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The Mining and Lands Commissioner
Le Commissaire aux mines et aux terres

File No. CA 005-94

L. Kamerman Mining and Lands Commissioner	))	Thursday, the 30th day of March, 1995.
B. Goodman Deputy Mining and Lands Commissioner	))	

THE CONSERVATION AUTHORITIES ACT

IN THE MATTER OF

An appeal to the Minister under subsection 28(5) of the **Conservation Authorities Act** concerning the conditional permission for the construction of an addition to an existing single family dwelling on Lot 16, Registered Plan 439, City of Vanier, Regional Municipality of Ottawa-Carleton.

B E T W E E N :

CAROL ANN HINDE

Appellant

- and -

RIDEAU VALLEY CONSERVATION AUTHORITY

Respondent

ORDER

WHEREAS an appeal to the Minister of Natural Resources was received by the tribunal on the 15th day of July, 1994, having been assigned to the Mining and Lands Commissioner (the "tribunal") by virtue of Ontario Regulation 795/90;

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AND WHEREAS a hearing was held on Thursday, the 12th day of January, 1995, in Hearing Room #2, Rent Control Programs, 255 Albert Street, 4th Floor, in the City of Ottawa, in the Province of Ontario;

UPON hearing from the parties and reading the documentation filed;

1. **THIS TRIBUNAL ORDERS** that the appeal from the conditional approval of the Rideau Valley Conservation Authority for the construction of an addition to an existing single family dwelling on Lot 16, Registered Plan 439, City of Vanier, Regional Municipality of Ottawa-Carleton be dismissed.

2. **THIS TRIBUNAL ORDERS** that no costs shall be payable by either party to the appeal in respect of this appeal.

Reasons for this order are attached.

DATED this 30th day of March, 1995.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

Original signed by B. Goodman

B. Goodman
DEPUTY MINING AND LANDS COMMISSIONER

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Appellant

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RIDEAU VALLEY CONSERVATION AUTHORITY

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REASONS

This matter was heard in Hearing Room #2, Rent Control Programs, 255 Albert Street, 4th Floor, in the City of Ottawa, in the Province of Ontario on January 12, 1995.

Appearances:

Carol Ann Hinde	Appearing on her own behalf
Helmut Brodmann	Counsel for the Rideau Valley Conservation Authority

Preamble:

The appeal before the tribunal to the Minister under subsection 28(5) of the **Conservation Authorities Act** concerned a decision of the Rideau Valley Conservation Authority (the "RVCA") in response to an application (Ex. 3) made by Carol Ann Hinde (the "appellant") on June 6, 1994 for an addition to her single family residence located at 77 Wayling Avenue in the City of Vanier. A hearing was held before the Executive Committee of the RVCA on June 9, 1994 and a Notice of Decision dated June 13, 1994 (Ex. 10) was sent to the appellant. The Notice advised that a decision was made to "approve the application as submitted" subject to an easement agreement being registered against the property and the submission of three additional sets of building plans. The Notice further advised that a formal letter of permission would be issued by the RVCA once satisfactory notice was given indicating that the easement had been registered, following which a building permit could be obtained. On June 28, 1994, the solicitor for the appellant wrote to the RVCA attaching the "Easement Agreement registered on title and Deed you require in order to issue the permit." (Ex. 11).

By letter dated July 12, 1994, the appellant appealed the decision of the RVCA to the Minister of Natural Resources, advising that "this appeal relates to the Authority's requirement that an easement be registered against the property." (Ex. 12). On July 15, 1994, the RVCA sent another "Notice of Decision" to the appellant confirming the receipt of "the required easement agreement" and the additional plans (Ex. 13). The letter further advised that the Executive Committee "passed a resolution which had the effect of making an exception to the Authority's adopted policies and granting permission for these works submitted ... recognizing that the proposal does not meet our floodproofing requirements.". The "letter of permission" also indicated that it did not come into effect until the release which formed part of the letter was signed, dated and returned to the RVCA offices. It does not appear that this was done.

At the outset of the appeal hearing on January 12, 1995, the parties were advised of the appointment of Mr. Brian Goodman as Deputy Mining and Lands Commissioner pursuant to subsection 6(1) of the **Ministry of Natural Resources Act**. The parties confirmed their agreement that he and the Commissioner sit as a tribunal of two, notwithstanding subsection 6(4) of the **Act**. The tribunal based its jurisdiction to proceed upon the agreement of the parties.

Preliminary Issue:

Does the tribunal have jurisdiction to hear this appeal?

Following opening remarks by the tribunal, Mr. Brodmann raised for the first time the tribunal's authority to proceed with the appeal.

Mr. Brodmann argued that the tribunal derived its authority from subsection 28(5) of the **Conservation Authorities Act** which provides that:

> **28.**--(5) An applicant who has been refused permission may, within thirty days of the receipt of the reasons for the decision, appeal to the Minister who may dismiss the appeal or grant the permission. (emphasis added)

Mr. Brodmann submitted that, on the facts, there had been no refusal of permission; on the contrary, the RVCA had granted permission, subject to a condition that had been complied with, namely the registering of an easement in favour of the RVCA. In fact, Mr. Brodmann advised that the addition to the appellant's residence, which was the subject of the application, had been completed. This was not disputed by the appellant.

