Appeal No. CA 015-92

Linda Kamerman) Thursday, the 25th day
Mining and Lands Commissioner) of March, 1993.

IN THE MATTER OF THE CONSERVATION AUTHORITIES ACT

AND IN THE MATTER OF

An appeal to the Minister under subsection 28(5) of the Conservation Authorities Act against the refusal to issue permission to build a new single family residential dwelling on Part of Lot 9, Front Concession, Part 3 Reference Plan 25R-2183, known municipally as Franklin Avenue, Brights Grove, in the City of Sarnia, in the County of Lambton.

B E T W E E N:

NELVIS PEZ and LINDA PEZ

Appellants

- and -

ST. CLAIR REGION CONSERVATION AUTHORITY

Respondent

O R D E R

WHEREAS the appeal was received on August 14, 1992 and a hearing was held in Sarnia on January 14, 1993;

AND WHEREAS the appellants represented themselves and the respondent was represented by Ottavio Colosimo, a lawyer;

. . . . 2

UPON HEARING from the parties and upon reading the material filed both prior to and at the hearing;

1. THIS TRIBUNAL ORDERS that the appeal from a refusal of the Minister to issue permission to build a new single family residential dwelling on Part of Lot 9, Front Concession, Part 3 Reference Plan 25R-2183, known municipally as Franklin Avenue, Brights Grove, in the City of Sarnia, is hereby dismissed.

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

Reasons for this order are attached.

DATED this 25th day of March, 1993.

Original signed by L. Kamerman

Linda Kamerman
MINING AND LANDS COMMISSIONER.

Appeal No. CA 015-92

Linda Kamerman)
Mining and Lands Commissioner)

Thursday, the 25th day
of March, 1993.

IN THE MATTER OF THE CONSERVATION AUTHORITIES ACT

AND IN THE MATTER OF

An appeal to the Minister under subsection 28(5) of the Conservation Authorities Act against the refusal to issue permission to build a new single family residential dwelling on Part of Lot 9, Front Concession, Part 3 Reference Plan 25R-2183, known municipally as Franklin Avenue, Brights Grove, in the City of Sarnia, in the County of Lambton.

B E T W E E N:

NELVIS PEZ and LINDA PEZ

Appellants

- and -

ST. CLAIR REGION CONSERVATION AUTHORITY

Respondent

REASONS

Background

The appeal to the Minister of Natural Resources was made concerning an application made on March 24, 1992 to construct a new single family dwelling on Part of Lot 9, Front Concession, Part 3 Reference Plan 25R-2183, known municipally as Franklin Avenue, Brights Grove, in the City of Sarnia, in the County of Lambton. Under Ontario Regulation 795/90 the power to hear and determine such appeals were assigned to the Mining and Lands Commissioner. The appeal was heard at Sarnia on January 14, 1993.

Part 3 on Reference Plan 25R-2183 is a parcel of land on Franklin Avenue, having a frontage of 50 feet. The north side of the parcel is 191.31 feet long,

. . . . 2

while the south side is 157.38 feet wide. The rear of the land backs onto Cow Creek, also referred to as Perch Creek and Bear Creek, at an angle, and measures 63.98 feet. There are homes along Franklin Avenue to the north of the subject lands. There is one home immediately to the south followed by Part 5 which is undeveloped land. Cow Creek runs southwest to northeast and Franklin Avenue runs north to south. Hamilton Road, which is the first street to the north runs east to west, so that a triangle is formed by the creek and the two roads. Part 5 forms one corner of the triangle.

That part of Bear Creek which runs along the rear of the subject lands is referred to in paragraph 5 of Schedule 1 of Ontario Regulation (O.Reg.)167/90. The respondent has not done any flood plain mapping of the area within its jurisdiction as it concerns this parcel of land.

Nelvis Pez, one of the appellants, filed an application, bearing number A-000538 to the St. Clair Region Conservation Authority, which was considered on June 17, 1992 before a meeting of the full board of the respondent. The following resolution was passed:

> That the application of Mr. Nelvis Pez to construct a new residential dwelling on Part 3, Reference Plan 25R-2183, Franklin Avenue, Brights Grove, in the floodway of Perch Creek (Cow Creek Drain) be denied.

The following reasons were given:

> The potential depth and velocity of flood waters over the subject property under Regional Storm flooding conditions, are too great to safely permit the construction of a new residential dwelling.
>
> Ingress and egress to the subject property under Regional Storm flooding conditions could not be considered "safe."
>
> The proposed building site is located below the elevation of the 100 year storm flood line placing the property within the floodway of the Perch Creek (Cow Creek Drain) flood plain. The construction of a new residential dwelling with (sic) the floodway of a watercourse flood plain

. . . . 3

would be contrary to Section 5.2 of the Provincial Flood Plain Planning Policy Statement, 1988.

This matter arises as a result of an appeal dated August 1, 1992, filed by the appellants and received by the tribunal on August 14, 1992.

