Box 330
24th floor, 700 Bay Street
Toronto, Ontario
M5G 1Z6

Ontario

The Mining and Lands Commissioner

In the matter of The CONSERVATION AUTHORITIES Act

G.H. Ferguson, Q.C.) Monday, the 27th day of
Mining and Lands Commissioner) June, 1988

AND IN THE MATTER OF

An appeal against the refusal to grant permission to construct a building on Part of the North Half of Lot 32, Broken Front Concession, in the Township of Osgoode in the Regional Municipality of Ottawa-Carleton.

B E T W E E N :

J. EDWIN BROWN

Appellant

- and -

THE RIDEAU VALLEY
CONSERVATION AUTHORITY

Respondent

K.A. MacLaren, for the appellant.
H.R. Brodmann, for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission under Regulation 175 of the Revised Regulations of Ontario, 1980 for the construction of a cottage on part of the North Half of Lot 32, in the Broken Front Concession, in the Township of Osgoode in the Regional Municipality of Ottawa-Carleton. Under 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 Ottawa on the 20th day of April, 1988.

Although the title document was not produced the appellant was said to be the owner of a small parcel of land situate on the westerly side of Regional Road No. 19 and fronting on the easterly bank of the Rideau River. Sketches filed indicate that the frontage of the property is approximately ninety-four feet and the distance between the road and the river is fifty feet. Notwithstanding this documentation the evidence of the appellant indicated that there was a distance of twenty feet between the road and the cottage that has been erected and

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for which permission is retroactively sought, the cottage is twenty-six feet in length and there is a distance of thirty-five feet between the cottage and the river.

The subject lands regardless of their dimension are situate within the flood plain of the regional storm on the Rideau River. In a regional storm the land in the area of the existing building would be subject to 1.1 metre of flooding or approximately three and one-half to four feet.

Pictorial evidence also shows that the subject lands were entirely flooded during a flood on March 29, 1976, which flood was found to be a one in twenty-five year flood. The appellant acquired the subject lands in 1985 at which time there was situated thereon the remains of a cottage measuring twenty-six feet by sixteen feet. The evidence clearly indicates that this building was very dilapidated and had not been occupied for at least ten years. Photographs taken in 1981 show windows missing from the building, the door missing, roofing torn down, the porch being without shingles and at an inappropriate angle and building material consisting of boards and concrete blocks lying in the vicinity of the building.

According to the appellant's evidence, he attempted to renovate the existing building on the subject lands following his acquisition thereof. He indicated that he had telephoned the office of the respondent indicating that he wanted to do renovations of the property and was advised, presumably correctly, that a permit was unnecessary for this purpose. He proceeded with his repairs and on so doing he found that the framing of the building was unsuitable as a base for renovations. He then proceeded to construct a new cottage. His evidence was that he called the building inspector, obtained a building permit and thereupon the officials of the respondent attended the property.

On March 14, 1986 an official of the respondent issued a stop work order at a stage when the roof consisted solely of the rafters and insulboard covered the sides. The appellant, notwithstanding the issue of the stop work order proceeded with

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the completion of the roof and the placing of siding on the building.

The building consists of a kitchen and a living room on the first floor and a loft within the hip roof which would be suitable for a bedroom. The proposal was to provide a holding tank for sewage purposes. The appellant indicated that his use of the building would be restricted to seasonal use and that his purpose for the building was to have a place to which he could retreat from the pressures of business.

In its reasons for refusal of permission, which were filed as Exhibit 5, the executive committee of the respondent outlined its objectives for the flood control program of the authority as follows:

- to prevent loss of life and personal injury due to flooding
- to minimize property damage and social disruption caused by flooding
- to encourage a coordinated approach to the use of land and the management of water.

Six reasons were given for the refusal which are summarized as follows.

1. The subject lands are within the regional flood plain.
2. The subject lands were flooded on March 29, 1976.
3. There was an absence of information on the method of construction and the evidence as filed indicated that the building itself would be subject to damage in the event of a regional flood.
4. The possibility of winterization and future use of the building for year-round occupancy, increasing the number of people exposed to the risk and inconvenience of flooding.
5. Against a background of non-residential use arising from the period of unsuitability of the previous building for a residential purposes the site was treated as vacant and the construction of residential property therein increases the risk of flood damages and the exposure of persons to the risks and inconvenience of flooding including public safety hazards.
6. Precedential implications.

