File No. CA 005-09

M. Orr) Thursday, the 15th day
Deputy Mining and Lands Commissioner) of October, 2009.

THE CONSERVATION AUTHORITIES ACT

IN THE MATTER OF

An appeal to the Minister under subsection 28(15) of the **Conservation Authorities Act** against the refusal to grant permission for development through the addition of a six foot extension on the first story of a residential building, being Lot 10 and Part Lots 9 and 11, Registered Plan 236, municipally known as 472 Indian Road, City of Burlington, Regional Municipality of Halton;

AND IN THE MATTER OF

Ontario Regulation 162/06.

B E T W E E N:

MICHAEL HANNA and SUSAN HANNA
Appellants

- and -

CONSERVATION HALTON
Respondent

O R D E R

WHEREAS THIS APPEAL to the Minister of Natural Resources was received by this tribunal on the 2nd day of July, 2009, having been assigned to the Mining and Lands Commissioner ("the tribunal") by virtue of Ontario Regulation 795/90;

AND WHEREAS a hearing was held dealing with a preliminary motion in this matter on the 20th day of August, 2009, in the courtroom of this tribunal, in the City of Toronto, Province of Ontario;

AND WHEREAS the Respondent, Conservation Halton, brought the motion arguing, amongst other things, that this tribunal did not have the jurisdiction to hear this appeal, there being no *de facto* decision from which an appeal could be brought and that counsel's letter advising of same did not constitute the necessary decision required to give rise to jurisdiction;

. . . . 2

1. **IT IS ORDERED** that the motion be granted.

2. **IT IS FURTHER ORDERED** that no costs shall be payable by either party to this matter.

DATED this 15th day of October, 2009.

Original signed by M. Orr

M. Orr
DEPUTY MINING AND LANDS COMMISSIONER

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REASONS

Appearances:

Ms. Susan D. Rogers appeared on behalf of the appellants.
Mr. Kenneth E. Jull appeared on behalf of the respondent.

Introduction

This motion was brought by Conservation Halton who is the Respondent in an appeal made to the Minister of Natural Resources by Michael and Susan Hanna pursuant to subsection 28(15) the **Conservation Authorities Act (“**the **Act”)**. Conservation Halton (the “Authority”) is questioning the Mining and Lands Commissioner’s jurisdiction to hear an appeal launched under

the **Act** by the Hanna's in this instance as there has not been a hearing by the Authority and alternatively, even if there had been a hearing, the Hanna's appeal is, in the Authority's words "stale". Furthermore, the Authority has laid a charge under the **Provincial Offences Act**, the prosecution process is underway and a court date has been set for a time in December 2009.

In reply, the Hanna's say that their appeal stems from a decision of the Authority albeit made by way of a letter from its solicitor. As a result, they have the right to a hearing. In addition, the Hanna's argue that the Authority's decision to prosecute them is denying them their right to a hearing into the matter.

In its simplest terms, this case involves an application for the approval of a permit by the Hanna's under the **Conservation Authorities Act**; receipt of that permit; no appeal from the terms of the permit; and then building something. Unfortunately, what was built did not reflect the terms of the permit; a violation notice was issued by the Authority; an attempt was made to file an application covering what was described here as "unauthorized work"; this application was turned back, and a prosecution was commenced. An appeal was filed with the Mining and Lands Commissioner by the applicant.

The Issue

Does the Mining and Lands Commissioner have the necessary jurisdiction to hear this appeal? Did the letter sent by the Authority's solicitor in response to the application filed by the Hanna's in August, 2008, constitute a decision from which they could launch an appeal to this tribunal?

Overview of Facts Not in Dispute

The Hanna residence is located on the north side of Burlington Bay. The lands are in an area for which Conservation Halton claims jurisdiction under the **Act**. The argument between the two parties has its origins in a series of events associated with the Hanna's applying for a permit from the Authority. Permit No. 3088 was issued by the Authority on November 20, 2007 to the Hanna's. Its expiry date was set for November 20, 2008. A City of Burlington building permit was also issued in November, 2007. The Hanna's did not request a hearing upon receipt of the Authority's permit. There were four conditions listed on the permit having to do with such things as "effective and appropriate sediment and erosion control measures being installed prior to starting work and maintained during construction." The letter accompanying the permit states in bold that "[a]ny changes to the approved design or installation methods must be reviewed and approved by Conservation Halton staff prior to their implementation."