At the hearing, the appellants were present and represented themselves. The respondent was represented by Ottavio Colosimo, a lawyer with the firm of Siskind, Cromarty, Ivey & Dowler. David Sawyer and Patricia Hayman, employees of the respondent, were also present.

Issue

The issue to be determined is whether the application for construction of a single family residence was properly refused on the basis that it is an area susceptible to flooding during a regional storm.

Evidence

Patricia Hayman, Director of Water Resources for the respondent, stated that the respondent considered applications in light of provisions of O.Reg. 167/90, which she referred to as the Fill, Construction and Alteration to Waterways Regulation. Pursuant to subsection 3(a), without permission granted under section 4, no person is allowed to construct a building which is in an area susceptible to flooding during the regional storm.

With respect to the Cow Creek watershed, the respondent implements the Two Zone Concept of flood plain management, which is outlined in the Provincial Flood Plain Policy Statement. Ms. Hayman stated that construction is prohibited in the floodway, which is defined by the 1:100 year storm. New development may be permitted in the flood fringe, defined by the regional storm level, which is Hurricane Hazel.

Evidence was given that it had been recommended to the City of Clearwater by the respondent in February, 1990 that the Two Zone Concept be

. . . . 4

implemented in its Official Plan, and further explained in a zoning by-law. With the intervening amalgamation of the Town of Clearwater into the City of Sarnia, this recommendation was verbally pursued but has resulted in no action. Historically the City has regarded the top of the bank as being the limit of the area of concern with respect to construction, so that the extent of the flood plain is not shown on the Official Plan.

Brights Grove was described as an old cottage community, which has recently undergone a transformation into a residential community. Many of the existing cottages have been renovated and enlarged. Activity has included severances and infilling of lots.

Ms. Hayman advised that the respondent has been involved in the change since 1989, with an inspector informing residents of the need to apply for permission for construction, where the lot is on land which is susceptible to flooding during the regional storm. There are currently "a couple" of lots remaining in the immediate vicinity. Mr. Pez advised that there are three lots. Ms. Hayman stated that two of these lots are within the land referred to as the triangle formed by Hamilton Road, Franklin Avenue and Cow Creek.

Mr. Pez stated that he purchased the property in 1989. The original purchase included the land which is the subject matter of the application, a small portion at the corner of the triangle where Franklin Avenue meets Cow Creek and another portion of land across Cow Creek. He had been informed that he could build on the property at any time. Mrs. Pez advised that they had been given one month to check into the issue of construction and had been informed by the Town of Clearwater that there would be no problem.

Mr. Pez stated that services had existed on the subject lands for some time. Three pictures, filed as Exhibits 1A, 1B and 1C, were filed showing the lands from across Franklin Avenue, across Cow Creek and along Franklin Avenue looking in the direction of Hamilton Avenue respectively.

Referring to Schedule N of the respondent's material, Ronald. W. Robertson Surveying Ltd. was retained by the appellants to survey the subject lands. The elevations, measured in feet, range from 586.0 to 586.5 on that portion of land bordering Cow Creek, 587.5 to 588.8 in the centre of the land, and 588.8 to 589.9 near Franklin Avenue. Lambton Design drew a plot plan, having the house set well away

. . . . 5

from the creek. Mr. Pez stated that the house would be raised, without the use of fill, and at the suggestion of the engineer would have no basement. He felt that there should not have been a problem with the approval as a result of these measures. In response to Mr. Colosimo's question, Mr. and Mrs. Pez indicated that they are unable to contradict the measurements set out by Robinson Surveyors, and trusted Mr. Robinsons' measurements.

Referring to Schedule D of the respondent's material, which is the site plan by Lambton Design Consultants, Mr. Pez stated that the house is set back 120 feet from the creek. The cross section and notes show the building envelope to have been levelled to 180.54 metres. The bottom of the foundation would be below grade at an elevation of 179.32 metres. The elevation at the top of the concrete foundation is 181.3 metres, with the floor being at 181.35 metres. The flood plain level is stated to be 181.1 metres. Under cross-examination, Mr. Pez indicated that the set backs from the adjoining properties were 4.33 feet on each side, and that the building would be 4 feet above grade. When Mr. Colosimo suggested that the land would have to be sloped to meet the building, Mr. Pez stated that the house had been designed to have an empty crawl space, with cement slab walls as a foundation. He stated that the present elevation would remain as it is. Mrs. Pez stated that the design had not been submitted to the building department for approval, as it would have been futile without the respondent's permission first. She stated that the house had received a verbal approval from the building inspector, without a slope to the lot line from the four foot elevation, although she did not have this in writing. Under cross-examination, Mr. Pez indicated that he had spoken with a building inspector who had no problem with the proposed construction so long as the ground was not disturbed, although he admitted that the discussion had taken place some time before. Mr. Colosimo asked whether it was not, in fact, at the time that plans are submitted that the site plan would be scrutinized, suggesting that the verbal assurances of the inspector are not binding on the City. Mr. Pez stated that the cost of a building permit, being $2,500., would have been premature.

Mr. Pez indicated that Part 5, Reference Plan 25R-2183, was sold to his neighbour, who knew that it could never be used for building, as it is 70 feet on one side and could not meet setback requirements.

