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Ontario

The Mining and Lands Commissioner

In the matter of The CONSERVATION AUTHORITIES Act

G.H. Ferguson, Q.C.)
Mining and Lands Commissioner) Wednesday, the 4th day of October, 1989.

AND IN THE MATTER OF

An appeal against the refusal to issue permission to construct a single family dwelling on Part 1, Reference Plan 51R-16196 being part of Lot 32, Registered Plan 767 in the Township of Innisfil in the County of Simcoe.

B E T W E E N :

UDO BAUER

Appellant

- and -

LAKE SIMCOE REGION CONSERVATION AUTHORITY

Respondent

W.P. Somers, 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 on Part 1, according to Reference Plan 51R-16196, being part of Lot 32, Registered Plan 767 in the Township of Innisfil in the County of Simcoe. By 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 September 28, 1989.

The subject lands are a parcel of land fronting on the road allowance between Concessions IV and V of the Township of Innisfil in the County of Simcoe. The road allowance is also known as Bellaire Beach Road. The subject lands have a frontage of 60 feet on Bellaire Beach Road and a depth of 156.33 feet. They were purchased in 1987 by the appellant who was and continues to be a supervisor in a bakery. He acquired the subject lands because he was married, with three children and was unable to buy a home and he proposed to build his own home on the

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subject lands. He considered advertisements which indicated that the subject lands were a building lot and relying thereon he signed an offer of purchase on August 13, 1987 for the purchase of the subject lands.

The appellant also received some misleading information from a township official. The word "misleading" is used inadvisedly as his inquiry may have related solely to the conditions of the by-law respecting the erection of buildings and the information he was given may have been in reply to his inquiry. However, as the tribunal views this and the two immediately preceding facts these matters are not relevant to the consideration at hand. The transaction was closed and the deed of the property which was obtained and duly registered contained a certificate of the Secretary-Treasurer of the Committee of Adjustment of the Township of Innisfil certifying the consent of the Committee on June 26, 1987 to the conveyance. The price of the subject lands was $21,000.

Following the completion of the purchase of the subject lands and the inquiries as to the building requirements of the Township of Innisfil the appellant entered into an agreement to purchase a home containing not more than 1,030 square feet. A deposit of $1,000 was made on this purchase. The price of the building was $68,341.

In reviewing appeals under the Conservation Authorities Act, it is not the practice of this tribunal to act as if it were a Divisional Court dealing with the legality of the decision or the civil liability, if any, resulting from the background facts. The tribunal has regard to three matters primarily. Firstly, the tribunal has regard to the policy, both express and implied, of the respondent and the issue of whether the appellant has been denied an application of that policy. Secondly, the tribunal has regard to the principles of flood plain management and determines whether the permission should be granted by the Minister in accordance with recognized flood plain management principles. Thirdly, there is a matter of overriding municipal, provincial or

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federal concern.

In this case the tribunal is satisfied on the evidence that the appellant has been denied the benefits of an implied policy of the respondent. The evidence indicated that it was the express policy of the respondent to prohibit new construction in the flood plain in issue although it did permit certain additions or renovations to existing buildings. The subject lands are situate some 400 feet from the watercourse. The evidence indicates that the elevation of the regional flood in accordance with the Hurricane Hazel standard is 722.5 feet above sea level. The subject lands were filled at the time they were acquired by the appellant and according to the evidence before the tribunal the elevation of the higher parts of the subjects lands is within six inches of the elevation of the regional flood.

There are at least six or seven properties between the subject lands and the watercourse. It is noted from the evidence that there are one or two vacant properties in the area in respect of which the allowance of an appeal in this matter would serve as a precedent. However it is noted that there are some distinguishing factors in respect of at least one of the vacant lots. The lot immediately to the north of the subject lands has not been filled and has an elevation of approximately one and one-half feet below the subject lands.

