CONSERVATION AUTHORITIES

G.H. Ferguson, Q.C.)
Mining and Lands Commissioner)

Friday the 2nd day of December, 1988.

AND IN THE MATTER OF An appeal against the refusal to issue permission to place fill on part of Lot 13 in Concession XIV in the Township of Huntingdon in the County of Hastings.

B E T W E E N :

JACK CHRISTIE, RALPH CROSBY and JAMES APPLEBY

Appellants

- and -

MOIRA RIVER CONSERVATION AUTHORITY

Respondent

A.L. Philpot, for the appellants.
D.W. Fairbrother, for the respondent.

The appellants appealed to the Minister of Natural Resources from the refusal of the respondent to grant retroactive permission to place fill on part of Lot 13 in Concession XIV in the Township of Huntington in the County of Hastings. Under Ontario Regulation 364/82 the power and duty of hearing and determining such appeals where assigned to the Mining and Lands Commissioner. The appeal was heard in Belleville on the 26th day of October, 1988.

In October, 1987 the appellants, whose wives are related, agreed to purchase part of Lot 13 in Concession XIV in the Township of Huntington. The property is situate at the north-westerly part of Moira Lake and measures approximately 13 acres. It is a very swampy area much of which cannot be walked on at any time of the year. A point projects south-easterly into Moira Lake and some higher land is situate on this point. A right of way crosses the land traversing the acquired parcel at the westerly end of the point and thereafter following the east boundary of the part lot. Parts of the lot have been severed along the easterly side of the right of way providing cottage lots on the north-westerly shore of Moira Lake.

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The short term plans of the appellants were to place three house trailers near the point and prior to closing and with the consent of the vendor they caused sixty-eight truckloads of sandy loam fill to be placed on the easterly side of the right of way. Each load contained approximately twelve cubic yards with the total volume being approximately 850 cubic yards. The fill was levelled but prior to completion of the operations, due to a complaint of a neighbour, the respondent investigated the matter. The evidence indicates that the appellants proceeded with the placing of fill without knowledge that permission of the respondent was required.

An issue arose as to whether the zoning by-laws and the official plan provided for the use of the land for the purposes adopted by the appellants. The tribunal does not consider it necessary to make a finding with regard to this matter. Although the tribunal is reluctant to grant permission that is inconsistent with the zoning laws, the tribunal has recognized in the past that the provisions of the Conservation Authorities Act are separate from the planning legislation and that applications under the Conservation Authorities Act should be dealt with under that Act particularly, as an applicant always has the opportunity of applying for a change in zoning or a minor variation.

The evidence with respect to flooding indicates that the regional flood elevation of Moira Lake determined in accordance with the one in one hundred year storm which standard has been used in the area under the administration of the respondent is 156.2 metres above sea level. An elevation on the access road was shown as 155.1 metres. There is also a spot elevation near the boundary of the subject lands of 155.2 metres. An elevation of 155.0 metres appears on the contour between the fill and the lake. Consequently the respondent was of the opinion that the area filled was subject to at least one metre of flooding during a one in one hundred year storm.

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Photographs taken in March, 1988 show extensive flooding of the land. The trailers had been moved to the higher area and the photographs filed indicate that the area filled was covered to a depth of approximately two feet on this date, which date was not the date of a storm event according to the evidence of the respondent.

The evidence for the appellants indicated that the depth of the fill that was placed was approximately 16 to 18 inches. After compaction the fill was not higher than the access road. There is a ridge between the access road and the shoreline and the area between the road and the shoreline formed in the words of the appellant Christie "a hollow". The fill was placed in this hollow. Accordingly if the access road is one metre below the elevation of the regional flood, the area filled was approximately one and one-half metres below that elevation prior to filling.

Prior to the hearing of the application of the appellants by the respondent the appellants submitted a supplementary or supporting application for approval to restore the lost storage capacity by the construction of a pond or a trench in the area on the land side of the access road. This pond would measure 300 feet in length, 21 feet in width and 4 feet in depth below the existing access road. It was calculated that the material excavated would measure 930 cubic yards and it was proposed to remove the excavated fill from the lands owned by the appellants.

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Prior to the making of the above submission and following discussions with employees of the respondent the planning and regulations officer of the respondent advised the appellants in a letter dated November 19, 1987 of the requirements of the respondent in respect of the creation of such a pond. These requirements were as follows;

1. Survey of your property showing existing ground elevations in the area of the pond and the ditch draining the pond, including culvert elevation.