In asking that the tribunal reconsider the application, Mrs. Pez indicated that the appellants were seeking to build a small house. They would ensure that all

. . . . 6

floodproofing requirements would be met and would plant extra trees for the environment to reinforce the bank of the creek. Mr. Pez indicated that he would be willing to build a narrower house, making it 25 feet wide instead of the proposed 40 feet. The tribunal indicated that its jurisdiction did not extend to consideration of changes which would amount to a new application.

For reference purposes, the initial application, filed by the respondent as Schedule D and the denial of the respondent, filed as Schedule I to the respondent's Statement of Reply, were recognized as being the documents which resulted in the bringing of the appeal.

Mr. Pez filed an undated newspaper clipping from Magic Realty Inc. which, in part, sets out, "OPENING SOON LAKESIDE SUBDIVISION Phase II 26 lots, 13 backing onto creek in Bright's Grove"(ex.2). He stated that none of these lots are yet serviced and questioned why the respondent would allow construction in that area, which he stated had been open space.

Mrs. Pez showed the tribunal a certificate indicating that Nelvis Developments Co. Ltd. is a registered HUDAC builder, with excellent ratings for 1989, 1990 and 1991. She also stated that the property taxes had been increased, being a residential building lot. They have subsequently been reduced, due to the difficulty in obtaining the respondents' permission for construction.

Under cross-examination, Mr. Pez indicated that Nelvis Developments Co. Ltd. owns the land. He stated that he had been given permission to sever the subject lands from the larger lot adding that it was always a lot, with the creek creating a natural severance. Mrs. Pez stated that it was their intention to build their own home on the subject lands, and eventually sell the land across the creek. Mr. Pez has been in the business of building homes since 1985 and it is his primary source of income, which he supplements working as a drywall contractor.

In response to Mr. Colosimo's question, it had been the appellants' intention to build a house for themselves, while keeping a potential purchaser in mind.

Asked whether a lawyer had been retained to make all necessary investigations concerning the property, Mr. and Mrs. Pez indicated that they had retained a lawyer who was a councillor of the Town of Clearwater. Mrs. Pez stated

. . . . 7

that she was sure he had done his job. Mr. Pez stated that he did not know whether inquiries had been made concerning whether approval of the respondent had been required.

David Sawyer, Resource Planner with the respondent, stated that he first became involved with Nelvis Development Co. Ltd. when the request for the severance of part 5 had been circulated. Schedule K of the respondent's materials, is the letter to the Town of Clearwater Committee of Adjustment dated March 20, 1990, which outlined the respondent's concerns with respect to flooding.

Mr. Sawyer's next contact with the appellants concerning its flood plain policies is set out in Schedule L, being a letter dated May 24, 1990 to Lambton Designs. It sets out that new development will not be allowed in the floodway, and that development in the flood fringe would require floodproofing to the regulatory storm flood line of 181.1 metres. The letter indicates that an applicant would be required to provide elevations of the property before the application could be considered. It is noted that the flood line elevations used by the respondent are taken from a report prepared in connection with an application on another property, and that a prospective applicant could have a specific flood line study prepared by a professional engineer. At the hearing, Mr. Sawyer indicated that the respondent had not done a groundline elevation for the subject property.

Schedule M is a letter dated July 12, 1990 addressed to the Town of Clearwater from the respondent concerning an application for severance. The letter reiterates the flood plain policy of the respondent and indicates that the property is potentially flood prone and development would require the respondent's approval.

Referring to the letter from Ronald Robertson Surveying Ltd. dated March 8, 1991, being Schedule N, Mr. Sawyer stated that this had been the first opportunity for the respondent to put the two pieces of information together, namely the flood line study prepared in connection with 2527 Hamilton Road and the elevations for the subject property. A summary of flood plain information for Cow Creek was filed (ex.3). Relying on the 2527 Hamilton Road Study, the hydrology estimates 100 year storm flows of 107 cubic metres per second and regional storm flows of 373 cubic metres per second. Hydraulic information places the 100 year storm flood line elevation at 180.3 metres and the regional storm flood line elevation at 181.1 metres. Using the ground

. . . . 8

elevation information provided by R.W. Robertson Surveying Ltd., the average ground elevation is 179.46 metres. This results in calculated flood depths of .84 metres or 2.75 feet during a 100 year storm and 1.64 metres or 5.38 feet during a regional storm.

Mr. Sawyer stated that the respondent had relied on the site specific study done for 2527 Hamilton Road, as it is not far from the subject property, is a similar property and is in the same channel of the watercourse. He stated that the subject property is 100 metres upstream from 2527 Hamilton Road and that he inspected the land before determining that there was not much difference in elevation. He reiterated that, as there is no floodline mapping for the Cow Creek along its entire reach, the Hamilton Road study provides the best information.

In a letter to Ronald Robertson Surveying Ltd. dated March 22, 1991, being Schedule O to the respondent's materials, the respondent stated that the property is below the 1:100 year flood line elevation and, being in the floodway, is in the portion of the flood plain where new development is prohibited. The policies of the respondent concerning development in a flood plain are reiterated.