The appellant introduced as Exhibit 9 a letter to himself from the firm of Manhire Cunliffe Partnership dated April

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19, 1988 which purported to deal with the risks to the building itself. It is noted that the first recommendation of this report is that a further geotechnical study be made of the property and subject to the findings of such a study steps could be taken to raise and support the building now existing on the subject land. The tribunal is not prepared to consider this evidence. As indicated above it is conditional on a further geotechnical study being made. It was presented without the prior knowledge of the respondent and in effect would constitute a completely different application than the application under appeal. The suggestions are not considered by this tribunal and the appellant, as far as this tribunal is concerned, may consider making a future application based on these considerations if he sees fit.

The main thrust of the argument of counsel for the appellant was that the policy of the respondent constituted a freeze on the construction of buildings in the flood plain and relying on the case of Hinder v. Metropolitan Toronto and Region Conservation Authority 16 O.M.B.R. 401 he argued that the reasons given by the respondent in dealing with the application had no relation to the matter of control of flooding and that other considerations were irrelevant as the engineer for the respondent gave evidence that there was no concern regarding pollution or the conservation of land. He coupled his argument that the respondent should not freeze lands in the flood plain from development with the fact that the conservation authority has powers of acquisition and argued that such powers should be exercised rather than an exercise of policies which constitute a freeze on development. He suggested that the legislation should contain specific reference to the principles of loss of life, damage to property, and management of the use of land and water, which matters were outlined in the objectives of the authority and without such terms in the legislation the respondent was not entitled to take such matters into consideration in dealing with "the control of flooding". He also submitted that there was no evidence of increased risk notwithstanding that the engineer for the respondent had given evidence pointing out the potential for

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people being in the area, both as occupants of the summer cottage, or of a permanent home if the use changed or of service personnel providing public service on the occasion of a regional flood. Counsel also raised the fact that no connection was established in the evidence between the flows of Hurdman Creek and the one in one hundred year storm. He also submitted that the respondent was incorrect in dealing with the matter on the basis that the property was vacant.

Counsel for the respondent relying on several decided cases submitted that the matters considered by the respondent fell within the "control of flooding". He also referred to Province of Ontario publications and manuals regarding these matters and submitted that it was the responsibility of the respondent to follow these guidelines and directives in its administration. He also referred to a case known as the Barry case in which permission had been refused where an existing structure had been removed and a subsequent application for a new building had been refused and the appeal from the refusal thereof was dismissed. It was submitted that there was no overriding exception to the prohibition of the regulation based on a pre-existing use.

Mr. MacLaren's argument was based on sections 3 and 4 of Regulation 175 of Revised Regulations of Ontario, 1980 which read,

> 3. Subject to section 4, no person shall,
>
> (a) construct any building or structure or permit any building or structure to be constructed in or on a pond or swamp or in any area susceptible to flooding during a regional storm;
>
> (b) place or dump fill or permit fill to be placed or dumped in the areas described in the Schedules whether such fill is already located in or upon such area, or brought to or on such area from some other place or places; or
>
> (c) straighten, change, divert or interfere in any way with the existing channel of a river, creek, stream or watercourse.
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> 4. Subject to the Ontario Water Resources Act or to any private interest, the Authority may permit in writing the construction of any building or structure or the placing or dumping of fill or the straightening,

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> changing, diverting or interfering with the existing channel of a river, creek, stream or watercourse to which section 3 applies if, in the opinion of the Authority, the site of the building or structure or the placing or dumping and the method of construction or placing or dumping or the straightening, changing, diverting or interfering with the existing channel will not affect the control of flooding or pollution or the conservation of the land.

These two sections establish legislative jurisdiction of the conservation authority. In addition to legislative jurisdiction the Conservation Authorities Act provides conservation authorities with powers and objects of a significantly broader area than the legislative field that is delegated to conservation authorities. Accordingly when the conservation authority refers to its objectives it is referring to those broader objectives provided by the Act and the legislative powers are part of the enforcement of the broader powers and objectives of the Province under the Act and of conservation authorities under the Act.

With reference to the argument of counsel it should be noted that section 3 creates a prohibition against the construction of buildings in flood plains. It is not the authority by its discretionary powers under section 4 that creates the freeze. Such freeze is found in the law itself and the conservation authority is provided with a discretion to relieve against that freeze. That discretion is exercised where, in respect of the present case, the conservation authority is satisfied that "in the opinion of the Authority, the site of the building ... and the method of construction ... will not affect the control of flooding....".

