File No. CA 009-94

L. Kamerman Mining and Lands Commissioner	))	Tuesday, the 22nd day of August, 1995.
B. Goodman Deputy Mining and Lands Commissioner	))	
L. Gertler Deputy Mining and Lands Commissioner	))	

THE CONSERVATION AUTHORITIES ACT

IN THE MATTER OF

An appeal to the Minister under subsection 28(5) of the **Conservation Authorities Act** against the refusal to grant an application for the construction, placing of fill and alteration of a watercourse in the Floodplain Lot 15/16, Concession BF, Township of Thurlow, Moira River Conservation Authority.

B E T W E E N :

EDWARD SPRAGUE and JAMES SPRAGUE
Appellants

- and -

MOIRA RIVER CONSERVATION AUTHORITY
Respondent

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O R D E R

WHEREAS an appeal to the Minister of Natural Resources was received by the tribunal on the 19th day of November, 1994, having been assigned to the Mining and Lands Commissioner (the "tribunal") by virtue of Ontario Regulation 795/90;

AND WHEREAS a hearing was held on the 8th day of June, 1995, in the Commissioner's Court Room, 24th Floor, 700 Bay Street, in the City of Toronto, in the Province of Ontario;

UPON hearing from the parties and reading the documentation filed;

1. THIS TRIBUNAL ORDERS that the appeal from a refusal of the Moira River Conservation Authority to issue permission for the construction, placing of fill and alteration of a watercourse in the Floodplain Lot 15/16, Concession BF in the Township of Thurlow is hereby dismissed.

2. THIS TRIBUNAL FURTHER ORDERS that no costs shall be payable by either party to the appeal in respect of this appeal.

Reasons for this order are attached.

DATED this 22nd day of August, 1995.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

Original signed by B. Goodman

B. Goodman
DEPUTY MINING AND LANDS COMMISSIONER

Original signed by L. Gertler

L. Gertler
DEPUTY MINING AND LANDS COMMISSIONER

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REASONS

The matter was heard in the Commissioner's Court Room, 24th Floor, 700 Bay Street, Toronto, Ontario on June 8, 1995.

Appearances:

Edward Sprague	Appearing on behalf of the Appellants.
David W. DeMille	Counsel for the Moira River Conservation Authority.

Background:

On June 22, 1994, Mr. Ed Sprague wrote to Mr. Mike Revie, Planning and Regulations Supervisor for the Moira River Conservation Authority ("the MRCA") attaching architect's drawings of a proposed building project on the Bay of Quinte. The letter described the project as a marina/condominium proposal to be located in Part of Lots 15 and 16, broken front Concession, Township of Thurlow. Mr. Sprague asked for an opinion as to the practicality of proceeding with the project, as well as all necessary application forms, rules and regulations etc. Mr. Revie had been copied on a letter sent to Mr. Sprague by Ms. Karen Poste, a planner with Thurlow Township, to whom Mr. Sprague had earlier submitted his site plans for the project.

On June 29, 1994, Mr. Revie replied to Mr. Sprague, advising of MRCA staff comments in response to the proposal. It was noted that the entire area was located within the Bell Creek Swamp Complex and Blessington Creek Marsh, both of which are Provincially Significant Wetlands. Reference was made to the provincial Wetlands Policy Statement, and in particular to Section 2.1 which provides that development shall not be permitted within Provincially Significant Wetlands. It was noted that the entire area is also subject to flooding under a 1:100 year event from the Bay of Quinte. Pursuant to the provincial Flood Plain Planning Policy Statement, it is the policy of the province where watersheds, such as the Moira River, are subject to the One Zone Concept whereby the flood plain is defined by the Regulatory Flood Standard (1:100 year flood), that new development in the flood plain is to be prohibited or restricted. (Sec. 4.2) It was further indicated that specific policies of the MRCA supported these two provincial Policy Statements. The letter concluded that, in light of the above, MRCA staff would not

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support any development within these lands as proposed. It was indicated that if, however, Mr. Sprague wished to pursue the matter, a permit application was enclosed. Finally, it was noted that there may be other approvals also required from all three levels of government. The letter was copied to the township and to the Ministry of Natural Resources ("the MNR") in Napanee.

On July 7, 1994, the appellants submitted to the MRCA a Fill, Construction, and Alteration to Waterways Permit Application, on behalf of the Estate of Alan B. Sprague, their late father. The covering letter requested an answer as soon as possible. Copies of the site plan were also attached. Mr. Revie replied to Mr. Sprague on August 3, 1994, advising that a hearing before the full Authority had been scheduled for October 13, 1994. The letter also noted that MNR was also reviewing the proposal, and that the MRCA would be using information provided by the MNR as part of an evidence package, which would be disclosed upon request.

On August 26, 1994, the Tweed District Planner for the MNR, Mr. Rick Forster wrote to Mr. Sprague advising of the results of the review of the proposed development by staff from the Quinte Management Area. The letter commented on the review in relation to the federal **Fisheries Act**, the provincial Wetlands Policy Statement and the Bay of Quinte Remedial Action Plan. After referring to subsection 35(1) of the **Fisheries Act**, the letter commented that the amount of filling and dredging that would be required for the project would harmfully alter the fish habitat and its productive capacity in the area. It was the opinion of MNR staff that compensation for the loss of this habitat would not be possible. The letter also indicated that the development proposal would clearly involve development within a provincially significant wetland, which was prohibited by section 2.1 of the Wetlands Policy Statement. Finally the letter commented that the loss of wetland area and function had been identified as an impairment to the Bay of Quinte ecosystem, and that the above-mentioned Action Plan had recommended in its Stage 2 Report that the Quinte Community should prevent any further loss of the integrity of the basin's remaining wetland ecosystems (Recommendation 64). The letter concluded that, based on these comments, staff from the Quinte Management Area would not be able to support the development proposal as submitted or any revised or modified design that involved development within a provincially significant wetland or would harmfully alter, disrupt or destroy fish habitat. The letter was copied to Ms. Karen Poste and Mr. Mike Revie.