Thereafter, the appellants filed their application and the matter was scheduled for a hearing before the full board on April 23, 1992. Discussions were held at the hearing concerning the possibility of improvements to the Cow Creek pursuant to the **Drainage Act**, R.S.O. 1990, c. D17. The matter was deferred pending an exchange of information between the City of Sarnia and the respondent on whether the **Drainage Act** could be used to improve the channel, thereby improving the drainage. At the meeting of the executive committee of the board on May 14, 1992, Mr. Sawyer advised that, through his discussions with Bill Vetch of the City of Sarnia it was determined that the channel had not been designed to carry flows of the 1:100 year storm or the regional storm. The executive committee then referred the matter to the full board. The appellants were advised of the full board meeting, which was held on June 17, 1992, where is was resolved that the application would be refused. A copy of the resolution and reasons, submitted by the respondent as Schedule I, was sent to the appellants on June 18, 1992.

Referring to excerpts of the Flood Plain Policy Implementation Guidelines (ex.4), Mr. Sawyer stated that the respondent implements the construction regulation

. . . . 9

through the Two Zone Concept of the Provincial Flood Plain Policy Statement. The respondent recognizes that portions of the floodway already have existing development and has adopted a policy for minor additions to existing homes within the floodway, to allow for the continuing viability of the existing homes and community. The conditions under which such minor additions would be considered to an existing home would be where the additional floorspace does not exceed 30 percent of the existing foundation size, where the proposed use would be the same or becomes a use less affected by flooding, where the feasibility of relocating the proposed addition to a less hazardous site has been considered and where methods of floodproofing are of an approved engineering design, having been submitted to and approved by the respondent.

In response to Mr. Colosimo's question, Mr. Sawyer stated that the Provincial Flood Plain Policy Statement does not specifically set out these conditions on the issue of development. It is clear that prohibition of new development in the Policy would include a new house on an existing lot in an existing development. The respondent has assumed a more flexible approach on existing homes. Being aware that there were existing homes within the floodway, the respondent recognized that changes to these homes would occur. The respondent's policy is dependent on the determination that the proposed alteration would not significantly increase the number of people or level of investment in the floodway.

Referring to the executive committee's decision concerning the 2527 Hamilton Road property, Mr. Sawyer stated that the policy was interpreted to mean that a 30 percent addition would only apply to the habitable portion of the building, so that the double garage which was constructed in connection with the addition was not taken into account in its determination. The habitable portion of the addition, a dining room, involved pouring a concrete foundation which contained fill in the inside portion, thereby preventing collapse during a flood of high velocity. The flood proof design was the work of a professional engineer.

Referring to the Lakeside Phase II and other developments backing onto the Cow Creek, Mr. Sawyer stated that, although independent flood line studies had been undertaken, the resulting developments had no homes within the floodway of the

. . . . 10

watercourse and all those on the flood fringe were floodproofed to the level of the regional storm.

Mr. Sawyer stated that the City of Sarnia has a policy for infilling of vacant lots. He stated that an application for a building permit must show the proposed grades on the existing property and that it is the developer, not the City, which is responsible for drainage on the individual property. Referring to Schedule D, Mr. Sawyer stated that the grading necessary between the sides of the proposed home and the lot line would be four feet of rise over four feet of length, which would be susceptible to erosion during the 100 year storm. He stated that a ratio of 1 to 3 rather than 1 to 1 is recommended.

Mr. Sawyer stated that the respondent's concern, if the application were allowed, would be that all other proposed new homes in the floodway would have to be allowed. This would defeat the purpose of the Two Zone Concept, which is to maintain the inner channel, or floodway, as free from development as possible, so that the flood can pass. Any construction would increase the velocity of the water and the water levels both upstream and downstream. Referring to page 37 of the Implementation Guidelines (ex. 4), Mr. Sawyer stated that structural integrity of a building is limited to 0.8 metres or 2.6 feet of flood water. Flood velocities of between .08 to 1.5 metres per second or 2.6 to 5 feet per second are also determinative of threat to structural integrity. Vehicular access would be impeded by depths of 0.3 to 0.5 metres or 1 to 1.5 feet, while large emergency vehicles would be impeded by depths of 0.9 to 1.2 metres or 3 to 4 feet. A maximum velocity of 3 metres per second or 10 feet per second could accommodate vehicles so long as the depths are less than 0.3 metres or 1 foot. The risk to vehicles is that they could stall or be swept away.

Reviewing the applicable legislation, Mr. Sawyer read section 20 and clause 21(j) of the **Conservation Authorities Act**:

> **20.** The objects of an 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.
>
> **21.** For the purposes of accomplishing its objects, an authority has power,

. . . . 11

. . . . .

