



The Mining and Lands Commissioner

In the matter of The CONSERVATION AUTHORITIES Act

G.H. Ferguson, Q.C.) Wednesday the 24th of
Mining and Lands Commissioner) May, 1989.

AND IN THE MATTER OF

An appeal against the refusal to issue permission to construct a single family dwelling and install a septic system on Part of Lot 25 in Concession V in the Township of Uxbridge in the Regional Municipality of Durham.

B E T W E E N :

MARGARITA FLORES(LANDRY)

Appellant

- and -

LAKE SIMCOE REGION CONSERVATION
AUTHORITY

Respondent

E.E.P. Iglar, for the appellant.
K.C. Hill, for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to issue permission to construct a single family dwelling and install a septic system on part of Lot 25 in Concession V in the Township of Uxbridge in the Regional Municipality of Durham. Under Ontario Regulation 364/82 the power and duty of hearing and determining such appeals were assigned to the Mining and Lands Commissioner. The hearing was held in Toronto on the 17th day of April, 1989.

The subject lands are a ten acre part of the township lot that was acquired in 1988 by the appellant. It lies southerly of the north boundary of the lot which appears to be an open road allowance. The parcel has a frontage of approximately three hundred feet on the road allowance and runs southerly for a distance of approximately twelve hundred feet, such measurements being scaled measurements from exhibits filed with the tribunal which do not precisely show the boundaries of the parcel. The Pefferlaw Brook flows northerly entering the subject lands at

its south limit and exiting therefrom approximately one half of the distance northerly on the easterly boundary. The entire parcel falls within the flood plain of the regional storm of the Pefferlaw Brook. The elevation of the regional flood is 237 metres at the northerly edge of the subject lands. It may be slightly higher at the southerly end thereof.

For some reason not put in evidence, although flood plain mapping has been available since 1979, the respondent has not added the area in which the subject lands are situate to a schedule under its regulation and hence there is no control by the respondent of the placing of fill on the subject lands. The husband of the appellant admitted that they were aware that the lands were in a flood plain at the time of purchase and they further must have been aware that there was no requirement to obtain a permit to place fill. Accordingly the husband of the appellant, who has had experience with equipment suitable for the digging of ponds such as bulldozers, backhoes and draglines and who owns such equipment and has been in the business twenty-three years, cleared an area lying to the west of the brook, excavated a pond and placed the fill on an area referred to as a "building envelope". It was admitted that the elevation of the envelope as constructed exceeded the regional flood but the respondent refused to issue permission for the erection of a residence and septic tank. Subsequent to the application the husband of the appellant did further bulldozing to the west of the building envelope and raised, with stumps and other material then on the site, an area leading to the house on the property immediately to the west of the subject lands. The evidence was that he did this with the consent of the owner but he obtained no legal right to do so and no easement for access over the filled area. The purpose of the access was to enable occupants to escape from the proposed house to the property to the west and from thence to higher ground above the regional flood elevation lying to the west of the neighboring property, which property was said to be

"bush" and was situate some thousand feet or more from the road allowance.

It may be said that although the husband of the appellant has had considerable experience in pond construction there was no evidence that he had acquired any geotechnical skills and had not obtained the advice of a geotechnical engineer in respect of the construction of the building envelope or the subsequent access to the west. There was no evidence produced to the tribunal that showed that in the construction of the building envelope or the access road any methodology provided by or approved by a geotechnical engineer had been obtained or followed. There was no evidence of the type of material used, layering and methods of compaction used and there was no technical evidence before the tribunal that relates to the ability of the building envelope to resist the flows of a regional flood.

The approach of the appellant was twofold. Firstly it was said that as a matter of law the respondent had no jurisdiction to refuse the permission requested. In this regard it was submitted that the placing of the fill not being prohibited or controlled, the construction of the building envelope and the access was perfectly legal and also had the effect of removing the building envelope from the flood plain of the regional storm and hence the matter was removed from the jurisdiction of the respondent.

The second approach was that the implied policy of the respondent as evidenced from its activities in respect of other properties was that permission would be granted in such cases. Approximately eleven cases were drawn to the attention of the tribunal in which permission had been granted. This evidence was produced by a former employee of the respondent, A.A. Timmins.

