



# The Mining and Lands Commissioner

## In the matter of The CONSERVATION AUTHORITIES Act

G.H. Ferguson, Q.C. )  
Mining and Lands Commissioner ) Wednesday, the 16th day of  
January, 1985.

AND IN THE MATTER OF

An appeal against the refusal to issue permission to construct a frame addition to an existing structure on part of Broken Lot 11 in Concession XIV in the Township of Otonabee in the County of Peterborough.

B E T W E E N :

CARLOS (CARL) REGINALD McMILLAN

Appellant

- and -

THE OTONABEE REGION  
CONSERVATION AUTHORITY

Respondent

Robert E. Pakenham, for the appellant.  
George W. Coros, for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to issue permission to construct a frame addition to an existing structure on part of Broken Lot 11 in Concession XIV in the Township of Otonabee in the County of Peterborough. By Ontario Regulation 364/82 the power and duty of hearing and determining such appeals were assigned to the Mining and Lands Commissioner. The appeal was heard in Peterborough on January 16, 1985.

The subject lands were acquired by the appellant in April, 1983 and are composed of a parcel measuring 100 feet by 160 feet that is situate on the north side of the Otonabee River at a location easterly of a sharp bend to the east of that river. At the time of purchase a building measuring 24 feet by 28 feet was situate on the subject lands in addition to a smaller shed-like building. The building was not serviced with water or sewage facilities. It was heated with a wood stove and a portable toilet was used.

The building existing at the time of purchase consisted of an original building and a porch. Permission was sought to

raise the concrete block basement under the original part of the building and to raise the porch portion leaving it on piers. In addition permission was sought for the construction of an addition measuring 8 feet by 28 feet on the easterly or downstream side of the building. In addition permission was requested for the construction of a concrete wall which would deflect flows including ice to be situate to the west of the existing building. The purpose of the addition was to provide a kitchen and a washroom in which a humous toilet would be used, eliminating the need for a septic tank and tile bed.

Although the regulation made by the respondent under the Conservation Authorities Act defines the regional storm as the Timmins storm, the policy of the respondent has been to administer applications in respect of the floodplain of the Otonabee River on the basis that the regional storm was the one in one hundred year storm. This lower standard was adopted by reason of the experience gained from the control of waters by the dams on the Trent Canal system. Not surprisingly the respondent has adopted a policy of not granting permission for new residential construction or extensions to existing residential construction in the floodplain of the Otonabee River. The evidence of the enforcement officer of the respondent indicated that such policy was not only the written policy but was the applied policy and that both categories of applications had been made in the past and had been refused.

For the purpose of the hearing the respondent engaged the consulting firm of Totten, Sims, Hubicki Associates to prepare a study of the subject lands in relation to the elevations of the one in one hundred year storm and flows associated with lesser storms or discharges, the degree of which was established by records of the flows through the Auburn Dam in Peterborough. The report of the study was filed as Exhibits 6 and 6a and a consultant of that firm, Dushan A. Marucelj, who has experience in hydrology and hydraulics gave evidence regarding the study conducted. The study adopted elevations prepared by M.J. Davenport & Associates Ltd. with regard to the subject lands and from the calculation of the

elevation of the flood of the one in one hundred year storm it is clear that the subject lands would be inundated by four feet of water in that storm. Not only would the subject lands be covered with such a depth of water but the access road leading thereto would be similarly covered. The area behind the subject lands is quite swampy and of a lower elevation and there is no doubt that in a regional storm the subject lands would be completely isolated and surrounded by water of a serious depth.

The evidence also indicates that the subject lands are subject to frequent floodings. In Table 3 of the report a number of occasions of flooding are extrapolated from given flows. Some question was raised as to the accuracy of the lower flows but in reading the evidence the tribunal is satisfied that while the report related to the highest point of the land and applied a discharge flow that related to lower parts of the land that the use of the table in the report is not seriously hampered. The end result is that during the period 1913 to 1979 portions of the site have been flooded in at least forty-nine of the sixty-seven years between those dates, that seventy-one flooding events occurred during that period with the result that flooding occurred on more than one occasion in some years, the average duration of flooding was fourteen days, fifty-six events had a duration of five days or more and sixty-nine flooding events had a duration of two days or more. The evidence also shows that flooding occurred after the normal spring freshets in May and June and that the risk of flooding to the subject lands is not limited to spring freshets. At least two flooding events occurred in June and two flooding events occurred in July. Both of the latter events lasted three days or longer. In addition an aerial photograph taken in 1980 and filed as Exhibit B indicates a considerable amount of flooding on the subject lands. Accordingly, the tribunal is satisfied that not only would the subject lands be inundated to a significant depth in a one in one hundred year storm but that the subject lands have regular exposure to flooding of varying degrees.

The thrust of the case for the appellant was that the case is an appropriate one for creation of an exception to the

general policy of the respondent and that an exception should be made by this tribunal based on the assumption that the policy of the Province and of the Authority recognizes the existing risk in respect of properties that are occupied at the time the regulation came into effect. It was said on behalf of the appellant and supported by evidence of Murray J. Davenport, an engineer who has had experience in dealing with municipal and flood related matters, that the proposal would protect the building from flooding through the raising of the building and the use of the deflective wall and that any risks that presently exist are not increased by reason of the fact that the purposes of the extension are merely to make an existing building more habitable rather than increase the size of the building to make more living space. To give effect to this argument would mean that this tribunal or, in effect, McMillan through his actions in this particular case, establishes the policy of the respondent. This tribunal does not consider that it is its responsibility to establish the overall policy of a conservation authority. The conservation authority has established its policy for this watershed. Admittedly it has adopted a stringent policy with regard to existing buildings but that policy is in place and is being applied and this tribunal does not consider that it is its responsibility to amend that policy. If the appellant had established that the de facto policy of the respondent had been to permit extensions consideration might have been given to the particular case but on the evidence the tribunal is satisfied that the appellant had received the benefit of all policies of the respondent and has not been denied permission under any policies or de facto policies of the respondent which have been afforded to other landowners and for this reason the appeal should be dismissed.

The thrust of the argument for the respondent was that the risk of life and limb occurring in a regional storm in connection with a building that is completely surrounded by four feet of flood water and which is inaccessible both for egress and ingress warrants that permission should not be granted. The

counter-balancing argument was that the risk presently exists and is not increased by the proposal. Counsel for the respondent indicated the problems of distinguishing between various degrees of extensions.

The tribunal is not aware of any principle of federal, provincial or municipal policies that would require the issue of permission in the present case and in view of the policy of the respondent established before this tribunal and shown to be applied without exception the appeal will be dismissed.

THIS TRIBUNAL ORDERS that the appeal is dismissed.

THIS TRIBUNAL ORDERS that no costs shall be payable by either of the parties to the appeal.

SIGNED this 6th day of March, 1985.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER