



The Mining and Lands Commissioner

In the matter of The CONSERVATION AUTHORITIES Act

G.H. Ferguson, Q.C.) Monday, the 28th day
Mining and Lands Commissioner) of August, 1989.

AND IN THE MATTER OF

An appeal against the refusal to issue permission to place fill and steel pilings on Lots 141 and 142, Plan 6 in the Township of Bosanquet in the County of Lambton.

B E T W E E N:

amended
May 9, 1989.

STEWART CLUTTON and FLORITA HUNT

Appellants

- and -

AUSABLE-BAYFIELD CONSERVATION
AUTHORITY

Respondent

K.J. Williams, for the appellants.
T.G. Price, for the respondent.

The appellants appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission retroactively for the placing of fill and steel pilings on Lots 141 and 142, Plan 6, in the Township of Bosanquet in the County of Lambton. By Ontario 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 Sarnia on May 9 and 10, 1989.

The appellants reside on the southerly side of Biddulph Street, sometimes spelled Biddolph, in the community of Port Franks. Biddulph Street is a street shown on Plan 6 which shows Lots 141 and 142 on the north side of the street. A small portion of these two lots consists of land and the remainder appears to be under the waters of an elbow in the Ausable River. Nothing in this decision affects the issue of title or the right to place fill on the lands in issue. There was no evidence before the tribunal as to the issue of imperceptible accretion or deliction, avulsion, error or grants from the Crown. This decision is

without prejudice to any decision that may be made in the future on this issue.

The appellants have carried on the business of a handyman construction store. In addition they have continued the operation of a marine service consisting primarily of rental dockage. In the fall of 1987 a considerable amount of fill was placed along the edge of the water. A wall was constructed probably 50 feet from the existing shoreline and the fill was leveled to the wall. The wall was composed of pilings and steel used for the siding of buildings. Decks were placed along the southerly edge of the wall and the areas to the south thereof were sodded.

In the construction of the wall and the placing of fill the appellants overlapped approximately 20 feet of a wall that had been constructed by the Township of Bosanquet along the water's edge on Biddulph Street. This wall had been constructed for the use of a boat to be used for dredging or clearing the mouth of the river.

In the course of the negotiations between the parties it was alleged that the respondent had agreed to the removal of the existing wall and fill to a line shown coloured yellow on Exhibit 2. This exhibit also shows a modification of the wall with a green line agreed to by the township in respect of the fill placed in front of the wall constructed by the township. However, counsel for the respondent took the view that the appeal encompassed the entire filling by the appellants and that any offers of settlement were for the purposes of the appeal withdrawn. For these purposes the line shown coloured orange on Exhibit 2 illustrates the limit of the filling and the location of the wall although there is no suggestion that this exhibit was verified by a survey of an Ontario land surveyor.

The respondent rejected the application on the grounds of control of flooding, pollution and conservation of land.

The first witness called on behalf of the appellants was James A. Monteith, B.A.Sc., P. Eng. Monteith was a recognized expert in respect of agricultural land drainage matters and in

view of his lack of experience with flood control matters his evidence was admitted subject to weight in respect of matters related to the control of flooding.

Many years ago an artificial channel known as the Canada Company Cut was constructed along the tortuous course of the Ausable River leading to the mouth of the river at Lake Huron. For the purpose of this case it is considered that the elbow is part of the original bed of the Ausable River that lay southerly of the cut commencing upstream of the subject lands approximately 600 metres and returning to the cut at a similar distance to the west. The subject lands are situate approximately at the midpoint of the elbow.

For the purpose of his evidence Monteith made calculations based on a part of the elbow shown on Sheet 6 of the respondent's flood and fill line mapping. The portion considered by him is outlined in blue on Exhibit 9, a copy of a portion of that sheet. His evidence was that from the point of view of control of flooding, the area in dispute, i.e. the area between the yellow and orange lines on Exhibit 2, measured 142 square metres and when this area was contrasted with the 7.2 hectares shown in blue on Exhibit 9, the area in dispute contained 0.27% of the area in blue. He also compared it with the area lying between the upper end of the elbow and the lake and concluded that the area in dispute constituted 0.07% of the water area of that part of the river. It was his opinion that this amount of utilization of flood storage did not create a measurable effect on the flood storage capacity of the flood plain of the Ausable River.

Monteith also gave evidence that the flows of water in the elbow were very minimal and that flows could only be expected in major storms although recent dredging operations had created some flows. He also suggested that the area in question would only be subject to backwater flows in a regional storm and that the filling by the appellants would not constitute a protuberance affecting the flows of the river.