A third submission of counsel was that because the general area was treed there would be a reduction of the velocities of the flows during a regional flood. The tribunal

has considerable difficulty in following this point. The existence of tree cover was undoubtedly taken into account in the establishment of the N factor, one of the factors used in determining flood elevations and the only conclusion that the tribunal can draw in respect of this matter is that the removal of the tree cover and the creation of the pond reduces the effect of the forest cover which was undoubtedly used with the result that the action taken by the appellant probably had the effect of increasing the elevation and the flows of a regional flood. However there was no technical evidence before the tribunal to come to any conclusion in this regard but the tribunal cannot accept the thrust of the point put before it.

Returning to the first point the statutory authority for the making of regulations controlling the construction of building and structures is found in clause 28(1)(e) of the Conservation Authorities Act which reads:

28.-(1) Subject to the approval of the Lieutenant Governor in council, an authority may make regulations applicable to the area under its jurisdiction,

- (e) prohibiting or regulating or requiring the permission of the authority for the construction of any building or structure in or on a pond or swamp or in any area susceptible to flooding during a regional storm, and defining regional storms for the purposes of such regulation; and

It will be noted that the geographical area involved is "any area susceptible to flooding during a regional storm".

The same phrase is used in the regulation of the respondent. Clause 3(a) of Regulation 179, R.R.O. 1980 reads:

- 3. Subject to section 4, no person shall,
 - (a) construct any building or structure or permit any building or structure to be constructed in or on a pond or swamp or in any area susceptible to flooding during a regional storm;

While it may be the responsibility of the regular courts

to determine the legal effect of the proposal of the appellant it does not appear to this tribunal that the respondent has lost its jurisdiction by reason of the action taken by the appellant in this case. The area of jurisdiction is not "the flood plain" but "the area susceptible to flooding". The tribunal is satisfied that the word "susceptible" is quite broad and would encompass the effect of a regional flood on the building envelope and the access area created by the appellant.

Turning to the second point and by way of background for a comparison with the alleged precedents the evidence indicates that in a regional storm the subject lands and more particularly the site of the proposed residence would, in the state of nature, be subject to 1.6 metres, or approximately five to six feet, of floodwaters moving at a velocity of approximately .88 metres per second in the channel with lower velocities over the banks and lesser flows on the bank. At the road the flows were estimated to be 3.77 feet per second in a regional flood. There was no evidence produced to the tribunal to indicate the reason for the lower flows on the banks and it may well be that the removal of the tree cover would have some effect on the flows provided by the consultants of the respondent.

The width of the flood plain at the present site is approximately three thousand feet but the brook passes through the westerly part of the flood plain and at one point the westerly bank of the brook within the subject lands is only five hundred feet from the west boundary of the flood plain. In this regard the position of the respondent was that the risks associated with the present case were more serious than the risks associated with the properties alleged to be precedents.

The first property mentioned was the Kane property which is situate approximately one concession north of the subject lands. Apparently permission had been granted in respect of a building envelope which was moved on the property. Timmins' evidence was that the property generally was slightly under the

regional flood elevation and that the envelope itself was above that elevation. However the Ravenshoe Road on which the property bordered was subject to 2.6 feet of flooding. However, in contrast with the subject lands, there did not appear to be five or six feet of flooding in the natural condition as exists in the present case.

Reference was made to a property situate in the Nicholson Drive area. In this case the local municipality issued the building permit prior to the authority dealing with the application. Timmins' evidence was that there was two to three feet of flooding on the site and that the building that was constructed pursuant to the township building permit was floodproofed with the exception of the provision of dry access.

The third example was situate in the Baldwin or Brownhill area on Highway 48. The witness indicated that there was a significantly wide flood plain approximately two miles in width with the flood depth in a regional storm varying from one metre at the centre to the usual absence of depth at the outer edge.

The fourth example was a property owned by one Rosenberg where there had been an exchange of property and the issue of the permission was part of that exchange. The fifth example was in the Miles Road area where a parcel of land existed in the natural state at or above the flood elevation. The sixth example referred to an unidentified portion of land in which permission had been granted on a natural area that was above the regional flood elevation. The seventh example was a property situate at the intersection of Regional Road 23 and Highway 47. Part of the property was found in its natural condition to be above the regional flood elevation and access was permitted over a driveway which was subject only to one foot of flooding and required only a slight depth of filling.