The permit application dated July 7, 1994 was heard by the full MRCA at it's October 13, 1994 meeting. On October 14, 1994, Mr. Terry Murphy, General Manager/Secretary-Treasurer of the MRCA wrote to Messrs. Sprague, advising that, after

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discussion following the meeting, the Authority had voted to deny the application for permission to construct and place fill. The letter indicated that the Full Authority based it's decision on the proposal's contravention of various Provincial Policies, Provincial and Federal Legislation and Regional planning documents and objectives. The letter further notified the Spragues of their right to appeal the decision, pursuant to section 28 of the **Conservation Authorities Act** to the Minister of Natural Resources.

The Spragues filed their appeal with the Office of the Mining and Lands Commissioner by letter dated October 31, 1994. An appeal pursuant to subsection 28(5) of the **Conservation Authorities Act**, R.S.O. 1990, c. C.27 is to the Minister of Natural Resources. The Mining and Lands Commissioner (the "tribunal") is appointed pursuant to subsection 6(1) of the **Ministry of Natural Resources Act**, R.S.O. 1990, c. M.31. By virtue of subsection 6(4) of this **Act**, where two or more deputy commissioners are appointed, the Commissioner and two of the deputy commissioners may hear an appeal to the Commissioner as a tribunal of three, and a hearing by the tribunal is deemed to be a hearing before the Commissioner and the decision of the majority is the decision of the tribunal.

Policy and Regulatory Framework:

(1) The Planning Act

By virtue of subsection 3(1) of the **Planning Act, 1983**, the Minister of Municipal Affairs, either solely or together with any other Minister, was authorized to issue policy statements that had been approved by the Lieutenant Governor in Council on matters relating to municipal planning that in the opinion of the Minister were of provincial interest. In exercising any authority that affected any planning matter, the council of a municipality, every local board and every provincial government agency "shall have regard to" such policy statements (subsection 3(5)).

(2) The Provincial Flood Plain Planning Policy Statement

On October 24, 1988, the Minister of Municipal Affairs, together with the Minister of Natural Resources, issued a provincial Policy Statement on Flood Plain Planning under the **Planning Act, 1983**. The Policy Statement had been approved by Cabinet on August 11, 1988. The Policy Statement contained sections dealing with the

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purpose of the Statement, its interpretation, the background, definitions, and the basis of the policy, before setting out the policies themselves. It contained a final section on implementation. The policies contained general provisions, set out the regulatory flood standard used to define flood plain limits, indicate the policy of the government in relation to Official Plans, and the one zone, two zone, and Special Policy Area concepts for the flood plain.

The One Zone Concept is covered in the fourth part of the Policy. It provides that the flood plain will consist of one zone, defined by the regulatory flood standard, and that new development in the flood plain is prohibited or restricted. Where the one zone concept is applied, municipalities and planning boards must include policies in their official plans that explain the intent of the one zone concept. Further, where the one zone concept is applied, the flood plain must be appropriately zoned in conformity with the official plan designation, to reflect its prohibitive or restrictive use.

(3) Provincial Wetlands Policy Statement

The Provincial Wetlands Policy Statement was issued jointly by the Minister of Municipal Affairs and the Minister of Natural Resources to give direction to municipalities, planning boards, public agencies, the private sector and others for the protection of wetlands. This Policy Statement was approved by Cabinet on May 14, 1992. The stated goal of the policy statement is to ensure that wetlands are identified and adequately protected through the land use planning process, and to achieve no loss of "Provincially Significant Wetlands". These are defined to include Class 1, 2 and 3 wetland in that part of the Great Lakes-St. Lawrence Region below the line approximating the southern edge of the Canadian Shield defined in "An Evaluation System for Wetlands of Ontario South of the Precambrian Shield", Second Edition, 1984, as amended from time to time. One of the objectives of the policy is to ensure no loss of "Wetland Function" or "Wetland Area" of "Provincially Significant Wetlands" in the "Great Lakes-St. Lawrence Region". The first part of the policy requires all planning jurisdictions including municipalities, planning boards and resource management bodies to protect "Provincially Significant Wetlands". Where these wetlands have been identified, all planning jurisdictions are to incorporate policies and protect these wetlands in official plans zoning by-laws and other development decisions under the **Planning Act, 1983**. All planning jurisdictions are encouraged to protect other wetlands that are not provincially significant.

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The second part of the policy addresses the Great Lakes-St. Lawrence Region. It stipulates that "development shall not be permitted within 'Provincially Significant Wetlands'". Certain restrictions are outlined for development on "Adjacent Lands" to ensure no loss of "Wetlands Functions" or loss of contiguous "Wetland Area". These terms are defined in the Policy Statement.

The final section of the Statement is headed "Implementation". It indicates, among other things, that "application by Conservation Authorities of Fill, Construction and Alteration of Waterway Regulations under the **Conservation Authorities Act**, will assist in the implementation of this Policy Statement, where Provincially Significant Wetlands are contained within such regulated areas".

(4) Official Plan of the County of Hastings

On June 25, 1974, Hastings County Council adopted the Official Plan for the Hastings County Planning Area which was subsequently approved by the Minister of Housing on March 9, 1976. Since receiving approval, there have been various amendments to the Official Plan. "Hazard Lands" are defined in Clause 2.4 of the Official Plan as those lands which may pose a threat to life and property because of inherent physiographic characteristics. The stated objectives include discouraging within the flood plain any future land uses that would be susceptible to flood damage, and preventing development from occurring on lands having inherent environmental hazards, such as flooding, which could endanger human life and property. (Clause 2.4.2) The permitted uses on Hazard Lands are limited to agriculture, conservation, forestry, wildlife management, public or private parks and outdoor recreational activities. The erection of buildings or structures or the removal or placing of fill in areas subject to periodic flooding or which are deemed hazardous are not permitted without the prior approval of the appropriate authority.

It is indicated that lands having inherent environmental hazards such as flood plains are shown as Hazard Lands on the Schedules, which are to be used as guides in the delineation of Hazard Land in the implementing zoning by-laws. Hazard Lands are to be placed in a separate section in the implementing zoning by-laws.

Clause 3.5.1 provides that the conservation of soil, water, flora, fish and wildlife will be encouraged in all Hazard Land locations.

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Clause 3.7 deals with flood plains and flood lines. It provides that where Engineered Flood Plain and Flood Line mapping is approved by the Ministry of Natural Resources and the necessary regulations have been adopted by the Conservation Authority, the above-noted restrictions on the erection of buildings or structures or the removal or placing of fill are to apply. Engineered Flood Lines are shown schematically on the Land Use Plan Schedules. Where a major alteration is necessary to overcome the hazards within Engineered Flood Lines, an amendment to the Official Plan is required.

(5) Township Zoning By-Law

The Township of Thurlow passed its comprehensive Zoning By-Law No. 3014 on August 12, 1987. The Zoning By-Law implements the policies of the County Official Plan. The By-Law, as amended was filed as Exhibit 53. Clause 6.21 of the By-Law addresses "Hazard (H) Zone". The residential, non-residential and accessory permitted uses are specified. The By-Law also contains other special provisions relating to these uses.

(6) The **Conservation Authorities Act**

By virtue of subsection 28(1) of the **Conservation Authorities Act**, a Conservation Authority is empowered, subject to Cabinet approval, to make regulations:

> (b) prohibiting or regulating or requiring the permission of the authority for the straightening, changing, diverting or interfering in any way with the existing channel of a river, creek, stream or watercourse;
>
> (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 the regulations;
>
> (f) prohibiting or regulating or requiring the permission of the authority for the placing and dumping of fill of any

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> kind in any defined part of the area over which the authority has jurisdiction in which in the opinion of the authority the control of flooding or pollution or the conservation of land may be affected by the placing or dumping of fill.

Subsection 28(3) requires an authority to hold a hearing before refusing permission required under clause (1)(b), (e) or (f), while subsection 28(4) requires that an authority give written reasons for its refusal to the applicant. Subsection 28(5), referred to earlier in this decision, provides for the right of appeal to the Minister of Natural Resources by an applicant who has been refused permission.

(7) MRCA Fill, Construction and Alteration to Waterways Regulation

The MRCA has passed a regulation under subsection 28(1) of the **Conservation Authorities Act** (Ontario Regulation 260/92). The regulation was approved by Cabinet on April 30, 1992. Section 3 of the Regulation requires the prior written permission of the authority for the construction of a building or structure in or on a swamp or in an area susceptible to flooding during a regional storm, for the placing or dumping of fill in an area described in the Schedules, and for the changing or interfering with the existing channel of a river, creek or watercourse. Without such permission, such activities are prohibited. "Regional storm" is defined in section 1 of the regulation.

Section 4 provides that, subject to the **Ontario Water Resources Act** and any private interest, the Authority may permit any of the activities set out in section 3 if, in the opinion of the Authority, the activity will not affect the control of flooding or pollution or the conservation of land. Section 5 sets out the requirements for an application for permission to the Authority. On June 9, 1994, the MRCA passed procedures and guidelines for the above regulation.

The above-noted regulation was amended by Ontario Regulation 725/94 in November, 1994.

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The MRCA also passed a Wetland Policy on May 13, 1993. It provides that the general policy of the MRCA will be, among other things:

- To support the Provincial Wetlands Policy Statement.
- To support the objectives of the Bay of Quinte Remedial Action Plan through the "no net loss" approach to wetland habitat areas.
- To protect all fragile ecosystems contained within or adjacent to wetlands from irreparable damage due to development, land use changes, or other activities ... .
- To actively promote wetland protection through MRCA programs.
- To discourage the draining of wetlands in rural and urban areas.

(8) Federal **Fisheries Act**

Subsection 35(1) of the **Fisheries Act** prohibits any person from carrying on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat. There is no contravention if the means or conditions are authorized by the Minister of Fisheries and Oceans or under the regulations. Section 37 permits the Minister to require plans and specifications where a person proposes to carry on any work that is likely to result in the alteration, disruption or destruction of fish habitat. It also set out the powers of the Minister and the regulation-making power of the federal Cabinet.

Evidence:

The subject lands were, according to the evidence of the appellants, acquired from different owners by their late father, Alan B. Sprague, in the early 1960's. It was the evidence of Mr. Ed Sprague that his father bought the land because of its perceived potential value as a re-development site. The only letter that Mr. Ed Sprague believes his father received from the MRCA was dated August 21, 1990, and addressed to "Dear Landowner" (Exhibit 9). The letter, from Ms. Janice Hanright, Shoreline Management

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Planner indicated that the MRCA was in the process of preparing a shoreline management plan for the portion of the Bay of Quinte within its area of jurisdiction. The letter requested information concerning any short or long term plans of the landowner for development of the property, and attached a form for completion in this regard. Mr. Sprague Senior replied to the request by registered letter dated August 28, 1990, attaching the completed form. Under the heading "proposed changes (particularly plans to divide into parcels, erect structures or change the use of your property)" Mr. Sprague wrote "planned commercial/industrial".

Mr. Ed Sprague testified that, prior to this request for information and for 20 years leading up to the "wetlands" designation of the subject lands in 1992, the MRCA made no attempt to identify the subject lands as an area of natural or scientific interest. It was only after the MRCA was informed of the appellants' plan to develop the property that, according to Mr. Ed Sprague, these lands became "significant" and the MRCA declared them "provincially significant Class 1 Wetlands". He indicated that the MRCA made no attempt to inform the appellants of its proposed designation or its ramifications. Nor did the appellants receive notice of the wetland evaluations performed in relation to the property. He also testified that his father received no notice of the proposed "Hazard Lands" designation in the zoning by-law, and therefore questioned its legality.