> (j) to control the flow of surface waters in order to prevent floods or pollution or to reduce the adverse effects thereof;

The ability to implement these objects is through the regulation making power contained in clauses 28(1) (b), (e) and (f) which provide that an authority may make regulations which prohibit, restrict or require the permission of the authority for diverting a watercourse, construction in an area susceptible to the regional storm or for the placing or dumping of fill in a defined area. Section 4 of O.Reg. 167/90 will allow permission for construction, provided that it does not affect control of flooding. Mr. Sawyer stated that there are two approaches which can be taken by the respondent. It can use structures such as dams and dikes or it can implement the Provincial Flood Plain Planning Policy. This is contemplated by the Flood Plain Planning Policy through the use of the Two Zone Concept.

Under cross-examination, Mr. Sawyer stated that the lot of 2527 Hamilton Road is 140 long, and that the addition had been constructed 43 feet from the top of the bank. Mrs. Pez indicated that the Pez construction would be 120 feet from the top of the bank. Mr. Sawyer indicated that the addition had been approved because it met the guidelines of the respondent to alterations to existing structures within the floodway, namely that the addition did not exceed 30 percent of the habitable portion and that the floor of the dining room was constructed above the floodline.

Mrs. Pez asked why the respondent would have policies that improvements such as she and her husband propose, which would be a benefit to the area, could not be approved. She also asked why their application had been refused, to which Mr. Sawyer responded that it was not a minor change to an existing structure. Mrs. Pez also suggested that the land was more of a hazard as it exists now, as it is used to dump garbage. Mr. Sawyer stated that the respondent must have a view to incremental change, and the impacts of incremental construction such as potential damage to other areas. Mr. Pez asked whether development is to mean an entire subdivision or one infill house. Mr. Sawyer responded that one new house is considered development for purposes of the respondent's policies.

Mr. Pez stated that the subject land had a garage on it in 1990, which is visible in Exhibit 1B. Mr. Sawyer stated that there is no evidence that the land had

previously been used for residential purposes. Mrs. Pez asked why the lots had been serviced. Mr. Sawyer responded that historically, because of its proximity to Lake Huron, all of the lots were serviced as potential cottage properties. It had been a requirement at that time that sewers be installed.

Under redirect, Mr. Sawyer stated that the top of the bank is irrelevant to the issue of flooding, so that the distance in the 2527 Hamilton Road property is not determinative. Rather, it is the velocity of the flood waters, the size of the drainage area and the amount of water coming in which is determinative. While it is dangerous to construct within the floodway, there is also the question of maintaining the floodway clear of development so that it exercises its function of allowing the floodwaters to pass with as little impact a possible. Concerning the top of the bank, Mr. Sawyer stated that, while the bank on the Pez property is much higher, there will be the additional question of the stability of the bank and potential for erosion under flood conditions.

Peter Harold Crook gave evidence for the respondent. He has been an employee of the Ministry of Natural Resources since 1974, having worked formerly as a zone engineer and currently as a regional engineer in London, Ontario. Mr. Crook was not specifically asked to review the application until just prior to the hearing. He had, however, been asked to review the study for the application concerning 2527 Hamilton Road in March, 1990. His opinion of that study, although the methods used were what he referred to as a short-cut, were that calculations of flood levels and flows were satisfactory. With the channel slope, the low lying land with no fill having been placed, the impact of the golf course bridge, there was sufficient information to assess the flood level for purposes of the proposed addition.

The Pez property is located a short distance upstream from the Hamilton Property and therefore the flood levels are slightly higher. Being a distance of approximately 100 metres upstream, with a .0009 slope, Mr. Crook calculated that flood levels would be in the area of .1 metres higher. Mr. Crook used the Robertson survey for purposes of making his determinations, which he summarized (ex. 3). He estimated the average ground elevation to be 179.46 metres, with depths of .84 metres, or 2.75 feet during the 1:100 year storm and 1.64 metres, or 5.38 feet, during the regional storm.

Referring to the stability of the slope between the house and the property line, being a 4 foot drop over 4 feet, or 1:1, Mr. Crook stated that such a steep slope

. . . . 13

would be difficult to maintain and would likely slump onto the adjoining property. To effect a transition, the fill would have to be placed at a 45 degree angle, which is only possible if special measures are taken, such as paving stones or concrete slabs. However, as the current plan indicates no special measures, the proposed 45 degree slope would not be acceptable.

Under cross-examination, Mr. Pez asked whether it would be allowable for the property to slope to the front and back of the house.

Final Submissions

Mr. Pez questioned the respondent's written authority to state that there could be no new homes built in an area where there are serviced lots. He submitted that there is nothing in the respondent's adoption of the Provincial Flood Plain Policy concerning the Two Zone Concept which shows that new development is prohibited. Pointing to the evidence of Mrs. Hayman, Mr. Pez pointed out that nothing in the policy deals with the issue of serviced lots. He stated that the decision of the respondent is not justifiable.

Concerning the issue of flooding, Mr. Pez pointed out that, in spite of the calculations of the engineer, the golf course is much lower and has experienced flooding. In fact, there had been flooding across the creek from the property. As the subject property is much higher, there can be no problem with building.

