



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 erect a building on Part Mill Reserve, Block L, Registered Lot 1180 on Plan Number 6 in the Village of Norwood in the County of Peterborough.

B E T W E E N:

PATRICIA A. COCHRANE

Appellant

- and -

THE OTONABEE REGION CONSERVATION AUTHORITY

Respondent

I. W. Campbell, for the appellant.
G. W. Coros, for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to issue permission under O.Reg. 61/79 in respect of a log cabin placed on lands owned by the appellant and her husband. The power and duty of hearing and determining the appeal was under O. Reg. 847/79 made under The Ministry of Natural Resources Act, 1972, as amended, assigned to the Mining and Lands Commissioner.

In 1979 the appellant and her husband purchased a parcel of land in the Village of Norwood lying between Highway No.7 and the Ouse River. A restaurant was situate on the property at the time of purchase. Prior to the time of purchase there had been situate on the property and to the east of the restaurant a trailer which was used as a workshop but the vendors removed the trailer from the property under the provisions of the agreement for sale.

In June, 1979 the Cochranes became aware of a log cabin that

was situate on a gasoline station in the westerly part of the village and after checking with the clerk and the building inspector for the village and obtaining permits from the Ministry of Transportation and Communications at Port Hope and from the Ontario Provincial Police the cabin was moved through the village and placed on a foundation consisting of a number of cement blocks at a height of one block. The cabin has been used as an art and craft shop in which crafts manufactured by local residents and the appellant in the cabin are sold to the public.

Subsequently the respondent became aware of the placing of the cabin at the location and served a violation notice. An application for permission was filed with the respondent. Following a hearing the application was refused and the following four reasons were given therefor:

1. The building would be subject to flood damage during a regional storm.
2. The building, or resulting debris, could float downstream and block the bridge at Cedar Street causing a backup which could increase flood damage.
3. The granting of permission would set a precedent for the placement of structures within a floodplain.
4. Granting permission may result in a future purchaser suffering flood damage to the proposed structure.

The legal background is that by O.Reg 61/79 the regulation of the respondent was brought in line with the 1971 amendment to The Conservation Authorities Act extending the jurisdiction of the authority in respect of construction of a building or structure to areas susceptible to flooding during a defined regional storm. Prior thereto the regulation applied to areas below the high water mark.

The cabin measured ten feet by twenty feet. It was constructed of cedar logs all of which were shorter than twenty feet. The logs measured approximately six inches in diameter and were held together by eight inch spikes which protrude approximately one inch into the lower log as a one inch by two inch framing was inserted between the logs. The evidence of Mr. Cochrane was that the cabin was

designed to withstand only vertical pressures such as depth of snow and by reason of the thousand pounds of shingles on the roof, which overhung the front of the cabin by approximately nine feet and the slight penetration of the nails, he characterized the cabin as being top heavy and having little resistance to lateral pressures and a tendency to break up rather than remain in one unit if it were subjected to lateral pressures.

Subsequent to the original hearing the respondent obtained an assessment of the situation from Totten, Sims, Hubicki Associates Limited, an independent consultant. The evidence of Dushan A. Marucelj, the Head of the Conservation and Resources Department of that company established that he had examined the area and calculated the flood flows on the basis of an analysis with a similar section of the watershed of the Ouse River. He prepared a report which was filed as Exhibit 13 and a plan which was filed as Exhibit 12 and outlined various elevations and a cross-section of the river at the site.

The plan illustrates that the cabin is situate at an elevation of 650 feet. The following elevations were calculated in respect of four storms as follows:

25 year storm - 652.7 feet
50 year storm - 653.2 feet
100 year storm - 653.5 feet
regional storm - 656 feet

Consequently in a regional storm the site would be covered with approximately six feet of flood waters. In addition, although the evidence of Marucelj showed that the flows of the 25, 50 and 100 year storms were not sufficient to float the cabin, the cabin was situate below the elevations of such storms and in such storms there would be depths of approximately three feet around the cabin. His evidence further indicated that in a regional storm the cabin would float and as it floated downstream, it would have a force of 100 tons taking into account the velocity of the flow of a regional flood and the weight of the cabin. He admitted that if the cabin were to break up as suggested by Mr. Cochrane this force would be diminished but there

would be significant risk of damage to downstream properties from the floating logs.