Mr. Sprague referred to Exhibit 1, a portion of an undated survey map, believed to have been prepared in the 1890's, entitled "Plan of Bell Creek Island Lots 17, 16 and the east part of 15 Broken Front Concession Township of Thurlow". He claimed that this showed that the Bell Creek complex and Blessington Creek Marsh were never "provincially significant wetlands". There was little or no swamp in existence prior to the building of the two intersecting railways shown on Exhibit 4, a Plan of Survey completed by Darrell L. Hume on January 31, 1984 entitled "Plan of Survey of Part of Lots 15 and 16 Broken Front Concession and Bell Creek Island and Part of the Bay of Quinte, Township of Thurlow, County of Hastings". He submitted that this section of the swamp was created by the railway embankments indicated on the survey, and therefore was man-made. He suggested that the proposed development would not affect this swamp. Mr. Sprague disputed the statement in Mr. Revie's letter of June 28, 1994 previously referred to that "the entire area is also subject to flooding under a 1:100 year event from the Bay of Quinte". He argued that most of the land in the proposed project is reclaimed land and railroad embankments, which were built well out of reach of any flooding, and that it would be a very simple matter to secure the remainder of the project from flooding. Mr. Sprague referred to Exhibit 51, a composite of parts of Exhibit 7, consisting of a

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coloured map prepared from flood mapping by the MRCA of the subject area. Mr. Sprague indicated that the area coloured green was above the flood elevation, the area coloured brown would require six inches of fill and the hatched area two feet of fill to bring them to the flood elevation.

Mr. Sprague also disputed, based on his own observations of the subject area, that the loss of wetland areas has been determined to be an impairment to the water quality of the Bay of Quinte. He argued that clear water would continue to flow through the subject property and into the "dirty bay ... development or not". Any long term impact of the development on the natural environment would be minimal, while the benefits to the inhabitants of Belleville and surrounding area would last for years.

Mr. Sprague also referred to Exhibit 31, a notice of property valuation (assessment) from the Ontario Ministry of Finance, effective from January 1, 1995 and the final tax notice dated June 3, 1992 from the Township of Thurlow, showing that, for the purpose of the assessment and notice, the property was classed as residential. He argued that this supported his position that the lands were not "hazard lands" and could be developed for residential purposes.

Mr. Sprague also made reference to a newspaper article from the October 12, 1990 edition of the Belleville "Intelligencer", part of Exhibit 40. The article is headed "Authority is planning for private development - But city hall has concerns about proposed uses for site". In the article, Mr. Paul McCoy, land management coordinator for the MRCA is quoted as having said that the authority was then considering leasing a ten acre section of land immediately south of its headquarters on Highway 2 at Wallbridge-Loyalist Road for private development, including a 55-slip marina and boat launch. Mr. Sprague contended that this showed that the authority was then considering the same type of facilities that the appellants were now proposing, and that the authority had a double standard.

He submitted that, if the decision of the authority in relation to the proposed project was allowed to stand, the appellants' lands would effectively have become public domain for which his father's estate and his father had paid taxes over the years. Designating these lands as "hazard lands" and "significant wetlands" was just another method of expropriation without compensation. According to Mr. Sprague, the only option open to the appellants was to seek adequate compensation for this "constructive expropriation".

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Under cross-examination, Mr. Sprague responded to questioning about the proposed project that was the subject of the permit application to the MRCA. He also described the vegetation found on the property. Reference was made to the architect's drawing, which is part of Exhibit 23, being the application and accompanying documentation. In the northwest corner, on the south side of Highway 2, a retail strip plaza would be located with 16 units or stores, with a large one storey supermarket or fruit market store at both ends. Mr. Sprague was unable to provide the square footage of this part of the complex.

Parking would be situated south of the retail plaza as well as a seven or eight storey office building, which might have a basement. The westerly portion of the development would have to "jump" Bell Creek. A cement support or culvert would cover 300 feet of the creek. The appellants, according to Mr. Sprague would do whatever was necessary to ensure that the project complied with all provincial and local requirements. A family restaurant complex and public dock would be located south of the office building. Mr. Sprague was again unable to provide information concerning the size of the restaurant complex. Parking would be provided on either side of the office building and to the east of the restaurant. Mr. Sprague had not ascertained the local parking or building requirements, but reiterated that the appellants would do whatever was necessary. The parking lot would be crushed stone or asphalt, with adequate lighting.

An outdoor farmer's market and a flea market would be located on the northeast part of the property, protected by gazebo-like structures. A closed-in antique market would be located to the west, fronting on Bell Harbour. Mr. Sprague conceded that there was not, as yet, a grading plan, nor a drainage or storm water management plan for the complex. He also acknowledged that there was no servicing plan for the complex. If the City of Belleville did not agree to provide services, then well and septic sewage facilities would have to be installed. Located between the antique market and the restaurant complex would be a public marina. The dock in front of the restaurant would have boat slips and a lookout at the south end. The marina would have a floating dock, with boat slips. Mr. Sprague was not familiar with building or other requirements for the docks, but again indicated that all requirements would be met. He testified that this area of Bell Harbour is swamp, with cattails and reeds. If the project were to be approved, this vegetation would have to be removed and this part of the bay dredged for boats.

Mr. Sprague was questioned about that part of Section C of the permit application dealing with the fill proposal. This included both placing and removing fill.

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All types of fill were checked off, with the exception of broken concrete, and beside "other", "lagoon bottom" was indicated. Mr. Sprague was unable to indicate how much fill would be removed, the amount of fill required, what would be done to stabilize the fill at the water's edge, or what kind of fill would be placed on which part of the property.

