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Ontario

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 a permit to construct buildings on parts of lots 2, 63 and 64, Registered Plan 40-B, southwest corner of King Street West and Mid-Town Drive, 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

R. F. Worboy for the appellant.
R. M. Loudon, Q.C. for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission to construct a plaza of retail stores on part of lots 2, 63 and 64, Registered Plan 40-B in the City of Oshawa. The power and duty of hearing the appeal was assigned to the Mining and Lands Commissioner by O.Reg. 130/75. Following an extensive adjournment, the appeal was heard in Toronto on June 10, 1976.

The appellant acquired the subject property in 1971. The municipal address of the property is 155 King Street West. It has a frontage of approximately 76 feet on the south side of King Street and a depth of approximately 135 feet. At one time a brewery was located on the property. This building was destroyed

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by fire and the site is vacant at the present time.

Following consultation with the municipal officials and the officials of the respondent the appellant caused building plans to be prepared by Norman A. Wright, an architect. These plans illustrated a one-story building containing approximately 3,500 square feet of coverage with a total floor area of 3,200 square feet. The total area of the parcel is 10,100 square feet. The municipality issued a building permit on January 9, 1974 and a renewal on this permit was obtained on July 8, 1974.

As the subject property is within the floodplain of the Oshawa Creek, the respondent refused to grant permission to construct a building. This refusal was given following a hearing on October 2, 1974 and after the refusal the appellant appealed to the Minister.

The appellant's case was that the refusal to issue the permission was unreasonable in the light of the issue of permission granted in respect of other properties in the floodplain and in the vicinity of the subject property. Its position was that the probable refusal to issue the permission had not been clearly indicated to it in discussions with the officials of the respondent with the result that the appellant had expended money and effort in preparing plans and administering the subject property. The evidence on the issue of discussions with an official who is no longer employed by the respondent was objected to and on objection, was not led. While this approach creates some sympathy for the appellant, the position of the official would have been equally subject to attack if he had discouraged the appellant from proceeding with the application. I would find no fault with an official who would indicate to a prospective applicant that he had a right to apply for permission and have the case considered. Counsel for the appellant acted properly, in my opinion, in not

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pressing the issue.

The appellant, through its counsel and its evidence, invited me to compare its application with three permits that have been issued by the respondent. The first permit referred to was dated August 29, 1973 and was granted to Select Properties Limited. This permit authorized the construction of a retail store with professional offices in a second story on a site to the south of the appellant's property. In this regard the respondent pointed out that this permit was issued pursuant to a threatened mandamus application at a time the respondent had legal doubts as to its authority to implement its program. These legal doubts arose from the fact that the legislative authority for making the relevant regulation was amended in 1971 and a regulation changing the existing regulation to conform with the amendment of the statute was not made until O.Reg. 824/73 was filed on October 18, 1973. Clause e of subsection 1 of section 27 of The Conservation Authorities Act, R.S.O. 1970, c.78 read as follows:

> "27.-(1) Subject to the approval of the Lieutenant Governor in Council, an authority may make regulations applicable in the area under its jurisdiction,
> .....
> .....
> (e) prohibiting or regulating the construction of any building or structure in or on a pond or swamp or in any area below the high-water mark of a lake, river, creek or stream;
> ....."

In 1971, by an amendment contained in The Conservation Authorities Amendment Act, 1971, clause e was amended to read as follows:

> "....
> (e) prohibiting or regulating 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 purpose of such regulations."

During the interval between the amendment of the Act and the filing of the revised regulation in 1973 the respondent was revising the regulation and was carrying out its responsibilities of preventing flooding and pollution and ensuring the conservation of land in accordance with the principle contained in section 4 of O.Reg. 108/71, until its authority was brought in line with the amendment of the Act. I make no comment on the point of whether the respondent and any other conservation authority were in a doubtful legal position pending the changing of the regulation and particularly on the point of whether the respondent acted properly in the face of pending legal proceedings. Suffice it to say that the respondent acted with and in accordance with its legal advice. Many conservation authorities during this period in fact negotiated permits in order to obtain a measure of protection. While this approach may have provided an opportunity for some persons to obtain permits during the intervening period that they might not have acquired at a later date when the regulation was revised and while there may be an appearance of inequality between those owners who threatened legal action and those who merely negotiated with the conservation authority, the respondent clearly had jurisdiction at the time the building permit was issued by the City of Oshawa on January 9, 1974. Accordingly, I cannot conclude that the issue of the permit to Select Properties Limited being a permit issued in the face of legal proceedings and at a time when legal doubt as to jurisdiction existed, provides a precedent for the granting of a permit in this case.

The second permit referred to in the evidence was a permit

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granted on February 25, 1976 to Dominion Stores Limited for the purpose of constructing an addition to an existing building which is south of the subject lands and at a similar distance from the watercourse. It might be indicated in passing that this permit respected an addition to an existing building. On the other hand, the area of the addition was three times the area of the project under consideration. However, this permit was granted pursuant to minutes of settlement of an action that was instituted by the respondent and the Attorney General for the Province of Ontario. An addition was erected and an injunction granted which delayed the opening of the addition. In addition to payment of fixed costs of $15,000 the owner agreed to pay $20,000 towards a study which the respondent was conducting in connection with flooding hazards and alternative flood protection programs and the cost estimates thereof in respect of the part of the watershed in question.