Once the Hanna's project got underway in 2008 the work which was done did not correspond with the approved permit. This is all that matters for this motion. The Authority says it was not notified of the changed plans prior to them happening. The Hanna's stopped work on their development some time in the summer of 2008 and sought an amendment to their original building permit from the City of Burlington. The City told them that they had to go to the Authority first.

The Authority was made aware of the situation and following a site meeting held on July 31, 2008, the Authority issued a "violation notice" dated August 21, 2008 requesting that the "unauthorized works be removed by September 19, 2008." The Hanna's then filed a permit application with the Authority on August 28, 2008 dealing with the work they had already carried out, indicating that the proposed start date would be August 2008 and the completion date would be September 2008. They made reference to the original permit number 3088 on this subsequent application. A set of plans supporting this application was provided as well. The Authority's solicitor responded on September 8, 2008, indicating that the Authority would be returning the application since it related to "work that has already been done" and "Conservation Halton does not in the normal course accept permit applications for works that have already been completed." This correspondence was in turn followed by correspondence from the Hanna's solicitor which was addressed to the Authority and which asked for "new permission" for the construction project and for the Board to approve the change to the construction plans. The Hannas requested an opportunity to speak to the Board and to provide information. The Authority's solicitor, in his response to the Hanna's' counsel reiterated the points he had set out in his previous letter and added that the Hanna's were not entitled to a Board hearing. He alluded to scheduling problems in any event, but this point was not clarified.

The Authority took the position at this motion hearing that the work carried out by the Hanna's was not the work approved by it in the original permit; that the work was contrary to the **Act**; that an offence had been committed and that the Hanna's should be prosecuted. It was not prepared to entertain an application for work that had already been carried out; there had not been a hearing into the original (November 2007) approved application - therefore there was no jurisdictional foundation for an appeal to the Commissioner. Furthermore, the matter was already before the courts, as a prosecution had been initiated dealing with the "unauthorized" work carried out by the Hanna's.

The Hanna's on the other hand took the position that the work that had been carried out was necessary and that they deserved a hearing because they had filed an application (albeit after the fact) and their application had been refused (albeit by a letter from the Authority's solicitor); that if they could file to amend a building permit under the **Building Code Act** then they should also be allowed to file to amend a conservation authority permit and have a hearing.

Analysis

(a) Statutory Context

The relevant legislation includes the **Conservation Authorities Act**, the **Ministry of Natural Resources Act**, and the **Mining Act**. Since the **Building Code Act** has been referred to by the parties it will be included in this list.

The **Conservation Authorities Act** provides the legislative context for the establishment of conservation authorities within watersheds in the province. An authority as such has the powers set out in the **Act**. The objects of every authority are to "establish and undertake, in the area over which it has jurisdiction, a program designed to further the conservation, restoration, development and management of natural resources other than gas, oil, coal and minerals."

Section 28 of the **Act** is applicable to this matter. By this section, authorities are allowed to make regulations (subject to approval of the Minister) for the areas under their jurisdiction that deal with a variety of activities that might affect the objects mentioned above. For example, regulations might be made that prohibit, regulate or require the permission of the authority for development if, in the opinion of the authority, the control of flooding, erosion, dynamic beaches or pollution or the conservation of land may be affected by the development. The regulations set out the standards that are to be met and the regulations themselves are enforced by the authorities. The contravention of a regulation is an offence under the **Act** and the authorities may prosecute offenders. On conviction, the offender may be subject to a fine of not more than $10,000, or to imprisonment and in addition, the court may order that the development be removed at the expense of the convicted person.

Applications seeking permission from an authority are processed in accordance with the **Act**, its regulations and the policies of the authority. Permission may be granted, refused, or granted with conditions. In the latter two instances, the applicant must be given the opportunity of a hearing before the permission is granted with conditions or in the event that it is refused. The hearing can be held by an executive committee appointed by the authority.

An authority may cancel permission (under the regulations) if conditions are not met. The permit holder is given an opportunity to show why the permission should not be cancelled through a hearing.

A permit is valid for a maximum of 24 months after being issued unless an earlier date is specified.

An appeal route is provided where after a hearing permission is refused or where the applicant objects to the conditions that have been imposed by the authority on the permission it grants. The appeal is made to the Minister of Natural Resources who may refuse the permission or grant the permission with or without conditions. The Mining and Lands Commissioner has been assigned the powers and duties of the Minister of Natural Resources for the purpose of hearing and determining appeals under subsection 28(15) of the **Conservation Authorities Act** by virtue of Ontario Regulation 571/00.

