



# The Mining and Lands Commissioner

## In the matter of The CONSERVATION AUTHORITIES Act

AND IN THE MATTER OF

An appeal against the refusal to issue permission to place fill and construct a pond and dwelling on Part lots 26 and 27, in Concession 7 in the Town of East Gwillimbury in The Regional Municipality of York.

B E T W E E N :

REG PRINCE

Appellant

- and -

SOUTH LAKE SIMCOE  
CONSERVATION AUTHORITY

Respondent

The appellant, in person.  
K.C. Hill, for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission to place fill and construct a pond and dwelling on part of Lots 26 and 27 in Concession VII in the Town of East Gwillimbury in the Regional Municipality of York. By Ontario Regulation 622/81 the power and duty of the Minister to hear and determine the appeal were assigned to the Mining and Lands Commissioner. The appeal was heard in Toronto on November 24, 1981.

The subject lands are a rectangular portion of land fronting on the southerly limit of Concession VII, which is also known as Holburn Road, having a frontage of approximately 165 feet and a depth of approximately 2,700 feet and containing 10.3 acres.

Black River or Black Creek, which rises near Newmarket and empties into Lake Simcoe near Jacksons Point enters the subject lands along the westerly boundary and meanders through the northerly part of the subject lands. The creek crosses Holburn Road a short distance to the west of the west boundary of the subject lands.

The appellant purchased the subject lands in September, 1980 at a price of \$12,000, paying \$8,000 down with the balance being secured by a mortgage. His evidence was that prior to purchasing the property he discussed the matter with a member of staff of the respondent, a Mr. Kinniburgh, and was told that his proposals would not require permission from the respondent. He subsequently arranged for a contractor to excavate a pond at a location somewhere in the vicinity of the point where the river enters the subject lands and to place the fill on the southeasterly part of the subject lands on which he proposed to raise an existing driveway and raise the grade around a proposed house. When the work was partially completed, the respondent stopped the work and the appellant applied for permission for the construction of the pond, the placing of the fill and the erection of a house. The appellant gave evidence that he had paid \$4,500 to date to the contractor and \$1,800 was still owing.

The appellant was of the view that the southeast corner of the subject lands was outside an area described in Schedule 2 to Ontario Regulation 782/74 prohibiting the placing of fill without the permission of the respondent. He proposed to raise the driveway which was somewhat to the west of the part of the subject lands that was in his understanding not within the prohibited area of filling and that he would also raise the elevations around the proposed house to two or three feet in order that it would be above the elevation of any expected floods.

The appellant had not considered what was acceptable from the point of view of sewage disposal or made any applications for permits in that regard according to his evidence on cross-examination. In such evidence he also indicated that he proposed to build a house measuring 60 feet by 35 feet, although he admitted that he had never filed any such information with the respondent or filed any plans with the respondent in respect of the proposed residence. He has also not applied for a building permit as he did not intend to make his application until he had completed the filling of the subject lands.

On cross-examination the witness admitted that he was aware that the subject lands had been subject to spring floods in the past. He admitted that the lot was three feet below the elevation of the road on the west side and that during the spring of 1980 the river had overflowed its banks during the spring thaw and the witness admitted that 50 to 60 feet of the front of the subject lands had been flooded. When asked if he was concerned regarding the possibility of floods to his future residence he agreed that he had such a concern and was prepared to obtain and place whatever amount of fill would be necessary to raise his proposed house above the flood elevation. However, he had no information on the elevation of a regional flood.

He also admitted that he had not sought any proper engineering advice in connection with the construction of the proposed house and had not made any plans or considered any procedures respecting the protection of the proposed residence from the effects of a regional flood.

The evidence of the respondent was that the permission was refused because the subject lands are believed to be inside the flood plain of a regional storm and that the placing of fill would interfere with the control of flooding.

In addition there would be the possibility of property damage or loss of life if a home were constructed on the subject lands. Also there would be a loss of the storage capacity of the flood plain with increased flooding and damage of other properties and the possibility of erosion and silting of the creek and ultimately Lake Siscoe from the placing of fill.

The evidence indicated that although the aerial photography has been completed the subsequent mapping has not been prepared as the respondent is hoping for a federal grant to fund this part of the program. Notwithstanding this, the respondent is satisfied that the subject lands are within the flood plain of a regional storm. Calculations of the flood plain had been made at two locations in the vicinity of the subject lands. One calculation had been made at Brownhill, which was ten lots downstream from the subject lands. In addition flooding had been experienced upstream of the subject lands in Concessions IV and V to a sufficient extent to indicate that the subject lands are within the flood plain. From the studies made at these locations the witness for the respondent, A.A. Timmins, its regulations enforcement officer, extrapolated that there would be flooding of all of the subject lands in the event of a regional storm. This position was further supported with reference to the general topography of the area which is a flat swampy area with a narrow basin merely some 1,200 feet in width. As additional support for the view that the subject lands would be flooded during a regional storm the witness produced photographs obtained from the public records showing the level of flooding in February, 1975 of a house situate on the west side of the river approximately the same distance from the river as the proposed site of the appellant's house. This photograph showed that the house was raised above the general area and that flooding had come to the garage doors of the house and that cars parked in front of the garage were situate in water of approximately one foot in depth depending on the distance from the building. Also photographic evidence showed

that a spring flood in February, 1975 completely crossed the Holburn Road and would have covered the subject lands. By the taking of elevations the witness was able to conclude that even with the fill that had been placed on the subject lands there would be two feet of water on the subject lands if a similar flood occurred. Needless to say, a spring thaw would not likely have the same impact as a regional storm and accordingly the witness gave the opinion that all of the subject lands would be flooded to a depth of three to five feet during a regional storm. The witness also gave evidence of the experience in respect of property upstream where the spring flows in recent springs had been closely monitored and with the result that it is established that there is a considerable risk of flooding along the stretch of Black Creek in question.

