



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 construct a dwelling on part of the south half of Lot 22 in Concession I in the Township of Innisfil in the County of Simcoe.

B E T W E E N :

EDWARD O. MEMBERY, VERNA M. MEMBERY
and FRANK MORRIELLO

Appellants

- and -

SOUTH LAKE SIMCOE CONSERVATION
AUTHORITY

Respondent

S.S. Thompson, agent for the appellants.
S.N.M. Plamondon, for the respondent.

The appellants appealed to the Minister of Natural Resources from the refusal of the respondent to issue permission to construct a dwelling on part of the south half of Lot 22 in Concession I in the Township of Innisfil in the County of Simcoe. By Ontario Regulation 448/81 the power and duty of hearing and determining the appeal were assigned to the Mining and Lands Commissioner. The appeal was heard in Toronto on September 23, 1981.

Mr. S.S. Thompson appeared as agent on behalf of Mr. and Mrs. Membery. They were unable to attend because of ill health. He also advised that the third appellant, Frank Morriello, was no longer interested in the property. At the

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time of launching the appeal he held an offer of purchase of the subject lands but this transaction has been terminated and this appellant has no further interest.

By way of general background Mr. and Mrs. Membery established a golf course on a property lying to the south of the boundary between the townships of Innisfil and West Gwillimbury some 28 years ago. The golf course with the exception of two small parcels of land has been transferred to their son. The two parcels lie to the east of a diverted creek flowing easterly through the golf course. The first parcel is the lands that are subject to the present appeal and are owned by Mrs. Membery according to the information provided. The second property lies to the east and is owned by Mr. Membery. A residential building is erected on the property owned by Mr. Membery. There are a number of other residential properties erected on the same side of the road allowance between the two townships to the east of Mr. Membery's property but the houses, particularly those in the immediate vicinity to the east, are situate above the regional flood line.

In the construction of the golf course, the creek which ultimately flows easterly into Cook Bay of Lake Simcoe was changed. The original route crossed the concession road and flowed in an easterly direction along the road allowance and at the easterly edge of Mr. Membery's parcel made a sharp turn to the north. This was straightened and further downstream the creek was re-channeled into a number of pools and a canal and ultimately the creek feeds into Cook Bay. There are a number of houses built in the vicinity of the mouth of the creek. Mr. Thompson estimated this number of houses to be approximately 150. However, in examining the plan filed as Exhibit 2 and illustrating the regional flood line, it is apparent that only a small portion of these residences are situate within the flood plain of a regional storm and the greater part of these

buildings including a number of buildings erected along the road allowance are above the elevation of the regional storm.

Two branches of the creek converge on the golf course a short distance downstream from the subject lands. The flood plain for both branches of the creek is shown as one flood plain in the area indicating that in a regional flood situation there would be a sufficient flow of water to create one channel where there presently are two channels. At the junction of the two branches the regional flood elevation is 740.4 feet. The subject lands are situate upstream some distance from the junction and based on the evidence of the Regulations Officer for the respondent and observing Schedule 2, it appears that the regional flood elevation of the subject lands is in the vicinity of 742 feet. Contrasted with this the elevations of the subject lands are 736 feet and 738.5 feet.

In addition to the depth of flooding in a regional storm as shown on Exhibit 2, there is a possibility that there may be increased flooding conditions resulting from two sources. The culvert in the concession road adjacent to the subject lands is not of sufficient size to pass the regional storm flows and there is a risk of the culvert washing out or the concession road overtopping. In addition, a short distance upstream, a railway embankment crosses the flood plain. At this intersection the ground elevations are 748 feet and the regional flood elevation is approximately 752 feet. In the event a wall of water were built up behind the embankment and washed out a portion thereof during a regional storm, a significant head of water would be released onto the subject lands.

A further implication is that the original bed of the creek flows between the proposed dwelling and the road allowance and is filled with stagnant water most of the time.

The key evidence for the appellants was a letter from

the firm of Reid and Associates Limited which commented on the reasons given by the respondent in refusing to issue the permission.

The Regulations Officer for the respondent gave evidence. He indicated at the outset that at one time the erection of a residence was considered on the stage storage principle but with different owners in the relevant part of the watershed, this proposal was unlikely. The witness also pointed out that in addition to the primary flooding resulting in a regional storm there is a risk of secondary flooding created by the risk of overtopping and washing out of the railway and road embankments suggesting that if both embankments were to give way a head of water of approximately ten feet in depth would be created in the vicinity of the subject lands.