Mr. Sprague was next questioned about the island portion of the proposed project on the southeasterly portion of the architect's drawing. On the northwest corner of the island would be situated a one or two storey club and recreation centre. This would include a gathering facility and entertainment room for the year-round condominium residents. Mr. Sprague did not know whether footings would be required. To the east of the recreation centre would be a private marina. Both the club and marina would have docks to the north with boat slips. This was now a marsh area with cattails, and would also require some dredging.

There would be parking to the south and east. The condominium complex would be to the west. This would consist of four three or four storey apartment style buildings with two smaller townhouse like structures on the east side. Mr. Sprague did not know the number of units to be built. There was no drainage, storm water management or servicing plan yet for the island. Again Mr. Sprague indicated that the appellants first wished to determine whether they could proceed with the project before preparing detailed plans, which would meet all government requirements. The island was 15 acres and would require large amounts of fill to bring it to the flood elevation, which was two feet higher than the current elevation. On the south side of the island would be located another clubhouse, on land extending into the bay. This was also now a marshy area.

Access to the island by land would be via a two-lane causeway on the abandoned railway embankment and probably a bridge. This would require fill at the embankment sides, and possibly a retaining wall. Fill would be removed from higher parts of the embankment and spread to meet the flood elevation.

Mr. Sprague was next questioned about the "alteration to waterways" part of section C of the application, in which every box had been checked. He conceded that he had done this because he was not sure at this stage what alterations would be required on which parts of the project.

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Mr. Sprague stated his understanding that the property was zoned "hazard lands", but that construction could take place above the flood elevation, which he believed was 75.8 meters. He was unsure whether this included non-residential construction. He stated that his father had talked about a condominium/marine project for these lands, which he had assembled between 1959 and 1965.

Michael Scott Revie was called as a witness by the MRCA. He has been the Planning and Regulations Supervisor for the MRCA for the past four years, and receives and reviews applications to the MRCA for permission under the relevant regulation. Mr. Revie testified that staff treated Mr. Sprague's letter to him dated June 22, 1994 as a development inquiry, and that he replied to the letter on June 28, 1994. When the appellants' application was subsequently received, he reviewed it against the MRCA Flood Risk map for Bell Creek (Exhibit 3), as well as the Flood and Erosion Risk Maps (Exhibit 7). The regulatory event is the 100 year flood under Ontario Regulation 260/92. The flood elevation for this event for the Bay of Quinte is 75.9 metres GSC. According to Mr. Revie, a majority of the area covered by the proposal would be within the flood plain and subject to the fill Schedules. Any construction, by virtue of the regulation, would require permission from the MRCA.

Mr. Revie then referred to the accessory maps and air photographs, including the two photos forming part of Exhibit 7. He carried out a site inspection with MNR staff (Rick Forster) in August, 1994. In his evidence, he described the vegetation that he observed, including the marsh and aquatic vegetation at the Blessington Creek outlet, the south shore, and around the island. Mr. Revie asked MNR staff to accompany him because the subject property included two provincially significant wetlands and he suspected the project would have an impact on the fisheries located there. Mr. Forster's letter of August 26, 1994 to Mr. Sprague was copied to him at his request.

When the application for permission was received, Mr. Revie determined that there was insufficient information in the application and attached "artist's impression" for staff to make a detailed analysis. Mr. Revie asked Mr. Sprague prior to the hearing of the application on October 13, 1994 whether he had any further information, but none was provided. Staff proceeded to consider the application because they knew that it would likely cost the appellants a great deal of money to have the studies done that would provide the details. They determined that, before the appellants expended such sums, they should be notified of the problems with the application.

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Mr. Revie gave evidence concerning the provincial Flood Plain Policy Statement, the MRCA Procedures and Guidelines for the above-noted regulation, and the MRCA Wetland Policy. The application was also reviewed against these policies. The development was located on two provincially significant wetlands, and the placement of fill, in his opinion, would affect the control of flooding or pollution or the conservation of land within the meaning of the regulation. At the time of the application, Blessington Creek was not within the regulated fill lines listed in the schedules made pursuant to section 2 of Ontario Regulation 260/92. However, as a majority of the land is below the flood line, massive amounts of fill would be necessary for any construction. This would result in degrading of the wetlands and impact on the conservation of land. While not relevant for this appeal, new fill schedules found in Ontario Regulation 725/94 include Blessington Creek, effective December, 1994 have caused all of the property to be subject to the regulatory fill lines, so that future applications would be considered on a more stringent basis.

Ernest A. Margetson was called as a witness by the MRCA. Mr. Margetson has been the Stormwater Management Coordinator for the MRCA since 1992. As such, he provides technical review and assistance regarding flood-related issues, when this is requested by the Regulations Officer. He also provides technical assistance to the MNR and to the Ministry for the Environment in relation to hydrological and hydraulic work. Mr. Margetson was qualified and accepted by the tribunal as an expert witness in relation to these areas of expertise.

Mr. Margetson was asked by MRCA staff to review the application. After locating the property, he reviewed the flood plain mapping and the aerial photographs for the area, and conducted site visits. He testified that there are two floods that are relevant to the application, the first in relation to Bell Creek, which runs through the northwest part of the property, and the second for the Bay of Quinte. There is no riverine flood for the Blessington Creek, so the Bay of Quinte flood is applied. It was his opinion that the proposed project had the potential to affect flooding by constricting Bell Creek. This could subject properties further upstream to flooding. Depending on the construction of the culvert over the creek, the flow of water, the flood plain and the flood storage area could be affected. Mr. Margetson testified that the flood elevation for the property was 75.9 metres GSC, and that the word "westward" in the memorandum dated February 21, 1991 re 1:100 year water levels in the Bay of Quinte from the Director of the MNR Conservation Authorities and Water Management Branch (Exhibit 34, Tab 2A) was

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in error, and should have read "eastward". The entire 15 acre island has an elevation of 75.1 metres. This means that 0.8 metres of fill would be needed to bring the island to the flood elevation. This would require 45,000 cubic feet of fill, or 3,000 truckloads. If this amount of fill was placed, flooding could be affected on other lands, the opening at the causeway could be constricted, and the flood storage capacity of the Bay of Quinte could be reduced.