This argument had not been made in the submission of the RVCA, dated October 26, 1994 (Ex. 17) in response to the tribunal's Order of July 26, 1994. The tribunal will refer to the points made by Mr. Brodmann in support of his argument later in these reasons. In reply to Mr. Brodmann's jurisdictional objection, the appellant submitted that she had been advised by both the respondent and her lawyer that, if she was unhappy with the decision of the Executive Committee of the RVCA, she could appeal the decision to the Mining and Lands Commissioner. She also claimed that she had been advised similarly by staff in the Commissioner's office.

Following a short recess, the tribunal advised the parties that it had determined that it would be unfair to proceed to consider the jurisdictional objection, given the absence of advance notice to the appellant. The tribunal advised that, had this notice been given, the appellant would have had the opportunity to consider obtaining legal advice, and possibly representation at the appeal hearing concerning this "legal" submission. The failure to provide this advance notice denied the appellant the opportunity to do so.

The tribunal determined that, in order for the appellant to be able to consider the issue of legal advice and/or representation, it was appropriate to direct the respondent to make a written submission dealing with the jurisdictional objection, and serve it on the appellant and the tribunal. After hearing from Mr. Brodmann, who apologized to the tribunal for his failure to provide advance notice of the jurisdictional argument, the tribunal directed that the submission be served within two weeks, namely by January 26, 1995. After hearing from the appellant, the tribunal directed that the appellant serve her written reply, if any, to the RVCA's written submission by February 26, 1995. These directions given at the hearing were subsequently confirmed by Order of the tribunal dated January 17, 1995 which was sent to the parties.

Written Submissions:

The RVCA's written submission dated January 24, 1995 was received by the tribunal on January 25, 1995. It was also copied by the RVCA to the appellant.

After making reference to sections 3, 20 and 28 of the **Conservation Authorities Act** and Regulation 166/90 entitled "Fill, Construction, and Alteration to Waterways", the respondent set out its position as follows:

> ... in order to invoke the appeal process, there must first be a "refusal" of permission by the Conservation Authority. In the instant case, the Conservation Authority granted to the Applicant, in essence, a conditional approval. The Conservation Authority's letter of June 13th, 1994 to the Applicant (Exhibit 10) states that approval has been granted "subject to an Easement Agreement being registered against the subject property and the submission of three additional sets of building plans".

The RVCA proceeded to argue that it is implicit in the **Conservation Authorities Act** and Regulation 166/90 that the RVCA has the power to impose conditions on its approval, and that to find otherwise would deprive the RVCA of the flexibility required to carry out its mandate.

It is the position of the Respondent that the Appellant, upon receiving notice of the decision, had two options:

> (1) Accept the decision and fulfil the condition, which would allow the matter to be finalized and the Appellant to obtain a building permit; or
>
> (2) treat the imposition of the condition as a refusal by the Conservation Authority and appeal to the Minister from the decision in accordance with s.28(5).
>
> What the Appellant cannot do, in the submission of the Conservation Authority, is accept the decision, fulfil the condition, obtain the requisite building permit, and then launch an appeal from the decision.
>
> It is the position of the Conservation Authority that the Appellant is estopped at law from pursuing an appeal in these circumstances.

After referring to the law of estoppel, the RVCA submitted that the appellant, by her conduct in fulfilling the condition imposed by the RVCA, represented to the RVCA that the condition was acceptable, and that no further legal proceedings would be pursued. In reliance on this representation, the RVCA issued its formal letter of permission allowing the appellant to obtain a building permit and to proceed with construction. The RVCA stated that, only after the formal letter of permission was issued, did the RVCA become aware of the appellant's intention to appeal the decision to the tribunal. The RVCA argued that the appellant may not now revert to its previous position. It reasoned that, had the appellant given notice of the intention to appeal the decision of the RVCA, no formal letter of permission would have issued, and no building permit would have been obtained by the appellant. Furthermore, the RVCA would have

had an opportunity to reconsider its position and, perhaps withdraw its permission in accordance with s. 7 of the Regulation. The RVCA continued that it was now faced with an incongruous and prejudicial situation, where the building permit had been obtained and the structure erected by the appellant, before the appeal against the decision granting permission to construct was even heard.

The RVCA contended that, while the tribunal may "dismiss the appeal or grant the permission" with or without conditions, it lacks the authority to provide the relief sought by the appellant, namely an Order that the Easement Agreement registered on title to the property be removed from title. The RVCA questioned how an Order of the tribunal can bind the Registrar of Land Titles.