The **Ministry of Natural Resources Act** and the **Mining Act** deal with the administrative and procedural aspects of this matter and they present no issues for determination here.

The **Building Code Act** has been used in argument by the Hanna's to support their position that they should be allowed to present their modified development at a hearing before this tribunal even though this is after the fact. The value (if any) that it adds to such an argument will be discussed later.

(b) The Parties Positions

Under the **Conservation Authorities Act** an appeal to the Minister will have its genesis in the filing of a "signed application for permission" that contains information required by regulation. The application is processed and normally followed by a decision of an authority or its executive

committee. Any decision to refuse permission or to grant permission subject to conditions must be preceded by the offer of an opportunity for a hearing before the authority or its executive committee. It is only after a hearing has been held and a decision made along the lines described above can an applicant seek further relief in the form of an appeal to the Minister.

In this case, the Authority pointed out that the granting of permission back in November 2007 had not generated an appeal. Furthermore, the Hanna's subsequent application of August 2008 had been turned back by staff and therefore no hearing had taken place (which potentially could have resulted in an appealable decision presumably). The Authority argued that the subsequent application was "stale-dated" which is apparently a term used by the Authority for those applications that are made after the fact, or after the "development" has taken place. The **Act** and regulations anticipates that applications will precede development. The Authority claimed that this is the only logical approach to interpreting its legislation as otherwise the Authority would be deprived of its ability to carry out its mandate under the **Act**. It would be forced to evaluate development that already occurred. The Authority argued that there was no basis in the statute for approving something that had already been built and for this reason, the Mining and Lands Commissioner could not and should not hear the matter. The Authority also said that the Hanna's should be making their complaints about the behavior of the Authority and its effect on their right to a hearing before a court in a judicial review proceeding. It also said that conflicting decisions could result in multiple proceedings namely here and in provincial court.

The Hanna's maintained that their August 2008 application does form the basis for an appeal as its submission to the Authority was followed by a refusal of the Authority in the form of a letter from its solicitor. He had responded by returning their application indicating that they were not entitled to a hearing in this instance as their application was out of time - it had been submitted after development had occurred. This refusal according to the Hanna's constituted a "decision" which could form the basis for an appeal to this tribunal. In the words of their solicitor "… this legislative scheme is very clear; it provides an absolute right to some form of hearing if an application is made."

(c) Application of the law to the Arguments

It is a well-recognized legal tenet that an appeal must (amongst other things) have an initial decision that underpins its legitimacy. The lack of an initial decision means there is nothing from which the appellate body can take its jurisdiction.

In this case, the "decision" being relied on by the Hanna's for their right to an appeal consists of a letter from the Authority's solicitor indicating that the Authority "does not in the normal course accept permit applications for works that have already been completed" and that his client (the Authority) would return the application "as it is not authorized under the legislation". The Hanna's say that the letter forms the basis for their appeal to this tribunal.

The tribunal thinks that the Hanna's argument would stretch the interpretation of the decision-making sections of the applicable legislation to untenable limits. The **Conservation Authorities Act** establishes authorities (a defined term) and allows those authorities to appoint "executive committees" to hold hearings in their stead. There is no further delegation of the decision-

making powers beyond the level of executive committee. Even if the solicitor was said to be speaking for the Authority, then at best it is indicating a refusal by the Authority or its staff to process an application, since the Hanna's application was returned – an action that would be the subject of a judicial review possibly or a civil suit in front of the appropriate body and not this tribunal. On this basis the appeal to this tribunal is premature at best.

The tribunal takes the approach that the reply by the Authority's solicitor is no more than a notice to the Hanna's that the Authority has chosen a particular legal strategy (prosecution) allowed to it under the legislation in response to their actions. The solicitor's response does not form the basis for an appeal to this tribunal.