Marucelj states at p.7 of his report in respect of the regional storm, the standard created by O.Reg.61/79, as follows:

The water level at the cabin is sufficiently high for the bouyant (sic) force to lift the cabin off its supports. It should be noted that at much lower flows (100 year flood) the bridges at Cedar Street and at Elm Street will be submerged. This would make a blockage of the bridge openings a highly unlikely occurrence.

At p.9 Marucelj concluded,

The results indicate that for the 25, 50 and 100 year floods the log cabin is not affected by the flow, nor does the cabin affect the water levels. For the Regional Storm, the cabin will be dislodged from its supports and will float downstream. However, since the bridges will be submerged even at flow rates lower than those caused by the Regional Storm, the log cabin will not likely block any of the bridges. Should any of the bridges be blocked, the water level will rise a maximum of 0.12 feet.

During a flood caused by the Regional Storm the cabin will be raised off its supports and carried downstream. Because the velocities in the flood plain are lower than in the channel, the cabin will be carried into the channel. Given the weight of the cabin and the high velocities that can be reached within the channel, the cabin will cause extensive damage if it hits a stationary object (buildings) on its path.

During the 25, 50 and 100 year floods, damage to the cabin will be large from water and mud. The possibility of floating debris damaging the cabin is high.

Marucelj's evidence indicated that in a regional storm the main flow of the flood would not necessarily follow the existing channel of the river with the result that floating objects would be directed not toward existing bridges but toward existing buildings in the floodplain many of which are residential and such damage is the probable result of the floatation of the cabin during a regional storm. He also indicated that in a regional storm the flow of 7,300 cfs would have a velocity of approximately four to five feet per

second which would have a significant erosive effect capable of eroding the foundations of buildings and dislodging trees. He also indicated although he did not so state in his report, that there was a potential for loss of life or injury to persons such as persons swimming in the river or persons taking shelter in the cabin.

J. W. Merriam, the Water Resources Planner and Enforcement Officer for the construction and fill regulation of the respondent, gave evidence in respect of the policy of the respondent. He evidenced that since the making of O.Reg 61/79 the respondent had not authorized any construction in the Village of Norwood below the elevation of the regional storm. He admitted that there had been previous permissions but these had been granted under the less stringent test of the high water mark. No policy of the respondent was established of permitting buildings, even a commercial building, below the regional floodline under the existing regulation. It was admitted that permission to place fill had been granted but these permissions were in a scheduled area above the regional storm elevation.

Merriam also indicated that the clerk and the building officials of the Village of Norwood should have been aware of the requirements of the respondent as the municipality approved the regulation prior to its making and they were provided with copies subsequent thereto.

The submissions on behalf of the appellant were that the four reasons given by the respondent for refusing the permission have not been sustained on the appeal. With reference to the first reason it was submitted that the damages to the cabin itself would be relatively insignificant in the context of the damage that would be sustained by the portion of the floodplain that is within the Village of Norwood. With reference to injury or death it was suggested that the ability of warning and the availability of better places of refuge would reduce the likelihood of such occurrences. It was submitted that the evidence of the expert witness should not be accepted in respect to the potential damage to the cabin itself.

With reference to the second reason it was pointed out that

the report of the expert witness was inconsistent with this reason. Counsel for the respondent agreed with this submission and withdrew the point.

Thirdly with reference to the issue of precedent it was submitted that each case should be assessed on its individual merits rather than an absolute policy of refusal to grant permission based on theories of precedent. It was submitted that the site being in the older part of the village and the placing of the cabin being a replacement of an existing structure warranted a distinction between this application and applications respecting vacant land.

With reference to the effect on future purchasers it was submitted that the major concern of the respondent should be the preventing of flood damage and that the fate of future owners should not be a major factor in the situation.

It was also submitted that the appellant was entitled to consideration because of the efforts that had been made by the Cochranes in checking with the usual officials who failed to refer them to the respondent and the loss of the ability to carry on the craft shop in conjunction with a long established restaurant business. It was also indicated that the appellant was prepared to make flood proofing changes to the cabin and she is prepared to do whatever is reasonable to meet flood proofing requirements.