With reference to pollution Monteith gave evidence that he was familiar with the project from which the fill had been taken. He identified the fill as perth clay, a medium or heavy clay and suggested that it was the type of stable soil which, as contrasted with a sandy, silty soil, would be least likely to migrate and in his opinion the existing wall would effectively contain the backfill that had been placed with the result that there would be no pollution from the project.

Monteith gave evidence respecting four other sites on the river which were introduced as precedents in respect of the policy of the respondent. These will be referred to by location numbers. Location 1 was on the cut above the elbow and was said to contain a sheet pile wall with a noticeable protuberance into the river. Location 2 was a park area lying upstream of the upper intersection between the cut and the elbow. Location 3 was a case of dredging of the bed of the elbow a short distance upstream from the subject lands and it was suggested that the spoils were being deposited in the middle of the stream in a loose, uncompacted manner. Location 4 dealt with a public park at a location downstream from the elbow but at a further intersection of the river and the cut. The witness had not visited this site.

The witness agreed on cross-examination that there was a significant protuberance into the oxbow by the placing of the fill. He also agreed that the quality of the material in the wall was not as strong as the material used in the construction of the township wall. He agreed that there were weaknesses in the wall that had caused buckling and he indicated that in his opinion steps should be taken to rectify deficiencies in the quality of the wall that had been constructed.

It was apparent from the photographs that the waters, which are subject to changes in elevation of the Great Lakes to some degree were quite low and that the wall did not retain the flows or its stability during the winter of 1988 - 89 in which the

water levels in the Great Lakes were low.

John Lawrence Russell, a member of Council for the Township of Bosanquet, was called to confirm the entering into the agreement with the appellants but he noted that the agreement had not been fully executed by both of the appellants.

The evidence of the appellants indicated that they had expended approximately \$10,000 to \$12,000 on the project, that they had not obtained any evidence from a geotechnical or a soils engineer regarding the placement of fill or any advice in respect of the material to be used in the construction of the wall. The evidence also indicated that the number of cubic yards of fill that had been placed was in the vicinity of 320 cubic yards consisting of approximately 20 loads with 16 cubic yards per load. Monteith was recalled and gave evidence that with compaction this amount of fill would be reduced to 240 cubic yards although there was no evidence before the tribunal to show that any compaction other than the use of the bulldozer was involved in the project.

The evidence for the respondent indicates that the subject lands are situate within the flood plain of the Ausable River and are below the regional floodline as established by the regulation of the respondent. The subject lands are also below the fill line established by schedules under the regulation. The evidence referred to the loss of storage capacity, the interference with flows and the risk of pollution particularly from the breaks that have occurred in the wall. The risk of pollution was said to be from the sediment that would result from the escape of fill into the waterway.

With reference to the precedents put in evidence on behalf of the appellants, E.P. Elston, the Planning Resources Co-ordinator of the respondent, dealt with the locations. With reference to Location 1 the witness was unable to identify the location. He was able to find correspondence on a property in the area known as the Kraft property but the property referred to did not appear to be this property. No permission was granted in

respect of the Kraft property and no permission was granted for any other properties at the location. No permission had been granted in respect of Location 2. The permission issued in respect of Location 3 required the spoils to be placed at a location where they would not wash into the river and if this was not being complied with there was a breach of the condition of permission. With reference to Location 4 the witness indicated that when the new sheet pile retaining wall was constructed at this site it replaced an old wall as closely as possible and that while the old wall was left in position there was very little encroachment into the waterway.

The witness also referred to other locations where fill had been placed and as a result of action taken by the respondent the fill was removed.

The evidence also indicated that in this case the hundred year flood had a higher elevation than the regional flood and that any discussion of two-zone policy was not relevant. The witness also discussed the issue of a special policy area for a portion of Port Franks and indicated that the subject lands were not within any of the areas under consideration for this type of treatment.

Jack E. Gorrie, B.A.Sc., M.A.Sc., P. Eng., was called on behalf of the respondent. His evidence was submitted as expert evidence in respect of hydraulic and hydrologic matters and no objection was taken to his expert qualifications.

He gave evidence that the subject lands were within what is commonly referred to as the floodway, i.e. the area below the hundred year floodline and in accordance with the provincial policy there is to be no development with the floodway. He also confirmed that the condition of the wall indicated poor workmanship, that there was evidence of the absence of appropriate tiebacks at places where movement had occurred and noted undulations in the surface of the fill which indicated that the fill was distorted by the movement of the wall or that the fill

was not properly compacted. In his opinion the wall was not one that could be repaired and more significant action than the repair of the existing wall would be required to establish a stable wall.