With reference to the filling in of the original bed of the creek which surrounds the subject lands, the witness pointed out that such a filling would remove some of the storage capacity from the flood plain. With reference to the Reid letter, the witness submitted that the letter fails to take into consideration the possibility of overtopping or washing out of the railway and road embankments. With reference to pollution, the witness referred to a special study being made of Lake Simcoe and attempts being made to reduce the phosphate load of the lake and to prevent the siltation of parts of the lake at areas where streams flow into the lake. He also pointed out that fill reduces the storage capacity of the flood plain and causes an increase in the velocity of the flows of a regional storm with the result that there is an increased likelihood of erosion and consequently pollution of Lake Simcoe. He also referred to the general build up of chemicals such as gasoline from normal household use which would effect the water quality of the lake. With reference to the comments on conservation of land the witness referred to the risks of erosion resulting from

construction in flood plains.

In his submissions, Mr. Thompson suggested that the situation was analogous to the construction of one building on a 100 acre farm and suggested in effect that the construction of the proposed dwelling would be the last dwelling on the concession road which currently has 13 other houses along it. He also referred to the dwellings lying between the subject lands and the lake and submitted that these houses were built on areas with lower elevations. In passing, as noted above, while these downstream properties have lower elevations a greater proportion of these buildings are not situate in the flood plain but are situate on lands that do not appear to be subject to the flows of a regional storm. He further suggested that the severance of the parcels some 12 years ago and the approval of the county for access and the health unit for a septic tank should merit further consideration of this parcel as a housing site.

On behalf on the respondent it was argued that the application was premature as the applicant had not provided sufficient information or data to enable the respondent to make a responsible decision. It was suggested that the onus was on the appellant to establish that his proposal had no effect on flooding, pollution or conservation of land and in view of the absolute prohibition in the regulations, the appellant failed to establish that these matters would not be effected.

Counsel for the respondent also referred to the obvious reduction of the storage capacity both from the house itself as well as the septic tank and sewage beds which were required to be raised. The effect of flooding of properties not otherwise subject to flooding by the reduction of the storage capacity and the increase in flows resulting therefrom were referred to. The potential for loss of life, particularly if the embankments did not retain the flows of a regional flood

were mentioned.

This tribunal is not aware of any conservation authority that adopts a general principle of permitting residential construction in flood plains. Residential construction in flood plains is the least desirable of any exception that could be created to the prohibition contained in the law. The most significant reason for the entire program of the conservation authorities is the prevention of loss of life that occurs during floods and where the lands are surrounded by a drainage ditch and are in addition subject to two to four feet of flooding in a regional storm and in addition are also subject to the risks arising from the washing out or overtopping of a railroad embankment or concession road, this tribunal fails to see how there could be any grounds for overlooking the risks to the inhabitants of the building proposed to be erected. There was no evidence produced that the respondent had a policy of permitting residential construction in flood plains and this tribunal is not aware of any policy of a provincial or broader nature that recognizes such an exception in such circumstances. With reference to the matter of precedent which is frequently raised in these matters, it is noted that one of the appellants already owns a residence constructed in the flood plain. If permission were granted to construct an additional building between that building and the channel there would be no grounds for rejecting applications for similar permission on the portion of the same concession road lying to the west of the channel and within the regional flood plain.

In addition this tribunal is satisfied that the proposal of the appellants carries with it the usual implications of placing of fill in the flood plain which has the effect of causing the flooding of lands that otherwise would not be flooded and to this extent is satisfied that the proposal of the appellants would have an effect on the control of flooding.

On the evidence produced the only conclusion can be that the proposal would have some effect on the conservation of land in that the loss of storage capacity is usually associated with additional flooding and increased velocities with resultant erosion and siltation and that notwithstanding the issue of a permit for a sewage system there is possibility of a lesser control of pollution from a residence erected in such a location than on ground not subject to flooding. The significant concerns however, are the risks to occupants of the proposed building who would be surrounded by waters of four to six feet during a regional storm and the risk of damage to the proposed building itself from the flows that would accompany such a flood.

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.

DATED this 12th day of November, 1981.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.