Mr. Colosimo submitted that the respondent has the jurisdiction, through its regulations, to manage the floodway according to its policies. Referring to the objects of a conservation authority, in section 20 of the **Act**, and the powers contained in clause 21(j), which allows programs which control flooding. Section 28 of the **Act** allows the respondent to make regulations concerning land within its jurisdiction. Section 3 of O.Reg. 167/90 provides that no person may construct on any land susceptible to flooding.

The Pez property is well within the regional storm line, being below the 1:100 year storm line as well. To deal with local flood conditions, the respondent has adopted a Two Zone policy. Mr. Colosimo submitted that it is the only entity which can deal with local flooding issues. It is only through the permission granted in section

. . . . 14

4 of the regulation that such construction would be permissible, and the permission is dependent on the discretion of the respondent. Mr. Colosimo submitted that the respondent is in a unique position to determine the impact of the proposed construction. He stated that it is difficult to apply one standard to an entire watercourse. Rather, conditions within the watercourse vary, and this should be recognized.

Referring to Mr. Pez's argument, Mr. Colosimo submitted that nowhere in the policies of the respondent is there a reference to serviced lots and this cannot be determinative. If there had been the intention of creating such an exception, it would be contained in the policies.

Under clause 1(g) of the regulation, the Cow Creek watercourse is defined as land within the jurisdiction of the respondent.

Referring to the evidence, Mr. Colosimo submitted that the respondent demonstrated that, in assessing the application, it used all of its resources and experience, as well as all available information to make a decision. There is evidence that it is reasonable to adopt the floodlines from 2527 Hamilton Road to the Pez property, and no evidence was brought forward at the hearing to refute this. The study relied upon drew reasonable conclusions concerning the level of flooding. The respondent does not have flood lines drawn for the entire watershed, as it does not have the financial resources to do so. Mr. Colosimo submitted that it was proper to transpose the evidence from 2527 Hamilton Road to this site.

With respect to the argument that it had not always been like this, and a private landowner could expect to make use of his property as he sees fit, Mr. Colosimo pointed out that, through the evidence of Mrs. Hayman, the management of the flood plain is evolving and will continue to do so as better information becomes available. During the 1960's and 1970's, the type of approval sought by the appellants was not required as the regulation did not yet exist. However, with the passage of time and with the respondent becoming increasingly aware of flooding issues, the regulations were passed which gives the respondent the authority to make such decisions. As of the date of the submission to the respondent, the appropriate regulation and policy was applied as it existed at that time. At the time of the application, it had been well known to the municipality that the respondent had guidelines concerning construction within

. . . . 15

the floodway. Evidence adduced at the hearing shows that letters on this issue were addressed to the Town of Clearwater. There is no evidence that the solicitor acting for the appellants had sought to inform himself of the respondent's policies at the time of the purchase.

The existence of other vacant lots in the vicinity shows that this issue is not isolated but is of ongoing concern to the respondent. If permission were granted to the appellants, it would become morally and legally difficult to refuse permission to subsequent applicants. The only way to fulfil the mandate of the **Act** is to prevent further development of the floodway by reason of the Two Zone approach. Therefore, the only way to allow continued development, ensuring the economic viability of the community as well as ensuring protection from flooding, is to allow development within the flood fringe. As concerning any development in the floodway itself, any new development must be rejected.

With respect to the cottages existing within the floodway, there is no power to change the fact of their existence. Therefore, the respondent can only proceed forward, regarding such structures as being legal non-conforming uses. The additions to existing structures is based upon the primary consideration that the dwelling already exists. Any addition which proposes no more than a 30 percent addition to the existing living space will be allowed, as long as the proposed addition can be satisfactorily flood proofed.

Mr. Colosimo submitted that the tribunal should consider five points in reaching its determination, which are set out below with accompanying argument.

1. Did the respondent act reasonably and follow due process in reaching its decision.

Referring to the evidence of Mr. Sawyer, Mr. Colosimo submitted that the respondent has demonstrated that the respondent used all available information at its disposal concerning the application of the Pez's. The deferral of consideration of the application to determine whether accommodation could be made using the **Drainage Act** to alleviate the impact of flooding. Mr. Colosimo submitted that due process had been followed in reaching its determination.

2. Did the respondent adhere to the **Conservation Authorities Act**, the regulations, provincial and its own policies in reaching the decision.

. . . . 16

Mr. Colosimo submitted that all policies of the respondent, as well as the applicable law, had been adhered to in reaching a decision.

3. Did the respondent exceed its mandate or jurisdiction in any way.

Mr. Colosimo submitted that there is no evidence that the respondent exceeded its jurisdiction in rejecting the application. Rather, all the evidence suggests that their mandate was strictly followed.

4. Is the decision of the respondent reasonably supportable on the evidence.

Pointing to the study for 2527 Hamilton Road, Mr. Colosimo submitted that the available information was supportive of the refusal. There was no evidence adduced at the hearing to indicate that the elevations used, which were supplied by Robinson on behalf of the appellants, should not have been used. There was no evidence that there were other elevations which should have been considered. The calculations of flood depths, therefore, were reasonable.