The question is whether the granting of a permit subject to such terms in such circumstances warrants the adoption of a principle that all other owners in the floodplain, or at least in the part of the floodplain in the vicinity of the property of Dominion Stores Limited should be entitled to utilize a portion of their land containing a comparable ratio of the storage capacity of the floodplain. Counsel for the respondent anticipated an argument that the $35,000 was a mere licence fee for validation of an illegal act and argued this was not the case but that it was a genuine recognition of the jurisdiction of the respondent and a co-operative approach to assist in the program of the respondent. I see no responsibility on my part to judge this aspect of the matter. Suffice it to observe that the evidence relative to this matter indicates that the respondent is accepting its role and taking

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constructive action in the circumstance.

Further if one were to blindly follow an approach of precedent, one would have to conclude that although there is a significant difference in the encroachment upon the storage capacity which would reflect favourably on the appellant's position, the cases are not analogous as the Dominion Store case involves an addition to an existing structure and the present case involves a completely new building.

The third permit was dated May 20, 1976. It was granted to Ontario Motor Sales Limited in respect of an addition to an office that was located in the floodplain on Bond Street which is the next street to the north of King Street. The evidence was unclear as to whether the proposal approved by this permit was for renovations or a new addition. The enforcement officer, R. W. Messervey gave evidence that, while he was not fully familiar with the building, he believed that the approval involved renovations. In any event, the witness indicated that in accordance with the policies of the respondent the approval was granted for an extension of an existing viable use. On the grounds of an existing viable use, the case is clearly distinguishable from the present application.

This is an appropriate place to again reflect on the theory of precedent. It has long been held by the courts that it is the responsibility of an administrative body in the exercise of its duties to fully consider each application before it on the merits of that case. Also in appeals of the nature of the present case, the prime consideration is the matter of safety, both of property and human life, and while such a theory may be justifiable in dealing with exceptions to zoning by-laws or severance applications, in safety matters it cannot be contended that two wrongs make a

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right. Each case must be considered on its own merits.

The enforcement officer was cross-examined on the construction of a bridge by municipal officials at a location south of the subject property. It appeared that this structure was erected without a permit, was under investigation and that the respondent would in the near future take action depending on the result of the investigation. This provides further evidence that the respondent is administering its jurisdiction provided in The Conservation Authorities Act and the regulations made under that Act in respect of the respondent.

Turning to an examination of the present application on its merits the enforcement officer gave evidence that the elevation of the subject property is 330 feet above sea level. The regional storm elevation for the area determined by the consultant for and shown on the plans of the respondent is 339.8 feet and there was no dispute in respect of this elevation. The summer level of Oshawa Creek is approximately 326 feet. The subject property is approximately 300 to 400 feet from the creek. An electrical parts warehouse is erected between the subject property and the creek. No evidence was presented of records of flooding of the subject property but I can make no finding of fact that there is no risk of flooding in connection with it as the regional flood elevation was accepted.

The enforcement officer indicated that a study of the area is under way by the firm of Totten, Sims and Hubicky. The report from this firm is expected at the end of the month and there is a possibility that, in the event the study finds that remedial works will reduce the hazard and such works are economically feasible and fundable, the regional storm line in the area might be lowered.

Regarding the present case on its merits, the site is

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clearly within the floodplain as it is presently defined with the result that there is a potential for flooding during a regional storm of approximately 10 feet. With such levels of flooding there would certainly be risks of damage to property and a potential of risk in respect of human safety. One of the concerns in such cases is the effect on the storage capacity of the watercourse and the building, if erected, would reduce such storage capacity by approximately 35,000 cubic feet. However, none of the evidence indicated whether such a reduction would have a significant or any effect on the lands above the existing regional storm line and in the absence of evidence that there is no likelihood of creating risks to property not now subject to risk and increasing the risk of properties that are now subject to risks, I can only assume that such a displacement would be significant.

Some conservation authorities adopt a principle known as the stage storage principle to permit in appropriate circumstances, but subject to conditions, the placing of fill or construction of buildings in floodplains but there is no evidence in this case to justify the issue of a permit on the basis of this doctrine. There does not appear to be any land owned by the appellant which could be adapted to provide compensating storage. In reviewing this case on its merits it is apparent that there is a risk of flooding to the extent of ten feet, with the adherent problems of danger to life and property, loss of storage capacity and the creation of potential constrictions in the channel in the event of a regional storm and accordingly, I cannot find any objection to the action taken by the respondent with regard to this application.

Counsel for the respondent indicated sympathy for the appellant and although I have no alternative but to dismiss the appeal it will be without prejudice to the appellant's position

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following the report of the consultants that is currently under preparation. It may well be also that following the receipt of the report and any decisions made in connection with its recommendations, the appellant would wish to have its plans reviewed by engineers that have expertise in hydraulics and hydrology to determine whether the building plans might be modified to provide a building that would not interfere with the potential flooding and which would be secure and not create constrictions to the flow of the creek during a regional storm. With inventive creativity, new designs and approaches, using pillars, staircases, elevators, escalators and other concepts may prevent potentially valuable commercial sites from becoming economic albatrosses to the owners. I make these remarks without prejudice to and without intent to influence in any way any further application that might be made by the appellant.

IT IS HEREBY ORDERED that the appeal be and is hereby dismissed.

No costs shall be payable by either of the parties.

DATED at Toronto this 25th day of June, 1976.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.