The eighth example was the Gerald Duerr property where some of the elevations were at the level of the regional storm and permission was granted notwithstanding that access was over a

distance of one hundred and fifty feet at a depth of two feet. The ninth example involved the Janssen property in Lot 28 in Concession VII in the Township of King. Following extended negotiations and the obtaining of flood plain mapping at the expense of the applicant permission was granted although the only access was to the adjoining road which was subject to flooding in areas beyond the subject land.

The tenth example was the LaRue property in the village of Keswick where a certain amount of channelization had been done to protect the area from spring flooding, the channel having the capacity to permit the flows of a one in one hundred year storm. Although there was no dry access and the staff of the respondent recommended against the concurrence with a severance, such severance was approved by the respondent. The witness was not aware of whether any permission to construct has been issued. It may be noted that the evidence of the witness was that the depth of flooding ranged from two to three feet. The final example was the Stevens property which was situate on the east side of the Metro Road. In this area approximately three hundred and forty metres of flooding crossed the road in a spillway fashion. In this case severance was approved notwithstanding the length of flooding along Metro Road.

The tribunal has carefully examined the alleged precedents submitted to the tribunal and accepts the argument of counsel for the respondent that in each case the depth of flooding was significantly less than the depth of flooding surrounding the building envelope in the present case. In several of the cases the building envelope was at a natural elevation and was not an envelope created without any indication of scientific methodology. The first and major concern of the respondent in the matter is the risk to life and to property resulting from a flood with a depth of five to six feet. This tribunal has dealt with the concerns respecting the creation of islands in regional flood plains in the past. This tribunal has

always had regard to the risk of loss of life in areas where the flood depths in the natural condition are in the vicinity of five feet or greater. This tribunal is not aware of any provincial policy that supports the construction of residential housing in areas that are subject to such a depth of flooding. Further there was no expert evidence brought to the tribunal to establish that there is a recognized principle of flood plain management which permits the construction of residential housing in areas subject to such depth of flooding in regional storms. In the case of Pivko et al. v. The Rideau Valley Conservation Authority, November 22, 1985 the tribunal said in respect of the insertion of a peninsula measuring one hundred and forty feet into a flood plain that:

The proposal of the appellants was to regrade the areas adjacent to the proposed building site and place the removed fill on the actual site. In order to comply with the understood zoning by-laws the proposed building site was placed 45 feet to the east of the west boundary of the subject lands placing at least ninety per cent of the building in the flood plain. Exhibit 22 was a cross-section through the centre of the proposed fill area showing a profile of the fill and the proposed residence. It indicates that the maximum length of the fill is 146 feet. This distance is relative to a total flood plain width of some 750 or 800 feet. Boyd calculated the effect on velocities of an insertion of such an amount of fill into the flood plain and concluded that the existing velocities were in the vicinity of .6 or .7 feet per second and that the greatest increase in velocity that might be expected in the event of a regional storm would be .2 feet. These velocities do not indicate a significant erosive influence. However the appellants did not produce evidence showing the effect of such encroachment by all of the landowners on the Rideau River and as this tribunal has indicated before the fact that an appellant comes as one of the first applicants for permission does not place the appellant in the position where he should be given an advantage over other landowners. The tribunal is concerned that the insertion of a peninsula of fill into a flood plain to the extent of 146 feet cannot be considered insignificant.

Dealing with the matter of the access and apart from the question of the engineering aspect of the construction thereof and ignoring the fact that it was work performed since the application was dealt with by the respondent, the guidelines of

the Province of Ontario appearing as item 3.7 of the guidelines published in October, 1988 by the Minister of Natural Resources and the Minister of Municipal Affairs and entitled "Implementation Guidelines" read:

It is the policy of the Province of Ontario that:

Any new development permitted in the flood plain, in accordance with this policy statement, be protected by acceptable flood-proofing actions or measures.

Ingress/egress for new buildings be such that vehicular and pedestrian movement is not prevented during times of flooding.

It is apparent to the tribunal that the proposed access does not meet the standards of the provincial requirement. The access leads into a bush area that is some distance from a public road and it takes little imagination to assess the confusion and risk associated with attempting to exit through such access or to obtain ingress by public officials at night over such conditions.

The tribunal is satisfied that the respondent has dealt with the appellant in accordance with its policies. The facts of the case indicate that the depths of flooding in this case are far more significant than in any of the alleged precedents submitted to the tribunal. As there is no overriding federal, provincial or municipal concern and as the decision appears to the tribunal to accord with provincial principles the appeal will be dismissed.

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

SIGNED this 24th day of May, 1989.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.