properties might have acted in concert to have resulted in the deposit of the ice on the parking lot and whether they could be duplicated and likely occur just meters to the west, at the subject property.

Similarly, damage occurred to a boathouse two doors downstream, being westerly, from the subject lands. The wooden retaining wall does not extend as far into the harbour as the concrete one along the parking lot upstream to the east. However, the damaged boathouse does extend into the harbour more than its neighbours. It has not been examined or analyzed whether the damage was the result of a whirlpool effect created between the concrete wall and wooden wall or whether it was a result of the location of the ice within the harbour during that particular occurrence. The question of potential whirlpool effects, however, raises the issue of whether, by allowing the original application, another property further downstream would then be at risk during the next occurrence of a spring melt ice jam.

The distribution of ice jamming in the harbour was not even. The video tape shows areas of swirling waters as well as areas with substantial jamming. Much of the ice pushed onto the parking lot adjacent to the subject property was quite large, while that next to the Cullen home was small. Reasons for this distribution are unknown.

Other questions not addressed by the evidence include the specific properties of ice break up in the harbour. While Mr. Hill stated that they are quite unpredictable, the question

. . . . 19

of their likely range was not addressed by the evidence. The ice on the parking lot and the damage to the boathouse occurred no more than one hundred and fifty feet apart. If this occurrence could shift by one hundred and fifty feet in either direction, clearly the proposed addition would be at risk. It is unlikely that the interlocking steel retaining wall could prevent the ice from overtopping onto the property any more than the concrete one was able to.

There is no question that any encroachment further into the harbour would have a potential constricting effect should the ice jam occur at this location. What is unknown is how this constricting effect might impact on the movement and jamming of ice at other locations up and downstream which would contribute both to the potential damage to and flooding of property within the area.

Similarly, the loss of storage capacity, however small, is critical in light of the effects. There is no question that the cumulative effect of the loss of storage capacity within the area might raise flood levels by a relatively small amount within the area, although specific flood levels were not provided. However, the effect of this one instance of construction on flooding and the presence of ice both on the subject property and on properties within the harbour area cannot be minimized, particularly in light of what is not known.

It is disturbing that the application would propose to study these effects once permission is granted. Sections 3 and 4 of O. Reg. 179/80 state:

> **3.** Subject to section 4, no person shall,
>
> (a) construct any building or structure or permit any structure to be constructed in or on a pond or swamp or in any area susceptible to flooding during a regional storm;
>
> (b) place or dump fill or permit fill to be placed or dumped in the areas described in the Schedules whether such fill is already located in or upon such area, or brought to or on such area from some other place or places;
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> . . . . .

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> **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.

Clauses 28(1)(e) and (f) of the **Conservation Authorities Act** provide for outright prohibition, along with regulation or requirement of permission for construction or the placing of fill. What is determinative in both the **Act** and the regulation is that, in the opinion of the conservation authority, control of flooding not be effected.

An application which would propose to address the concerns of the respondent once permission is clearly not the procedure contemplated by the **Act**. It is only at such time as the respondent is satisfied that the control of flooding would not be affected that an applicant could receive permission.

It is not the task of the respondent to determine whether a proposed development would be good for the local economy. Nor is the respondent incorrect in refusing the application before the very essential information necessary to its determinations are provided. Determinations with regard to the effect of proposed development on flooding have as their basis recognition of the inherent incapacity of certain land to withstand the stress of human activity. Flood plains are particularly sensitive in this regard and the implications of an incorrect decision

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granting permission are born not only by the applicant but owners of property both up and downstream.

The tribunal finds that, for the above reasons, the refusal of the application by the respondent was proper and the appeal will be dismissed.

No findings will be made with respect to the issue of whether the amended application is substantially the same as the initial application, as the findings concerning the absence of sufficient evidence to allow the application extend to both.

There is no order as to costs.