



The Mining and Lands Commissioner
Le Commissaire aux mines et aux terres

IN THE MATTER OF THE CONSERVATION AUTHORITIES ACT

G.H. Ferguson, Q.C.) (Tuesday, the 19th day
Mining and Lands Commissioner) (of December, 1989.

AND IN THE MATTER OF

An appeal against the refusal to issue permission to construct a residence and place fill on each of Lots 117 and 118, Plan 767, in the Township of Innisfil in the County of Simcoe.

B E T W E E N:

SERGEI KOVALIV and OLGA KOVALIV

Appellants

- and -

LAKE SIMCOE REGION CONSERVATION
AUTHORITY

Respondent

L. Kovaliv, agent for the appellants.
K.C. Hill, for the respondent.

The appellants appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission to construct a residential building on Lots 117 and 118 according to Plan 767 in the Township of Innisfil in the County of Simcoe. 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 November 9, 1989.

Although an independent court reporter was engaged for the purpose of recording the evidence of the appeal the court reporter, for some reason which could not be determined, failed to appear at the hearing and the parties agreed to proceed with the appeal without an official court reporter.

The appellants have owned the two lots since 1972. They are located on the westerly side of Temple Avenue and between Spruce Road and Bellaire Beach Road. No use has been made of

the subject lands during the period that they have been held by the appellants. The appellants now wish to either dispose of the lots or construct a house thereon in order that some revenue may be established for their retiring years.

The appellants were unable to obtain any expert evidence to provide the tribunal with data respecting their application to the respondent. Reference was made to another building that had been permitted or is currently being erected in the area.

The evidence of the respondent was that the subject lands are situate within the flood plain of a stream rising near Highway 11 and flowing very quickly into Cook Bay of Lake Simcoe. The flood plain map indicates a drop of approximately five feet in the elevation of the regional flood within the relatively short distance.

The elevation of the subject lots is 720.4 feet above sea level. The elevation of the regional storm on the westerly side of Temple Avenue is 723 feet with the result that the subject lands would be flooded to a depth of 2.6 feet in a regional storm. In addition Temple Avenue would be subject to flooding to the extent of 1.5 feet and Bellaire Beach Road and Spruce Road would also be subject to flooding in a regional storm.

No determination has been made of the 100 year flood elevation.

With reference to the precedential implications it was submitted that there are several vacant lots in the area which could be made the subject of an application if permission were granted in this instance. In addition the witness for the respondent had calculated the quantities of fill required to raise the lots to the regional storm elevation. He calculated that 1000 cubic metres of fill would be required for each lot if the lot were to be raised to the level of the regional flood. If the lots were raised to the elevation of Temple Avenue 700 cubic metres would be required on each lot. Concern was expressed that

this quantity of filling would have an effect on the storage capacity of the small watershed.

With reference to the granting of other permission in the area, it is apparent to the tribunal that permission has been granted in all of the exceptions in cases where there would be little flooding in the event of a regional flood. In one case an infilling principle was followed as the site was the last lot on Maple Street and two lots were incorporated for the purpose of one building. As indicated the elevation of the lot was such that there would be little flooding in a regional storm. Reference was made to the Bauer case and this case was distinguished on the basis that the flooding in that case was very minimal again. The third case referred to was a building currently being constructed on Lot 119 which lies to the west of Lot 118. It appears that this permission had been granted several years ago and that the evidence before the respondent at the time was that part of the lot was close to the flood elevation and that other parts of the lot were only subject to shallow flooding in a regional storm. It was also apparent from the evidence that the construction of buildings on the two lots would block the flows of a regional flood which flows would not now be blocked. In addition to the matter of loss of storage capacity, there would be a problem of interference with flood flows and additional flooding resulting from such interference.

On the evidence this tribunal concludes that there is no policy of the respondent for the granting of permission in respect of the subject lands and that there is no implied policy in respect of the subject lands by reason of the depth of flooding to which the subject lands would be subject. In addition the amount of fill that would be required to bring the subject lands to the regional storm elevation is significant and the tribunal accepts the submission that there would be an effect on other properties as a result of the placing of an amount of

fill required to raise the subject lands to the elevation of the regional flood. In addition the decision of the respondent is further supported by the risk of interference with the flows. The indicated flooding in a regional storm would have the result that damage to buildings and a risk of loss of life or injury to persons who would be unable to escape from the location in the event of the regional storm are reasonable expectations from the proposed construction.

Counsel for the respondent also pointed out that the application failed to contain any plans or specifications and that it should be treated as premature or vague with the result that there is a further reason to refuse permission.

The tribunal is satisfied that the appellants have not been refused permission in circumstances in which the respondent has in the past granted permission and that the refusal of permission is in accordance with the policies of the respondent. The tribunal points out that there is a possibility, if not a probability, that the subject lands are within the floodway of the watercourse and it may well be that the proposed construction is contrary to the provincial policy as laid down by the Province of Ontario. No evidence was produced of any overriding principle of federal, provincial or municipal concern and there is no basis on which the tribunal can allow the appeal.

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

SIGNED this 19th day of December, 1989.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.