The evidence clearly establishes that the respondent, notwithstanding the staff recommendations that have been given to it, has permitted the construction of new buildings in the area lying between the subject lands and the watercourse. In addition there has been a very broad application of a principle of permitting additions or renovations. The evidence indicates that the property, not adjoining, but to the east of the subject lands contained a very abandoned remnant of a building and a substantial building was permitted based on the existence of the remnant. In addition on Lot 26, Plan 746, a very substantial building said to contain in excess of 3,000 square feet was recently permitted. This permission was granted notwithstanding

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the recommendation of staff of the respondent. The property is a double lot and it was felt that the construction of one residence on the property would not interfere with the flows of water in the regional storm. A fairly large extension was permitted to a building situate on Lot 21, Plan 746, which fronts on the Bellaire Beach Road and is situate to the east of the building first discussed. The evidence also indicated that permission had been granted for a residence on the south side of Bellaire Beach Road which was closer to Lake Simcoe than the subject lands. This building had proceeded to the stage where it was 80 per cent completed prior to an application for permission being instituted as a result of the requirements of a mortgagee. This new building was authorized subject to floodproofing. It is also noted in Tab 7 of the document brief filed as Exhibit 1, that permission was granted in the same minutes in which the application of the appellant was refused for property owned by one Frank Lato. This matter was dealt with on pp. 4 and 5 of the minutes. Having regard to the location of the property on the flood plain map it appears that, although the building was on the south side of Spruce Road, the site is very close to the watercourse in issue and the building would be within approximately 100 feet of the watercourse. This case again was an example of an existing structure being torn down which fell within the literal wording of the policy of the respondent. However, having regard to the other examples the tribunal is satisfied that the respondent has in dealing with applications established an implied policy that is more lenient than the express policy contained in its policy statements.

In dealing with this matter the tribunal is not unmindful of the decisions of Ditta v. The Lake Simcoe Region Conservation Authority and of Graham v. The Lake Simcoe Region Conservation Authority. However there are, in the view of the tribunal, a number of distinctions related to flood plain management. Firstly, in the two cases the flood plain of the watercourse had been subjected to a special policy area treatment

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and a need for strict compliance flowed from the establishment of this area and was coupled with a need for more stringent applications of policy within the remainder of the flood plain. In the two cases the subject properties were subject to 1.5 feet of flooding while the subject lands have an elevation that is near the regional flood elevation. The two sites had not been filled in contrast with the subject site which was filled prior to the time of acquisition by the appellant. There is no comparable loss of storage capacity in this case. In the Graham case the intention was to construct a basement and this approach was not being followed in the subject application. In the two cases only one property separated the lands from the watercourse while in the present case the subject lands are some 400 feet from the watercourse. In addition the construction of a building at the sites in the two earlier cases would cause a constriction of flow very close to the watercourse in its normal flows. In contrast in the subject case there is a building immediately upstream from the subject lands and there is more than one building immediately downstream from the subject lands and although there was no professional evidence in this regard the tribunal cannot conclude that the proposal in the subject case would have any serious effects on the flows of a regional flood.

Another serious distinction is that in the two cases septic tanks with additional fill and risk of pollution were involved as contrasted with there being an existing sewer connection for the subject lands. For these various reasons the tribunal is satisfied that the subject application is distinguishable, keeping in mind flood plain management principles, from the Ditta and Graham cases.

Accordingly, based on the implied policy that the tribunal has found to exist in respect of the area in which the subject lands are situate, the appeal will be allowed. Counsel for the appellant requested his costs, particularly in view of the fact that he had brought E.C. Brisco, B.A.Sc., P.Eng.,

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O.L.S., a recognized specialist in drainage matters, as a witness. However, by Mr. Brisco's own evidence, he was unable to deal with the normal principles of flood plain management and the tribunal has not relied on his scientific expertise in coming to the conclusion. Accordingly, there will be no order as to costs.

1. THIS TRIBUNAL ORDERS that the appeal is allowed and permission is granted to the appellant to construct a single family dwelling not larger than 1,030 square feet on Part 1 according to Reference Plan 51R-16196 in the Township of Innisfil in the County of Simcoe subject to the following conditions:

    1. The building shall be constructed with the length of the building being parallel to the watercourse;

    2. The centre line of the building shall be located on a line between the midpoint of the easterly wall of the building on the property to the west of the subject lands and the midpoint of the westerly wall of the building erected on Part 3 of Reference Plan 51R-16196;

    3. No basement shall be constructed under the building and a slab foundation with footings shall be used;

    4. No opening shall be constructed in the building or its foundations below an elevation of 724 feet above sea level;

    5. No electrical services or wires or heating equipment shall be located below the elevation mentioned in condition 4;

    6. The edges of the fill placed on the subject lands shall be protected with gabion walls or shall be sloped to a slope of not less than one foot rise in three lateral feet and sodded.

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

SIGNED this 4th day of October, 1989.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.