Nor does the **Act** provide a means to apply for approval of permission after something has been built. One only has to look at the set up of the various sections dealing with the treatment of development to reach this conclusion. The **Act** and its regulations are crafted to ensure that absolutely no development occurs without appropriate review and permission. For example, the format for Regulation 162 is one that presents the reader with a clear warning at the very beginning – section 2's heading reads "Development prohibited". It then goes on to say that "no person shall undertake development … in or on the areas within the jurisdiction of the Authority…." This approach of outright prohibition followed by a scheme to provide permission is a good indicator of how seriously this legislation (taking into account its purpose and objectives) views development within those areas covered by conservation authorities. Development cannot precede permission. Equally, permitted development must never stray from approved parameters without first of all obtaining additional or further permission (after undergoing additional review) from the Authority. The reason for this must be that the **Act** and its regulations, being premised in part on extremely serious natural events in the form of 100 year storms like Hurricane Hazel, are designed to ensure that such events, if they ever happen again, will not wreak such devastation.

The legislation must therefore present what may appear to some to be an unforgiving face. However, a close reading of the legislation and the policy/guideline materials provided by the Authority show that there is some recognition given to the fact that unexpected situations could be encountered once permission has been granted. Apparently, the Authority has policies to deal with unforeseen contingencies. A document entitled "Policies, Procedures and Guidelines for the Administration of Ontario Regulation 162/06" was provided for this motion and section 2.4 of that document which is titled "Approval of a Permit" provides applicants with some guidance on the point. For example it says "[a]ny **proposed amendment** to the approval will require review and approval may be subject to additional fees." (Emphasis added) There is no doubt that changes or amendments can only be made after review and approval by the Authority and before building occurs. The Authority (through its Coordinator of Coastal Program and Watershed Capital Projects, Ms. Teresa Labuda), noted that it had not been notified of the change made by the Hanna's, nor had a hearing been requested to consider a proposed change. So, while these issues might be the subject of litigation at some future date, they are raised here to show that had they paid some attention to the legislation, the Hanna's might have had another basis for a hearing before the Authority or its committee thereby laying down the foundation for an appeal to this tribunal. The tribunal believes that this analysis also addresses the Hanna's argument that the **Conservation Authorities Act** and its regulations should be interpreted to

allow for amendments after the fact in the same way as the **Building Code Act** allows for amendments after construction has occurred. The tribunal is of the view that the **Conservation Authorities Act** gives a clear enough indication as to how permits are kept in good standing without resorting to comparisons with the **Building Code Act**.

One other section of the Regulation bears mentioning in order to illustrate how seriously the **Act** treats development that has taken place either prior to approval of permission or has failed to stay within the good graces of permission once it was given. This is section 8 of Regulation 162/06 and while it formed but a small part of submissions at this hearing, it merits some highlighting here. Under this section permission may be cancelled (after a hearing) if conditions are not met. Presumably, if the holder's attempts to justify construction fail, the construction itself could become the subject of prosecution proceedings as a cancelled permit would have the effect of putting the development in contravention of the law (upon conviction of course).

This takes us to where the parties are today with the Hanna's facing prosecution proceedings. Does the fact that the Authority has commenced the prosecution process stop any further processing of the matter by this tribunal? Since this tribunal has already decided above that it does not have the requisite jurisdiction to hear the Hanna's appeal because of the lack of a decision at the Authority's level, the question is really moot. However, regulatory legislation is normally designed to ensure that similar issues are not raised in two forums or venues at the same time. They are usually mutually exclusive.

Findings and Conclusions

This tribunal cannot find any basis for hearing this appeal. The Hanna's have attempted to get their foot in the Authority's processing door by drawing on administrative comparisons under the **Building Code Act**. The legislation and associated policies are different for each of the Acts and the **Conservation Authorities Act** does not work in the same way as the **Building Code Act**. The consequences of contravention might be equally serious under both regimes; however, they are set up to treat contraventions differently. The **Conservation Authorities Act** is unambiguous in its treatment of development that takes place either without the approval of a permit or outside the parameters of an approved permit. The consequences could be serious indeed.

The tribunal finds that the Hanna's complaints are primarily focused on the treatment they received from the Authority and its staff. If these complaints are to form the basis for litigation of any sort, it belongs in another forum and not in front of this tribunal. The Hanna's are not being denied the right to an appeal before this tribunal. This is really a case of putting their complaints in front of the appropriate decision-maker.

While the cases put forward by the parties' counsel were helpful in understanding their positions, the tribunal found that the **Act** and its regulations were clear in terms of the treatment of development that occurs either without permission or strays outside the parameters of approved permission. In either case, the Authority has the statutory right to resort to prosecution in order to carry out its mandate.

No costs will be awarded to either party.