



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 building or structure on parts of lots 2, 63 and 64, Registered Plan 40-B being the southwest corner of Midtown Mall Drive and King Street West in the City of Oshawa in The Regional Municipality of Durham.

B E T W E E N :

GINAEL HOLDINGS LIMITED

Appellant

- and -

THE CENTRAL LAKE ONTARIO CONSERVATION AUTHORITY

Respondent

G. G. Kitchen for the appellant.
J. R. Willms for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent dated September 26, 1978 to grant permission for the construction of a retail plaza on parts of lots 2, 63 and 64, Registered Plan 40-B in the City of Oshawa. By O.Reg. 914/78 the power and duty of hearing and determining the appeal was assigned to the Mining and Lands Commissioner.

The proposal of the appellant was to erect a one storey retail structure having a gross area of 3,600 square feet on the westerly side of the subject lands. The subject lands are situate at the southwest corner of the intersection of King Street West and Midtown Drive and are municipally known as 155 King Street West. The site measures approximately 75.5 feet on King Street and 134 feet on Midtown Drive. The site is approximately 400 feet westerly of the bed of Oshawa Creek. Immediately to the west of the bed is a restaurant which, with the permission of the respondent, was created by the

conversion of an electrical store. Associated with this property is a parking lot suitable for fifty cars. The property to the west of the restaurant is owned by Shell Canada Limited and there is situate thereon a building that recently was used as a transmission repair shop. Proceeding westerly to the regional floodline there is Midtown Drive, the subject lands, a one-hundred foot property owned by people by the name of Major from which the buildings have been removed and a row of houses. The subject lands are situate at the centre of the part of the floodplain lying westerly of the creek and are subject to approximately 10 feet of flooding during a regional storm.

The evidence for the appellant indicated that property owned by Ontario Motor Sales Limited on the north side of King Street in the area has been renovated with the permission of the respondent. The appellant has been able to arrange for the reduction of the taxes of the subject lands from approximately \$1,000 dollars to \$500 annually subject to revision if permission to build is obtained.

The president of the appellant, John A. J. Bolahood, gave evidence that the appellant had not been able to sell the property notwithstanding several conditional offers which failed for want of obtaining permission from the respondent. In cross-examination the witness was not able to assert that the applications had in fact been made by the purchasers. He did indicate that he understood that one proposal involved joining the subject lands with the vacant land on the west and erecting an office structure on piers. The appellant did not propose any similar approach in respect of the current application nor has the appellant consulted with a proper expert to determine whether modifications could be made to reduce the risks from a regional flood. The evidence for the appellant was that such matters would not be applicable to its proposal.

The reasons given by the respondent in refusing permission were as follows:

1. The site is susceptible to approximately 10 feet of flooding under regional storm conditions.
2. The structure would consume flood storage volumes and serve as a further obstruction

to flood discharge capabilities of the floodplain.

3. Risk of property damage, and to human safety.
4. Flood protection of the structure is impractical.
5. Precedent.

The regional flood elevation for the site of the proposed building is approximately ten feet above the elevation of the site. The regional flood elevation was shown on the 1975 flood mapping filed as Exhibit 5 and was further confirmed by a subsequent study which indicated that the elevation could not be reduced by remedial works.

With reference to matters of flood storage, constriction and existence of risks to property and human safety, I dealt with these issues on a prior appeal and the appellant brought no scientific evidence to dispute the existence of such factors and had not obtained any scientific advice on methods of meeting such factors, assuming, without suggesting, that such would be possible. In contrast the entire thrust of the appellant's case was that the respondent had granted permission in circumstances that were compellingly indistinguishable from its situation and on the ground of precedent the appellant should be granted permission. Accordingly such instances and the principles associated therewith must be examined.

Reference was made to two instances in respect of land in the floodplain of the Oshawa Creek. Firstly, the conversion of the electrical store to a restaurant complex was relied upon. This property adjoins the creek bed and hence would appear to be in a more vulnerable and risk creating location than the subject lands. However the evidence indicated that the elevation of this site was higher and that the subject lands would be affected with four feet of flooding before the flood waters would reach the restaurant site. More significantly there were two principles applicable to the decision which are not applicable to the subject lands. The evidence indicates that the respondent applies a principle of recognition of existing investment and is prepared to permit renovations which do not further reduce the storage capacity of the floodplain or create additional

constrictions of the flood flows. Secondly, the permission required the removal of two buildings which ameliorate the risks occurring in a regional storm by restoring storage capacity and removing existing constrictions to the flows. Neither this principle nor the ameliorating influences are present in the subject application, unless one is prepared to attribute to the subject lands its status prior to the fire which destroyed the old brewery building. This tribunal is not aware of any principle of watershed management that lands that have reverted to a state of nature should be considered as lands having previously existing buildings thereon and no such principle was established by the appellant either on a scientific basis or on a policy basis and it cannot be concluded that the permission in respect of the restaurant property establishes a precedent in respect of the present application.