The difficulty in the argument of counsel for the appellant is that the matters referred to are the reasons for the imposition of the prohibition in section 3 rather than matters that are normally considered as justifying an exception under section 4. The usual approach is that exceptions are created where within a recognized concept of flood plain management, an exception can be made to the prohibition contained in the regulation. The respondent may have gone to unnecessary length in explaining to the appellant in its reasons for its refusal the

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problems associated with the proposed building which are the reason for the imposition of the prohibition in section 3 of the regulation. The real reason of the respondent for refusing the application is that the proposal of the appellant does not fall within any recognized principle of flood plain management warranting the application of section 4 of the regulation. The significant aspect is that the law creates the freeze and it is not the conservation authority that creates the freeze. The conservation authority is required to have regard to matters of flood plain management which would justify an exception to the legislative freeze.

With reference to the power of acquisition, the power of acquisition extends to the objectives and programs of the respondent. These programs are far wider than the mere enforcement of Regulation 175 and as far as this tribunal is concerned the argument that a power of acquisition exists does not preclude the respondent from not exercising its powers under section 4 on the facts of the case.

Dealing more specifically with Mr. MacLaren's submission that no rational conclusion could be made which would include the words "loss of life, risk to property and management of the use of water and land" in the term "control of flooding", it is not apparent to this tribunal that it is necessary or useful to attempt such a matter. As has been said on numerous occasions the responsibility of the conservation authorities under the regulations is to develop programs for the control of flooding and exceptions should only be made where the facts of the particular case are compatible with such programs. As has been held on many occasions although the defects of a particular project may not be apparent, if the project does not fall within a recognized principle of flood plain management, the permission should be refused. As indicated above these three matters are more in the nature of the reasons and the objectives to be achieved by the programs of flood control and the responsibility of the conservation authorities is to have regard to the "control of flooding" and where applications do not comply with generally

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accepted principles of flood plain management the conservation authority is entitled to and should refuse permission. The three matters raised by Mr. MacLaren are the reasons for the programs of the conservation authorities. They may be broader than the program of the particular conservation authority in respect of the control of flooding. By way of example the third matter may have relation to the third consideration contained in section 4, namely the "conservation of the land".

With reference to the point raised regarding Hurdman Creek, the regulations made under the Conservation Authorities Act adopt various methods of defining the three standards of regional storms that are applicable across Ontario, namely the one in one hundred year storm, the Timmins storm and the Hurricane Hazel storm. The tribunal is satisfied that the reference in Regulation 175 to the Hurdman Creek is the best evidence of the one in one hundred year storm that was available at the time of the preparation of the regulation and the tribunal is satisfied in the absence of any evidence to the contrary that the flood plain mapping used by the respondent is an application of the one in one hundred year storm data. This tribunal does not consider it necessary in these appeals to require the respondents to establish the details of the jurisdiction of the respondent. If jurisdiction is non-existent the more appropriate tribunal for dealing with the matter is the Provincial Court where it deals with offences.

Dealing with the argument that the conservation authority made an error in treating the subject lands as vacant lands, there has never developed a concept of pre-existing non-conforming legal use under the regulations under the Conservation Authorities Act. The appellant's evidence, the respondent's evidence and the actions of the appellant clearly indicate that the existing building was worthless and assuming there were such a principle this tribunal sees no reason to apply it in the present case.

Turning to the merits of the appeal there was no evidence that the proposal of the appellant falls within any

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recognized principle of flood plain management. The building, although small, utilizes storage capacity of the flood plain of the Rideau River in the one in one hundred year flood. In addition it causes a constriction of the flow of the regional flood. No evidence was given to show that any recognized exception by way of flood plain management is applicable to the proposal of the appellant. There has been no application of the incremental staged storage principle in the construction of the building and indeed the evidence indicates that such would not be possible.

This tribunal is not aware of any policy of the Province of Ontario that authorizes the construction of residential buildings in the flood plain of the one in one hundred year flood where the flood waters have depths in excess of three feet. Accordingly the appeal will be dismissed.

1. THIS TRIBUNAL ORDERS that the appeal in this matter is dismissed.

2. THIS TRIBUNAL ORDERS that no costs shall be payable by either party to the appeal.

SIGNED this 27th day of June, 1988.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.