Gorrie also gave evidence that the construction of the wall and deck and the placing of the fill would have an impact on the hydraulic aspects of the flood plain. He referred to influences in a perpendicular and a parallel consideration. With reference to the portion of the work that was parallel to the shoreline the witness' opinion was that it was an obstruction into the floodway and would create a turbulence with eddies hitting the wall and excavating at the base of the wall. The effect would be scouring that would not otherwise have occurred along the existing shoreline.

With reference to the portion of the wall that is perpendicular to the township wall the witness' opinion was that this part of the wall is on the outside portion of the curve of the oxbow at which there are higher velocities. In his opinion any obstruction of this nature would interfere with the passage of water. The end result is the creation of eddies and scouring. Even in flows of less than major flows there would be a reduction of the velocities and where the flows are laden with silt the reduced velocities would cause a deposition of the silt which is a major problem in the area.

The witness indicated that if the angle were reduced to 60° there would be less eddying and siltation problems but there would still be a significant intrusion into the flood plain.

With reference to the utilization of the storage capacity of the watershed the witness' opinion was that there would not be a large quantity of loss of storage capacity but such would occur in some part of the Port Franks area.

With reference to the gaps in the wall the witness' opinion was that there would be siltation caused through the gaps in times when there were flows through the oxbow and also when

boat traffic used the oxbow creating waves that reached the wall erected by the appellants. He admitted that the use of clay as a fill would slow the process but in time the clay could be removed from the areas behind the walls.

In comparing the wall erected by the respondent at Location 4 with the present application the opinion of the witness was that the present project was on the outside of a curve and constituted an intrusion into the floodway. The wall erected at Location 4 was behind a peninsula and it was not in a location that would affect the flows of the river. With reference to the methods of construction used, namely, the retention of the existing wall, the witness was of the opinion that this was the better and more cost effective approach.

With reference to the project at Location 3, the witness advised that in the short term there would be a disruption of the quality of the water but this would be flushed out with subsequent flows and in the long term there would be a beneficial result with less erosion resulting than if the project had not been carried out.

The argument of counsel for the appellant was that the appellants had been denied a decision based on the implied policy of the respondent under which other landowners in similar circumstances had been granted permission and secondly that the decision was not in accordance with principles of flood plain management.

With reference to the precedents on which it was attempted to establish an implied policy of the respondent there was no evidence to suggest that the respondent has issued approval in respect of Location 1. There was no clear evidence that the respondent had caused fill to be placed at Location 2 or had authorized the placing of fill thereat. With reference to Location 3, the nature of this project was one to remove fill and was not a project to add fill to the floodway as has been done in the present case. The evidence produced by the appellants seemed

to indicate that the persons conducting the project may have been in breach of the conditions of the permission issued and this tribunal cannot conclude that the granting of permission in this case with conditions respecting the removal of the spoil can be construed as evidence of an implied policy of permitting additional fill to be placed in the floodway. With reference to Location 4 the tribunal is satisfied that the project was carried out in a cost effective method in an area that was not likely to cause an increased problem of interference with the flows of the river or the amount of sedimentation that might be added to the river.

This tribunal is not able to conclude on the evidence that there was an implied policy of the respondent under which permission had been granted to other landowners in circumstances similar to the present case.

It was clear from the evidence that the granting of permission in this case is contrary to the policy of the respondent. It is also clear that the filling is contrary to the policy of the Province of Ontario. The evidence indicated that the site on which the fill is placed is within the floodway of the river and under provincial policies any new development in floodways is generally prohibited. Exceptions for marinas are provided but the project was not the erection of buildings or structures for marina purposes and was merely a land reclamation project. The project went much further than protection of existing land situate above water in average circumstances. In an approved project there would be requirements for site specific floodproofing as well as an overall consideration of the loss of storage capacity and related additional flooding or changes in elevations, interference with flows and pollution i.e. flood plain management principles.

It was apparent to the tribunal that the erection of the wall and the placing of the fill was done without appropriate scientific advice and that the wall, even if it were approved, would have to be rebuilt, rather than repaired, to provide a

suitable protective device at the location. This tribunal makes no comment on the proposed alternatives as they were not in issue before the tribunal.

The tribunal is satisfied that the appellants have not been denied the benefits of any implied policy of the respondent under which other landowners in similar circumstances have been granted permission. In addition the tribunal is also satisfied that the refusal of the respondent was in accordance with principles of flood plain management. 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 28th day of August, 1989.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.