5. Is the respondent consistent in the exercise of its mandate.

It is consistent with the mandate of the respondent that new development within the floodway will not be permitted. There is a distinction between additions to existing dwellings and totally new construction. Mr. Colosimo submitted that these guidelines are reasonable and, in the opinion of the respondent in its administration of flood plain management, the minor additions do not adversely impact on potential flooding or on the ability of the watercourse to discharge floodwaters.

Concerns were raised with regard to the new subdivision. It is located in the flood fringe rather than the floodway, and development is permissible using the Two Zone approach with proper engineering techniques. Mr. Colosimo submitted that there was no evidence that construction of new homes in the subdivision was permitted below the level of the 1:100 year storm flood level. He added that, while lots may extend below this level, the homes themselves were not permitted at this elevation.

Mr. Colosimo submitted three cases of the Mining and Lands Commissioner in support of the respondent's position. In **Willis v. Cataraqui Region Conservation Authority**, (unreported) February 25, 1992, which recognized that even

. . . . 17

though guidelines are not regulations, they are recognized as proper tools to assist the conservation authority in making its decision. Referring to page 2 of the decision, Mr. Colosimo submitted that the respondent asked the tribunal to make a similar finding, namely, that the authority was not unreasonable in refusing permission and did not exceed its mandate or jurisdiction in refusing permission. Referring to page 4 of the decision, which relies on **Blake v. The Grand River Conservation Authority**, (unreported) March 20, 1992, Mr. Colosimo submitted that the tribunal should only step in if the decision of the authority is not reasonably supportable.

Mr. Colosimo submitted that the current appeal is distinguishable from the facts in **Junker v. Grand River Conservation Authority**, (unreported) August 12, 1992, where the lot in question was the last one which could be developed backing onto the river. However, there are remaining lots in Bright's Grove which could be developed.

Mr. Pez submitted that the evidence of the respondent did not prove that there would be any impact on flooding from infilling. He submitted that there is no proof concerning flood levels.

On the facts, Mr. Pez reiterated that the golf course area is lower than the land in question. He stated that the house he proposes to build would not have a septic system. He stated that he has built 33 houses and knows better than to build where there is a problem.

He submitted that the actions of the respondent amount to an action to strip him of his rights. He paid $75,000. for the lot and is only seeking to do with it that which the law allows. Since 1992, he has paid taxes for the lot as a building lot, rather than as vacant land. The actions of the respondent, in Mr. Pez's submission, can be characterized as using their mandate to retain private land for purposes of creek management.

Mr. Colosimo concluded by stating that the respondent was not seeking its costs in the appeal.

Finding of Fact

The tribunal finds that it is reasonable to use the Hamilton Road Study to base the flood elevation and velocity for the subject lands. It was open to the

. . . . 18

appellants to commission their own study to refute the findings of the respondent and they did not choose to do so. In the situation where a conservation authority has not performed flood plain mapping, decisions on applications must be made on the best available information. Ideally, this information would be supplied by the applicant, but it is not unreasonable to extrapolate findings from a site upstream or downstream, as long the distance and conditions for doing so are sound and supportable, which the tribunal finds they are in this case.

The elevations for the subject lands were supplied by the appellants. While it might not have been unreasonable to seek a comparison of elevations with the Hamilton Road property to ensure that the extrapolation of information was based upon the same benchmark, it is not the duty of the respondent to undertake its own survey unless there was disagreement between the parties concerning elevations. The respondent acted reasonably in accepting the elevations supplied by the appellants.

The use of the two-zone approach by the respondent is based upon the Provincial Flood Plain Planning Policy, for which, as an agency of the government, conservation authorities, must have regard. The respondent is in a unique position to assess the flood levels within its jurisdiction and determine whether the two zone policy should be applied to a particular portion of a watercourse.

The respondent has a very liberal approach to additions to existing structures within the floodway, as a means of helping to ensure the continuing viability of older communities built within the floodway at a time when the watershed was not subject to the respondent's jurisdiction. Additions of no more than thirty percent of the existing floorspace may be allowed, where the use is not intensified, where there is no possibility of relocating the addition to another location and where floodproofing methods, which must be to the regulatory flood level, are of an engineered design acceptable to the respondent. This seemingly liberal policy carries with it the possibility of perception that there is an unequal treatment with regard to building in the floodway.

An area within close proximity of the watershed determined to be within the floodway carries with it very significant importance. The jurisdiction of the respondent, in considering applications, is to examine whether the land has inherent characteristics which make it unsuitable for building. There characteristics, directly concerned with flooding in this case, include considerations of potential flood depths

. . . . 19

and flood velocities at the location in question, safe access and egress to the property both for occupants and emergency vehicles, and impact on flooding both upstream and downstream. The greater the degree of encroachment into the floodway, the greater the potential harm to both existing structures and persons near or in those structures.