With reference to the second property, i.e. the Ontario Motor Sales property, there is less detail in the evidence but the evidence that was given indicates that there was an application of a principle of renovation or conversion of an existing building without significant increase in the risks involved. It is most difficult to observe any similarity with the erection of a completely new building.

Considerable reliance was placed on permission granted to the Simcoe Hall Crippled Children's School and Training Centre which is situate in the floodplain of Harmony Creek in the easterly part of Oshawa. The site of the building is seventeen feet below the regional flood elevation and additions were permitted to the existing structure. The difficulties associated with crippled children, the serious depth of water in a regional flood and the fact that the site was 100 feet as contrasted with 400 feet, from the bed were relied on as showing greater risks than those associated with the subject application. However there was no evidence to quantify the risks and there was no evidence on which a comparison of the loss of storage capacity or constriction could be made. More significantly the granting of the permission fell within the principle of an extension, presumably minor, of an existing use and contained ameliorating factors such as the reduction of the use of basements which would have

greater risk for crippled children than first storey accommodation.

Reference was made to the replacement of a motel in the Harmony Creek watershed with a thirty-unit apartment building. The proposed apartment will be within 80 feet of the bed but the site is only two feet below the regional storm elevation and it is required that the new building will be erected on caissons with ground level parking which will result in the substantial removal of the concerns of loss of storage capacity and constriction created by the existing motel.

Reference was also made to a six-home subdivision in the Harmony Creek floodplain. The regional flood elevation at the sites of the houses varies from the elevation of the site to three feet above the site. However, the applicant is being required to fill the sites and replace the loss of storage capacity by a cut and fill operation, a recognized principle of floodplain management.

An application of Whitby Welding in the Corbett Creek watershed was discussed. This application involved an addition to an existing structure on a site that would be subject to one foot of flooding in a regional storm. In addition the cut and fill principle was applied. Similarly a proposal on Waverly Road on the Bowmanville Creek to construct a shopping centre was approved on the cut and fill principle. The overflow parking area was alleged to be subject to fourteen feet of flooding in a regional storm. The evidence was not clear in this regard and there may have been an application of the cut and fill principle as contrasted with the stage storage principle. At any event there was no suggestion that buildings or structures were to be erected in the floodplain.

An application for five thousand square feet on behalf of one Davis in the Pringle Creek watershed was approved. At present there is a flood potential of ten feet. However, the plans required the area below the regional floodline to remain open until certain remedial works are carried out which will have the effect of removing the site from the floodplain. In contrast the evidence was that remedial works on the Oshawa Creek would not affect the regional flood

elevation at the subject lands.

There is nothing in these permissions to show that the appellant had been deprived of an application of a principle that had been applied to other applicants. However with regard to the theory of precedent, it may be said, as this tribunal has stated at length on prior occasions, that where the objective of the legislation is based on the inherent weaknesses of land in and risks associated with floodplains, the principle of precedent is not as applicable as in cases of minor variances, and the more appropriate principle where a conservation authority may be alleged to have erred in connection with a previous application, is that two wrongs do not make a right. There is no grounds for a mistake, if made, becoming an established principle and this tribunal, even if such had been established, would not compel a conservation authority to repeat such a decision.

The evidence for the respondent also indicated that the erection of the proposed building was contrary to the official plans of the Regional Municipality of Durham and the City of Oshawa and that there is a funded program for the acquisition of the subject lands.

For the foregoing reasons the appeal will be dismissed. Counsel for the respondent made a very cogent argument for the award of costs including such matters as a multiplicity of applications, failure to support the application with proper scientific evidence, prior dismissal of an application in respect of a building having no significant difference, reliance on other applications as precedents without establishing or understanding the principles on which the exceptions were made and the ultimate unnecessary cost to the respondent of defending an appeal in such unwarranted circumstances.

Two matters occur to this tribunal in this regard. Firstly there will be subsequent negotiations between the appellant and the local bodies in respect of purchase of the subject lands, and while an award of costs should not reflect on this matter, the withholding of costs may create a better atmosphere for such negotiations. Secondly, and more relevant, is the fact that the respondent permitted the appeal to proceed notwithstanding that funds had been budgeted for the acquisition of the subject lands and the failure to open negotiations

and to adjourn the hearing pending such negotiations, which action, if successful, would have had the result that the hearing of the appeal would not have been necessary and not only the respondent but also the appellant would not have incurred the legal costs of the appeal, mitigate against the awarding of costs.

IT IS ORDERED that the appeal in this matter be and is hereby dismissed.

IT IS FURTHER ORDERED that no costs shall be payable by either of the parties to this matter.

DATED this 9th day of April, 1979.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.