Mr. Margetson also reviewed the application to alter waterways, but concluded there was insufficient information to make an assessment. Hydraulic modelling would be required, as well as grading, drainage and stormwater management studies. The Regulations Officer directed him not to require these from the appellants because there were other concerns with the project.

Karen Bellamy was called as a witness. Ms. Bellamy has worked for the MNR for the past 15 years. She is the Area Biologist for Quinte and the Acting Area Supervisor for the Tweed Management Area. She has conducted numerous wetland evaluations and was qualified and accepted by the tribunal as an expert for these purposes. Ms. Bellamy reviewed the proposed project against the Provincial Wetlands Policy Statement. She testified that Southern Ontario has lost 75% of its wetlands due to development. Wetlands are a unique ecosystem that provide habitat for plant and wildlife, control and storage of surface water, groundwater retention and recharge, trap sediments, immobilize contaminants and uptake nutrients, and protect land from erosion. The stated goals of the Wetland Policy are to ensure that wetlands are identified and adequately protected through the land use planning process, and to achieve no loss of "provincially significant wetlands". All planning jurisdictions are required by the policy to protect these wetlands, and development is not permitted. There are also limitations on development on adjacent lands.

An extensive classification system for wetlands was developed by the MNR in 1983/84. Wetlands are to be evaluated and scored based on four features or components: biological, social, hydrological and special features. If the total score exceeded 600 or if the score for any one component was more than 200, the wetland was determined to be "provincially significant".

Ms. Bellamy conducted a one-week field visit to the Bell Creek Swamp Complex in 1992 and reviewed the studies and mapping, following which she updated the previous evaluations done in 1991 and 1992. Her evaluation report dated January 20, 1993 is Exhibit 15. The scoring summary shows a total of 718.7, and the Bell Creek

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Swamp Complex was as a consequence found to be provincially significant. The Blessington Creek Marsh was evaluated in March, 1993 by consultants to the MNR, and the evaluation report dated July 31, 1993 entitled "Wetland Data and Scoring Record" is Exhibit 16. The scoring summary shows a total score of 475, with a score of 200 for the special features component. According to Ms. Bellamy, a more recent evaluation conducted in 1994 shows a total score of 505, with a score of 230 for the special features component. Accordingly this marsh has also been found to be provincially significant. The project, according to Ms. Bellamy would have a negative impact on the wetland by causing a loss of vegetation where the fill would be placed in the marsh, a loss of nutrient uptake and contaminant removing capability, and a loss of wetland and fisheries habitat.

On cross-examination, Ms. Bellamy testified that 1/3 of the project would be located within the Blessington Marsh area. The City of Belleville has done an environmental impact study (secondary plan) to protect its wetlands, and has designated certain areas "no development". Within the province, 60% of the wetlands have been found to be provincially significant. Ms. Bellamy did not know whether the landowners were notified of the evaluations conducted on these wetlands, although she indicated that the policy of the MNR over the past couple of years has been to notify landowners. On redirect examination she indicated that an evaluation is never closed, and a re-evaluation may take place based on input from the landowner and a site visit.

Alastair Mathers was called by the respondent. Mr. Mathers, who has worked for the MNR for more than ten years, is the Planning and Management Biologist with the Lake Ontario Management Unit of the MNR. He has supervised a project to map and evaluate fish habitat in the Bay of Quinte since 1993. Mr. Mathers was qualified and accepted by the tribunal as an expert witness on the biological significance of wetlands and fisheries in the Bay of Quinte area. Mr. Mathers visited the site both before and after this application for permission. In 1992, this property was evaluated for the Bay of Quinte Remedial Action Plan, one of 43 areas of environmental concern identified by the International Joint Commission under the Great Lakes Water Quality Agreement. Mr. Mathers worked as Chair of the Habitat Working Group for the Bay of Quinte Remedial Action Plan (RAP) and referred to Exhibit 18, the executive summary of the Stage 2 Report entitled "Time to Act" prepared by the Bay of Quinte RAP Coordinating Committee. The Stage 2 Report contains actions recommended to restore the beneficial uses and enhance the ecosystem of the Bay of Quinte. The Stage 1 Report had identified the problems that needed to be addressed, contained in Table A to the second report.

Mr. Mathers referred to wetlands as "the kidneys of the ecosystem". He visited the subject property in 1989 to do an angling survey and again in October, 1994

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to conduct a waterbird survey. He referred to part of Exhibit 48, a species list (32 in all) for seine netting done between 1991 and 1993 in the Bay of Quinte. Many of these species are found in the waters bordering the subject lands. He testified that wetlands are important for pike, perch and bass. The marsh vegetation is important for fish habitat. He referred to the vegetation map of the property that he had done in 1989, which is also part of Exhibit 48, and how the proposed project appeared to "obliterate" the fish habitat (notated "large mouth bass nursery area") at the mouth of Bell Creek. There is very little submergent marsh left in the Bay of Quinte, and this is an uncommon habitat for the north side. The submergent marsh is important for shelter and for fish reproduction. Recommendation 64 of the above-noted Stage 2 Report was that the relevant governmental and non-governmental organizations and individuals "should cooperatively prevent any further loss of the integrity of the basin's remaining wetland ecosystems". If the proposed development were to proceed, the mouth of Bell Creek would no longer be used as a spawning ground because fish do not like culverts. Dredging the marsh areas and widening the causeway would also destroy fish habitat, contrary to the Canada **Fisheries Act**. It was Mr. Mather's opinion that the destruction of fish habitat and loss of the fisheries that would be caused by the proposed development, particularly at the mouth of Bell Creek, could not be compensated for.

Mr. Mathers testified that he returned to the site in October, 1994 and the Monday prior to the hearing, but that the conditions had not changed from those outlined in Exhibit 48. He also referred to a survey map of the property prepared in 1835, which he said showed that the property was embedded in marsh at that time, caused by the sediment from the creek. He disputed the submission of Mr. Sprague that the marsh was "man-made", caused by the construction of the railway embankments, which were constructed after this time and were not shown on the 1835 map.

Richard (Rick) Forster was called by the MRCA. Since 1992 he has been the District Planner for the MNR for Tweed. He has worked for the MNR for the past 17 years as a planner, giving advice on planning issues. Mr. Forster was qualified and accepted by the tribunal as an expert witness in relation to land use planning. He first became aware of this application in 1994, and testified as to his subsequent involvement, outlined in the "background" section of these Reasons and in Mike Revie's evidence. He testified that statement in his letter of August 26, 1994 to Mr. Sprague that: "... it is the opinion of MNR staff that compensation for the loss of this habitat would not be possible" was based on the advice received from the biologists, to whom he had circulated the proposal, and his experience in accompanying other biologists with the federal department of Fisheries and Oceans.

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The respondent also called Derrick A. Hammond. Mr. Hammond has been Planner with the Lower Trent Conservation Authority since October, 1994. He is responsible for the planning and severance program, reviews development applications and provides strategic planning input. Mr. Hammond was also qualified and accepted by the tribunal as a land use planning expert.

Mr. Hammond referred to Exhibit 2, the Official Plan of the County of Hastings. He testified that the property has a split designation under the Official Plan as hamlet/rural and hazard. Only a small portion of the property west of the railway right of way is hamlet/rural; the majority of the lands to the south are designated "hazard" and no development is to take place on these lands. The Zoning By-Law for the Township of Thurlow implements the policy by having a split zoning for the property: rural use north of the railway right-of-way, and hazard zone to the south. New development, with the exception of existing residential uses, is prohibited. The most recent Zoning By-Law (Exhibit 53) no longer permits new single family residences, even if floodproofed.

Mr. Hammond testified as to his concerns as a planner with the proposed project. The property is located east of the limits of the City of Belleville, and there are no municipal services (water and sewage) there. Mr. Hammond has learned from the City Clerk that the property is not covered, nor will it be covered by a servicing agreement with the city. This means that the appellants would have to arrange for their own services (well and septic system). A hydrogeological study would be required. The development would have to be severely scaled back if the study found the services could not support the current proposal. For example, a septic system cannot be installed in a flood area. The area must be raised, which would require even more fill. Present planning documents do not permit this proposal, and it is unlikely that the MRCA would support a proposed amendment to the Official Plan to allow it.

In response to a question from Mr. Sprague, Mr. Hammond testified that the assessment of property has nothing to do with the zoning. A landowner should always check with the municipality to determine whether a proposed use is permissable. Mr. Hammond was not aware of any compensation available to a landowner if "his land was rendered useless". In his view, the land was wetland and remains wetland; nothing has changed. Municipalities do have to notify landowners of changes to an Official Plan that would affect them.

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Submissions:

In his submission on behalf of the appellants, Mr. Sprague referred to the decision of the Mining and Lands Commissioner in **Hinder v. Metropolitan and Region Conservation Authority** 16 O.M.B.R. 401. In that decision, the Commissioner determined at page 436 that the proper meaning to be attributed to the word "conservation" in the **Conservation Authorities Act** was the concept of wise use as contrasted with retention in its existing state. At page 433 of that decision, the Commissioner said:

> While it is relevant to apply a broad interpretation to the administrative powers of a conservation authority ... this tribunal is of the opinion that where the act of a conservation authority is a legislative one and one that affects the rights of landowners generally, it may be more appropriate to apply the exception to the broad interpretation rule outlined on p. 258 of **Maxwell on the Interpretation of Statutes** 12th ed.(1969), where it is noted:
>
> > Where a statute confers a power, and particularly one which may be used to deprive the subject of proprietary rights, the court will confine those exercising the power to the strict letter of the statute.

Mr. Sprague argued that the Provincial Wetlands Policy should not be applied to this application, because the Manual of Implementation Guidelines for the Policy Statement indicated at page 30 that the application of the policy statement is not retroactive.

He contended that appellants were subject to a high degree of liability or exposure by virtue of their ownership of this property, and that they were seeking a conditional approval to proceed with the proposed development, or in the alternative, compensation for this "expropriation".

Mr. DeMille referred in his submission to the evidence which he contended supported a finding that the appellants had not met the test of proving that the proposed

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development "will not affect the control of flooding or pollution or the conservation of land" under section 4 of Ontario Regulation 260/92. In the course of his submission, Mr. DeMille referred to the decision of the Mining and Lands Commissioner in **611428 Ontario Limited v. Metropolitan Toronto and Region Conservation Authority** (unreported) File CA 007-92. At page 63 of that decision, the Commissioner stated:

> The tribunal finds that "conservation of land", in the context of clause 28(1)(f), includes all aspects of the physical environment, be it terrestrial, aquatic, biological, botanic or air and the relationship between them. Therefore, notwithstanding the fact that the term was not used, "ecosystem", not having yet been coined, "ecosystem" is found to be included in the definition of "land" as used in "conservation of land".

Mr. DeMille referred to **Rosenberg et al. v. Grand River Conservation Authority et al.** (1976), 12 O.R. (2d) 496 pointing out that the Court of Appeal recognized that the definition of "conservation of land" could evolve over time. Based upon these two decisions, Mr. Demille submitted that the **Conservation Authorities Act** allows an expansive definition of "conservation of land" consistent with an ecosystem approach.

Mr. DeMille suggested that the Sprague application amounts to a blank cheque, which is inappropriate given the condition of these lands. One need only look to existing provincial policies on flood plains and wetlands or to the MRCA guidelines to reach the conclusion that development on the subject lands should not be permitted.