Decisions concerning land have historically occurred without the jurisdiction of conservation authorities with respect to this very narrow issue - the inherent characteristics of certain lands to not withstand human encroachment through construction or placing of fill. While conservation authorities have input into official plans, official plan amendments, zoning by-laws and the like, all of which are planning matters, the hazardous nature of flood lands may not be reflected in land use documentation due to the relative newness of the Provincial Flood Plain Planning Policy and opportunities for change. The fact that a property may be zoned as residential or be serviced must necessarily be irrelevant for purposes of the jurisdiction of determination of approvals under the **Conservation Authorities Act**. Protection from the latent threat of a major storm event, such as the 100 year storm or regional storm, along with watershed management, has been given through legislation to conservation authorities who are uniquely equipped to assess encroachment on lands within their jurisdiction.

Concerning the perception of unequal treatment of properties within the immediate vicinity, the tribunal makes the following observations. The subdivision development was within the flood fringe, and therefore at a substantially lesser risk than construction in the floodway, notwithstanding that over time concerns could arise from encroachments into the floodway such as decks or swimming pools installed without approval. However, flood fringe lands, being higher than floodway lands, have been designated as relatively less hazardous, although not capable of development without certain requirements of the conservation authority being met. The tribunal finds that the buildings on the lands within the subdivisions discussed at the hearing are within the floodway and are subject to a less stringent application of the prohibition of construction.

Concerning the additions to existing buildings within the floodway, the respondent does have the discretion to determine whether it will allow for such additions. It has chosen, through its executive committee resolution EC-90-118 passed May 24, 1990, to exercise its discretion in a manner which would not put more people at risk. Without a doubt, the decision to allow for minor additions will have an impact

. . . . 20

on flood levels within the floodway. In choosing not to allow new buildings to be constructed within the floodway, aside from the inherent risks, it is recognized that the impact of additions to existing buildings must not be compounded. While this choice of allowing building at one location over another may appear arbitrary, it in fact reflects the position of this conservation authority to recognize pre-existing development and not jeopardize the viability of the community. The conditions under which such construction could occur are very limited when compared to throwing the door open for development of new buildings within the floodway and putting additional people at risk who would not otherwise be there.

Submissions concerning history of flooding or distance from the top of the bank are irrelevant for purposes of considerations of an appeal. Statistically, the frequency of a regional storm may be a one in two hundred and fifty year occurrence. However, that does not mean that it cannot occur two years in a row. More importantly, it does not mean that it is too remote a risk for the respondent to be concerned with. Clearly, the respondent has jurisdiction to determine whether construction is acceptable within the floodway. There is no evidence that it has acted arbitrarily or inconsistently. Similarly, the distance from the top of the bank is not determinative of flood susceptibility. Flooding during the regional storm or other major storm event is determined by a given amount of rainfall over several hours and the capacity of the watercourse to drain. In certain areas, such as the subject lands, the creek bed itself has a very small capacity, and the rainwaters will overtop the banks for some distance. As the land in the vicinity is quite flat, this overtopping, however incredible it may seem, could reach well over 100 feet, depending on elevations next to the creek. Purely linear distance from the watercourse itself cannot be determinative, where it is shown that the land in question is within the flood plain, or more particularly, the floodway, as is the case here.

Based upon the calculations of flood depths of 1.64 metres or 5.38 feet and particularly velocities of up to 373 cubic metres per second, it is unquestionable that the structural integrity of the proposed structure would be at risk. Based upon the facts of this case, as presented at the hearing, the tribunal finds that the decision of the respondent is sound and should not be interfered with. While the appellants have submitted that they would use construction techniques which would alleviate these concerns, the tribunal notes that Mr. Pez is not a construction engineer and does not have sufficient expertise in matters of flooding. This consideration and effects upstream and downstream aside, structures which are meant to withstand floods such

. . . . 21

as dams and dikes have been known to fail. Proper flood plain management techniques have not historically recognized construction as fail safe and an appellant cannot succeed on such a basis. It is to be noted that there was a discrepancy in the evidence of the appellants and respondent with respect to the slope alongside the proposed dwelling. Mr. Pez was quite clear that four feet of poured concrete would be exposed, while the witnesses for the respondent discussed the 1 to 1 slope from the top of the foundation to the lot line. The tribunal finds that the decision of the respondent is not affected by this misunderstanding of the facts. The slope alongside the proposed dwelling is one of the factors of concern in reaching a determination. Taken with encroachment in the floodway, related flood levels upstream and downstream, concerns of safe access and structural integrity, the tribunal finds that slope stability will not affect the outcome. Similarly, while the planting of trees along the bank could enhance slope stability of the creek for purposes of erosion, there was no evidence that the impact of mature trees on the bank would sufficiently impede flood flows or alter flood patterns.

The right of the respondent to make determinations concerning the ability of a watercourse to withstand human encroachment on adjacent land within its jurisdiction may appear to be a method of ensuring that land remain as open space without the necessary steps to acquire the land. However, where a conservation authority has made a decision based upon unrefuted evidence of substantial flood levels and velocities on the land, which is within its mandate under the **Act**, there can be no finding that the authority has exercised its discretion for an improper purpose. The tribunal finds that the exercise of its powers in this matter was not for an improper purpose.

The tribunal finds that no order will made as to costs.