2. Depth of ground water table.

3. Scale drawing of plan and profile views of proposed pond and drainage ditch which show road and culvert locations.

4. Scale drawing of plan and profile views of filled area between Moira Lake and the access road.

5. Calculations determining the volume of material to be removed in order to create pond and ditch.

6. Information describing who will undertake the work, when it will commence and be completed and where material removed from pond will be placed.
   NB - spoils from pond and ditch must not be located in the flood plain.

7. Documentation that you have discussed the matter of your beach improvements and the creation of the pond with the Ministry of Natural Resources.

8. Completed Moira River Conservation Authority permit application.

The only submissions made with the supplementary application were laymen's plans and a letter of the Ministry of Natural Resources indicating that the proposal was approved under section 33 of the Fisheries Act. The remainder of the material requested by the respondent was not prepared or submitted.

At a meeting held on February 10, 1988 the respondent rejected the applications for four reasons, namely;

1. The land filled was susceptible to more than one metre of flooding in a regional storm and the filling of such lands is contrary to the policy of the respondent.
2. The access road leading to the filled area is subject to at least one metre of flooding in a regional storm and developments depending on such access are not consistent with the policy of the respondent and the Province of Ontario.

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3. The placing of the fill creates a risk of flood damage to property placed on the fill in the event of a regional flood
4. The proposal submitted by the appellants was not satisfactory as the elevation of the replaced storage capacity was below the elevation of the utilized capacity and would not provide for replacement storage and further the respondent was concerned that with the culverts through the access road providing for the flow into and out of the pond there was a significant risk of siltation and failure to maintain the culverts would result in a loss of storage capacity.

At the hearing before this tribunal the appellants produced an amended proposal illustrated by Exhibit 10. The difference in the proposal was that the depth of the pond was reduced so that the elevation of the bottom of the pond would correspond with the elevation of the land that was filled. In addition the width of the pond was increased to thirty-five feet and the length increased to 350 feet. The employees of the respondent present at the hearing were unable to assess this proposal. The appellants failed to produce as an expert witness an expert in hydrology or in hydraulics and no evidence was placed before this tribunal which would indicate that the revised proposal complied with the principles of the incremental balance theory. The tribunal does not have the expertise to make this assessment and further it has always been the practice before this tribunal that it will not consider revised applications, such applications being required to be submitted to the conservation authority as the conservation authority has had no opportunity of reviewing the amended proposal.

Accordingly on both grounds the tribunal is not in a position to consider the revised proposal of the appellants with reference to the placing of the fill. The tribunal is satisfied on the evidence that the placing of approximately 850 cubic yards of fill is a significant utilization of storage capacity and the respondent was justified in refusing to permit such placing of fill without the provision of some acceptable principle of flood plain management.

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There was no evidence that the appellants were being treated in a manner different from other applicants. The evidence indicated that applicants in similar situations were refused permission and no evidence was brought to the attention of the tribunal in which permission had been given in analagous circumstances. Accordingly the tribunal cannot find that the appellants have been denied the benefit of any policy of the respondent under which other applicants have been granted permission.

There was no overriding federal, provincial or municipal concern which would have justified a reversal of the decision of the respondent.

The main thrust of the argument of counsel for the appellants was that the tribunal should where an error has been made consider the improvement of the land which prior to the placement of the fill was in an unusable condition and that the private interest of the land owners should be contrasted with the public interest established by the regulations under the Conservation Authorities Act. It was pointed out that the Crowe Valley Conservation Authority, having jurisdiction over the area to the west and being approximately five miles from the subject lands, has no fill regulation and does not regulate the placing of fill. It was also said that the Lower Trent Conservation Authority does not regulate the placing of fill. The tribunal cannot of course grant permission on the basis of the error or the law in effect in adjoining conservation authorities.

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With reference to the argument regarding the weighing of the public and private interest, it has always been the policy under the Conservation Authorities Act to create exceptions where a recognized principle of flood plain management can be established. It may well be that with appropriate expert opinion the more recent proposal of the appellants could be determined to fall within a recognized principle, namely the incremental balance theory, and although such has not been established to the satisfaction of this tribunal it may well be that with appropriate evidence, the respondent could consider that the doctrine is applicable. However, in the absence of the establishment of such an exception it has never been the policy of this tribunal to allow an appeal soley on the basis of an error of the appellants or the good intentions of the appellants.

1. THIS TRIBUNAL ORDERS that the appeal in this matter is dismissed.

2. THIS TRIBUNAL ORDERS that no costs shall be payable by any party to the appeal.

SIGNED this 2nd day of December, 1988.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.