It was submitted on behalf of the respondent that it is the duty and the responsibility of the conservation authority to establish and enforce flood control measures within its jurisdiction and inherent in this responsibility is the prevention of damage to buildings, injury to people and the prevention of legal actions in respect of liability for flood damage. It was submitted that the failure of the appellant to learn of the jurisdiction of the respondent has the sympathy of the respondent but the legal principle that ignorance of the law is no excuse should be the governing principle particularly where the purpose of the law is the protection of the public. With reference to the fact that many buildings now exist in the floodplain it was submitted that the approach should be that two wrongs do not create a right and that a further undesirable

intrusion into the floodplain should not be permitted on the basis of existing intrusions. In this regard it was pointed out that many of the buildings in the floodplain have been there for many years having been erected when there was no control and the implementation of the responsibility of the respondent can be created only as a long range program with such old buildings being removed from the floodplain on obsolescence and that the creation of exceptions constitutes an interference with the long range plan. As far as the hardship to the appellant was concerned it was suggested that the craft business could be carried on in the restaurant.

With reference to the four reasons it was submitted that the expert evidence clearly establishes that there is a risk of damage in the event of a regional storm. With reference to precedent the difficulty of the conservation authority in dealing with subsequent applications was emphasized. With reference to future purchasers it was pointed out that with changes of standards of liability in civil matters there is an unknown area of liability in which a conservation authority may in the future be held responsible for permitting the erection of buildings and structures which are susceptible to flooding and in the result it would be held liable for damage to buildings or loss of life or injury. Accordingly the conservation authority must use caution and refrain from making exceptions or playing favoritism with applicants.

In the opinion of this tribunal the evidence of the expert witness must be accepted and there is no alternative other than to find that in the event of a storm of lesser significance than a regional storm, the cabin itself would be subject to serious damage from water, mud, ice and floating debris and in the event of a regional storm the cabin will probably be floated off its supports, and as a unit or as a mass of debris would have a significant potential for causing damage to downstream properties.

Nothing in the evidence establishes, particularly since the making of O.Reg. 61/79, any policy of the respondent to permit construction in the floodplain. The basic reason for the regulation and the law authorizing the making of the regulation is the

prohibition of the erection of buildings or structures in floodplains. While the law permits exceptions to the absolute prohibition of the regulation through the issue of permissions, such permissions are required by section 4 of O.Reg 61/79 to be restricted to cases where the construction,

"will not affect the control of flooding
or pollution or the conservation of land."

In practice, conservation authorities and experts in the field have developed principles or policies that justify the creation of exceptions, keeping in mind however, the overall qualification that the control of flooding must not be affected. Accordingly flood control measures are an essential element of any principle or policy creating an exception to the general prohibition.

The leading examples of flood control measures that have warranted the creation of exceptions are channel improvements, diversion works, flood control measures and in respect of individual properties the application of the stage storage principle. In this case there was no evidence to establish that the respondent has any flood control programs which would justify it in creating an exception to the general prohibition and in fact, since the new regulation was made, the respondent has not created any exceptions in the village. Further on the evidence there is nothing in the appellant's case to warrant the creation of an exception on the basis of any provincial policy or any other aspect of public policy that might be weighed against the interest of the appellant. The cabin is situate in the heart of the floodway of a regional storm and it is doubtful that any theory of flood control would accommodate an intrusion into such a vulnerable area.

Issues of precedent and concern in respect of unsuspecting future purchasers are frequently raised in support of the positions of conservation authorities in appeals from their decisions. In view of the above approach to this appeal comment on these issues is unnecessary.

Counsel for the appellant referred to issues of hardship and

the fact that municipal officials failed to refer the appellant to the respondent. This tribunal has consistently refused to apply such principles to appeals as the guiding principle under the law is the control of flooding and such issues have no relation to principles or programs relating to such control. One cannot compare the present losses, even if proved, with the potential damage, injury or loss of life that could result in a regional storm and the whole concept of the legislation being to prevent the tragedies that occur in such storms, consideration cannot be given to such an issue. Similarly, lack of advice, actually beyond the area of responsibility, of municipal officials cannot remove from a structure that does not conform with the safety requirement of the legislation, those unsafe elements.

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 May, 1980.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.