On the issue of whether the provincial policies should be applied in this type of application, Mr. DeMille submitted that to do so makes sense in the scheme of the overall objectives of the **Conservation Authorities Act**. Upon being questioned by the tribunal, Mr. DeMille stated that an application and appeal under this legislation is not a planning matter, and therefore, the tribunal is not legally required to have regard to the provincial policy statements. However, because the nature of the application is ultimately about how the land is used in an area over which the conservation authority has jurisdiction, the principles raised in the policies should be regarded as persuasive.

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Findings:

The tribunal finds that the subject lands, which front on the Bay of Quinte, are low-lying and contain the outflow of two creeks. Much of the vegetation, particularly near and in the water, is marsh or wetland vegetation such as reeds and cattails.

The tribunal finds that the lands proposed for this development are subject to flooding during a regional storm because they are below the 1 in 100 year flood elevation. As such, by virtue of subsection 3(1) of Ontario Regulation 129/92 made under the **Conservation Authorities Act**, the prior approval of the MRCA must be obtained for the erection of buildings or structures.

The tribunal further finds that the "Bell Creek" watershed portion of the subject property (Lot 15) is described in Schedule 3 to Ontario Regulation 129/92 as an area in which the MRCA has determined the control of flooding or pollution or the conservation of land may be affected by the placing or dumping of fill. As such, subsection 3(2) stipulates that the written permission of the MRCA is required for the placing or dumping of fill. Permission is also necessary for the appellants to alter any waterway (subsection 3(3)).

The tribunal finds that two "provincially significant wetlands" within the meaning of the Provincial Wetlands Policy Statement, and designated by the Ministry of Natural Resources, namely, the Bell Creek Swamp and the Blessington Creek Marsh are situated on the subject lands. The tribunal finds that the Provincial Policy is not being applied retroactively to this application. The Manual of Implementation Guidelines indicate that the Policy Statement came into effect on June 27, 1992, and that new applications submitted after that date are subject to the Policy Statement.

This tribunal has determined on prior appeals that conservation authorities are not bound by the **Planning Act** or section 3 provincial policy statements, in making their determination under section 28 of the **Conservation Authorities Act**, since these applications are not "planning matters". The tribunal has also found that conservation authorities are not resource planning bodies for purposes of section 28 applications, nor is the Mining and Lands Commissioner a resource planning body for purposes of considering appeals from decisions of authorities. The tribunal has decided in these cases, however, that it will apply the technical provisions of provincial policy statements in consideration of technical issues. (see for example **Bye v. Otonabee Region Conservation Authority et al.** (unreported) File CC.1357) The tribunal will follow the same approach in considering this appeal.

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The MRCA has passed a wetland policy that prohibits development on such wetlands and requires that permit approval be obtained for proposed development within 120 metres of Class 1-7, wetlands, in accordance with fill schedules. The policy applies to these lands, since it is a wetland within the Bay of Quinte shoreline. The filling and loss of wetlands has been identified as a significant factor in the impairment of the quality of the Bay of Quinte.

The subject lands have also been identified by the Ministry of Natural Resources as an area that is used for the spawning, rearing and migration by several fish species.

The tribunal finds that most of the subject lands are designated "Hazard" in the Official Plan for the County of Hastings and all of the subject lands lie within the floodline as set out on Schedule A-24 of the Official Plan. Other than "outdoor recreational activities", none of the uses proposed in the appellants' development, are permitted under the Official Plan. Likewise, the majority of the subject lands zoned "Hazard (H)" in the Zoning By-Law for the Township of Thurlow, and other than "existing" and "public uses", none of the uses proposed in the appellants' development are permitted by the Zoning By-Law.

The tribunal finds that the Fill, Construction and Alteration to Waterways Permit Application and attached architect's drawing lack the details that are usually contained in such applications. The tribunal appreciates that the appellants wanted a preliminary indication from the MRCA of their response to the application before spending large amounts of money on studies and plans. Likewise, MRCA staff were reluctant to turn the application back for a lack of detail because they were also conscious of the costs likely to be incurred in obtaining these studies and plans. The absence of this detail has understandably made a detailed response to the application impossible.

Nevertheless, it is evident from the application and the evidence before the tribunal that massive amounts of fill would be required to bring the subject property to the flood elevation, and that the appellants propose to dredge large parts of the marsh area for the docking areas of the development, and to use this fill from the "lagoon bottom" for part of the fill that would be required. It is also clear that some existing waterways, such as the mouth of Bell Creek, would be altered by the proposed construction.

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The tribunal is persuaded by the expert evidence given at the hearing of this appeal that the placing or dumping of fill, the site of the proposed buildings and structures and the changing of the existing channel of the creeks flowing over the property will all affect the control of flooding or the conservation of land. It is only where "the control of flooding or pollution or the conservation of land" will not be affected that permission may be granted under section 4 of the above-mentioned application. The tribunal also accepts the expert evidence of Mr. Mathers that the dredging, filling and construction that would be associated with this development would harmfully alter the fish habitat. For example, the construction of a culvert over Bell Creek as part of this development would likely destroy the current large mouth bass nursery area.

While "conservation" is not synonymous with retaining lands in their existing state, there is persuasive evidence here that the subject lands are environmentally sensitive and perform many significant environmental functions which would be difficult if not impossible to replace by engineered solutions.

As a result, the tribunal must dismiss this appeal. The tribunal recognizes that this will be a disappointment to the appellants, whose late father assembled these lands for development at some future time. The tribunal explained to the appellants at the hearing that it has no authority to award the compensation sought by them. The tribunal suggested that the appellants consider obtaining legal advice should they wish to pursue their claim. They may also wish to consider requesting a review or appealing their tax assessment, and applying for a rebate under the Ontario Conservation Land Tax Reduction Program.