The RVCA attached three cases upon which it relied in support of its position. These cases are: Molander et al. v. City of Cranbrook 20 L.C.R. 135, a decision of the British Columbia Court of Appeal, Harding v. Corporation of Cardiff 1882 O.R. 329, a decision of the Chancery Division, and M.E.P.C. Canadian Properties Ltd. v. The Queen et al. 64 D.L.R. (3d), a decision of the Federal Court Trial Division. The RVCA argued that all three cases stand for the proposition that a party having elected a course of action in relation to another party, with full knowledge, cannot thereafter pursue an inconsistent course of action. Such conduct gives rise to an estoppel, or quasi-estoppel and should be restrained.

The RVCA concluded its submission by requesting that the appeal be dismissed.

The appellant's submission in response, signed by Ms. Hinde, was received by the tribunal on February 23, 1995. In her submission, the appellant argued that, since the RVCA took the position that it had the right to impose conditions in granting permission, it could not say that a refusal could not be read to include an approval with conditions. Further, unless subsection 28(5) of the **Conservation Authorities Act** is read as allowing an appeal from the decision of an authority where conditions have been imposed, an authority could defeat an applicant's right to appeal, by granting permission subject to conditions, rather than refusing permission outright. Applicants receiving a conditional approval would be compelled to seek to have the ordinary courts review the authority's decision, when the legislative intention was to have the review conducted outside of the courts. A refusal in this particular case, it was argued, must include a refusal to do as the applicant requested. (ie. to grant permission without conditions.)

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The appellant also argued that, once the RVCA accepted under s.4 of the regulation that her house does not affect the control of flooding etc. of the land, it was estopped from denying this. Further, by filing documents for over six months in response to the subject appeal and by outlining the appeal procedure to the appellant, the RVCA should be estopped from raising this jurisdictional objection. The cases relied on by the RVCA in support of its estoppel argument may be distinguished from the present case, it was submitted, since they are cases where parties accepted the validity of the expropriation but not the value of the land expropriated. The parties then question the validity of the expropriation after the authority has acted on and spent money improving the lands expropriated. Fighting an expropriation at the price offered is not inconsistent with the expropriation. The appellant submitted that she was simply appealing "the unreasonable expropriation price". Complying with the decision of the RVCA does not give rise to estoppel. The easement required to be registered on title by the RVCA is analogous to an inordinately low expropriation price. It was argued that this is offensive, hurts the value of the property, and gains nothing for flood control etc.

The appellant concluded her submission by requesting that the appeal be heard by the tribunal.

Findings:

Having carefully considered the facts in relation to this appeal, the relevant legislation and the submissions of the parties, the tribunal finds that it lacks the authority to proceed with this appeal, and accordingly, dismisses the appeal.

It is clear from subsection 28(5) of the **Conservation Authorities Act** that the jurisdiction of the Minister (and therefore the tribunal) is established only if "an applicant **who has been refused permission**" by the authority appeals to the Minister. We find on the facts here that the applicant was not refused permission. Exhibit 3 indicates that the applicant applied to the RVCA on June 1, 1994 for permission to construct an addition to her existing single family residence. It is clear from Exhibit 10 that what the applicant received was a conditional approval. It was indicated in this letter dated June 13, 1994 from the RVCA that a formal letter of permission would be issued by the RVCA once satisfactory notice was given to the RVCA indicating that the easement had been registered. It was further indicated that a municipal building permit could then be obtained.

Upon receipt of this letter, we find that the applicant was faced with a choice: she could dispute the condition by notifying the RVCA that the condition was unacceptable and requesting that the condition be withdrawn. The RVCA could then decide whether or not it wished to withdraw the condition. We find that the failure of the RVCA to so withdraw would constitute a refusal of permission within the meaning of subsection 28, since the definition of "refuse" is "not grant request made" (The Concise Oxford Dictionary), and at this point it would be clear that the applicant's request was for an unconditional permission.

Alternatively, the applicant could accept the condition imposed and take steps to comply with it. This is precisely what the applicant did here. On June 28, 1994, the solicitor for the applicant wrote to the RVCA enclosing "the Easement Agreement registered on title and Deed you require in order to issue the permit." (Exhibit 11). Under section 7 of Regulation 167, the RVCA is empowered to withdraw any permission given under this regulation, if, in the opinion of the RVCA, the conditions of the permit are not complied with. It was not until July 12, 1994 that the applicant wrote to the Minister appealing "the Authority's requirement that an easement be registered against the property." It is not disputed that the appellant not only subsequently obtained the building permit, but indeed completed the addition that was the subject of the request for permission.

Under the circumstances, we find that, rather than a refusal by the RVCA, there has in fact been an approval, subject to a condition that was subsequently satisfied by the applicant. Since the applicant was not refused permission, this tribunal has no jurisdiction to proceed with this appeal. The tribunal has considered the arguments of the parties and the cases cited in support in relation to estoppel, but finds that they are not relevant to the preliminary determination of whether or not the tribunal has jurisdiction to hear this appeal. Even if the appellant is not estopped from appealing, the tribunal must still be satisfied that there has been a refusal before it has jurisdiction to proceed to hear this appeal on the merits. The appeal is accordingly dismissed.