No evidence on cross-examination was produced to establish that the respondent had a policy of granting permission to construct residences in similar locations.

The submissions in respect of the applicant were that he had bought the property with the knowledge of a staff member of the respondent and consequently he was losing a substantial investment if the permission requested were not granted. He submitted that the respondent was taking a very absolute position and that he was prepared to place sufficient fill on the property to raise the house above the elevation of a regional storm regardless of what that elevation might be. He estimated that he would have a loss of \$25,000 if he were not permitted to continue with his program of constructing a residence. He also emphasized the fact that the apparent control of the respondent was limited to part of his property and it recently appears that the respondent is attempting to extend its jurisdiction so that it includes his entire property.

The submissions of counsel for the respondent were that the appellant overstated his case and that the evidence indicates that he had some knowledge of construction of residences and cannot wholly lay the blame for his predicament upon the respondent. He pointed out the risks of proceeding with the construction of a residence and the placing of fill including the effect on other properties and the precedential implications which would result in all of the properties along Holburn Road being granted permits if a permit were granted in this case. It was submitted that the evidence was sufficient to make it clear that the entire property was within the flood plain of a regional storm and that the site of the proposed building was under two feet of water in 1975 and would likely be under a greater depth of water in a regional storm. The difficulties of flood proofing and minimizing the effect on the storage capacity were referred to.

At the outset it may be said, that in the event the appellant was given incorrect information by a member of staff of the respondent that this is not the proper tribunal to deal with the implications of such a matter. There are judicial bodies which would have jurisdiction over these legal issues assuming the necessary facts were established before them. The jurisdiction of this tribunal is to look into the merits of the application and, assuming a mistake were made by the member of staff of the respondent in a situation where permission should not be granted, the granting of permission by this tribunal would constitute the making of a mistake to correct an earlier mistake and it is trite to say that two wrongs do not make a right. Accordingly, this tribunal should review the application on its merits and not on the basis of alleged statements of staff of the respondent which might in some other forum, if proved, provide some remedy.

Turning to the merits of the present application it is apparent to this tribunal that the subject lands are within the regional flood plain. There is no reason to suspect that the spring thaw of 1973 or the thaw of 1980 constituted a regional flood and the evidence does indicate that the subject lands would be entirely within the regional flood plain. With reference to the construction of the pond, the pond is completed and it would seem to be pointless to grant permission to construct a pond at this stage. There was no evidence to show that such construction had taken place in accordance with any acceptable principle of flood plain management. Similar considerations would apply with respect to the fill that is already placed on the property.

With reference to the construction of houses or residences in flood plains three matters are usually considered by conservation authorities. Needless to say these matters can only be considered against the background of the elevation and the flows of the regional flood.

One consideration is the effect of the proposed building and its supporting fill on the storage capacity of the reservoir. This effect cannot be assessed until such time as the mapping is completed and the regional flood elevation established. In similar vein the mapping will illustrate the effect of the proposed building and the accessory fill on the flows of the river during a regional flood. The building and fill will act as a dam having an effect on upstream flooding and downstream properties by way of changes in the flows and particularly the risk of erosion and related matters. It is quite likely that the proposed house would be fairly central to the channel of the regional flows with the result that there would be a significant impact on the house from the flows which should be considered.

The third aspect of the construction of residences in

the flood plain is the flood proofing of the building and the protection of the inhabitants. Until such time as the velocities of the flows are determined no steps can be taken to establish the flood proofing standards for the fill and the building itself. Similarly, the elevations must be established to determine the height to which the building should be protected, if permitted. Related thereto are considerations of sewage facilities. In addition it is also essential to ensure that the occupants of the proposed building would be able to have access and egress to and from the building in the event of a regional storm. The evidence clearly established that Bolburn Road was flooded during a spring thaw and there is little expectation at this time that adequate access and egress could be developed for a proposed residence on the subject lands. Associated with this matter of access is the safety to the occupants who might in panic or in sickness attempt to leave or require assistance and access is required for these purposes. People have been drowned in their basements during regional storms and this type of tragedy is the situation that the Conservation Authorities Act and the regulations made thereunder are designed to prevent.

Under the circumstances the application of the appellant can only be categorized as premature. There is no way of determining whether an exception to the regulations could be created and if created what protective steps should be taken to protect the building and the occupants. Further, the effect on the storage capacity of the flood plain and the effect on other properties cannot be assessed in the absence of the establishment of the flood elevations and the flows of a



regional storm.

Under the circumstances the appeal must be dismissed.

1. IT IS ORDERED that the appeal in this matter be and is hereby dismissed.
2. AND IT IS FURTHER ORDERED that no costs shall be payable by either of the parties to this matter.

DATED this 14th day of January, 1982.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.