



# The Mining and Lands Commissioner In the matter of The CONSERVATION AUTHORITIES Act

G.H. Ferguson, Q.C. ) Monday, the 25th day of  
Mining and Lands Commissioner ) April, 1988.

AND IN THE MATTER OF

An appeal against the refusal to issue permission to construct a storage shed on part of Lot 13 in Concession IX, (East Flamborough) in the Town of Flamborough in the Regional Municipality of Hamilton-Wentworth.

B E T W E E N :

DONALD K. HARTIN

Appellant

- and -

HALTON REGION CONSERVATION  
AUTHORITY

Respondent

D.H. Greenfield, agent for the appellant.  
R.I.R. Winter, Q.C., for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission for the construction of a storage shed on part of Lot 13 in Concession IX, formerly in the Township of East Flamborough, and now in the Town of Flamborough in the Regional Municipality of Hamilton-Wentworth. By Ontario Regulation 364/82 the power and duty of hearing and determining such appeals were assigned to the Mining and Lands Commissioner. The appeal was heard in Toronto on March 29, 1988.

The part of the township lot owned by the appellant lies on the northeasterly side of Highway 6. The Bronte Creek flows in a southeasterly direction through the lands of the appellant, leaving the lands at the southeasterly boundary thereof and shortly thereafter flowing under Highway 6 through a culvert which does not permit the passage of the flows of a regional flood. A residence is presently constructed on the lands of the appellant. It is proposed to construct a storage building to the

north of the residence and although the appellant was aware of the jurisdiction of the conservation authority by reason of a diversion of the Bronte Creek undertaken by him in the past the foundation and part of the walls of the proposed storage shed were constructed prior to the application for a permit. The evidence indicates that there may have been some confusion in interpreting the township by-laws as they apparently permit the construction of garages without the need of a building permit.

The elevation of the regional flood taking into account the constriction in Highway 6 is 267.8 metres or 878.65 feet above sea level. The lowest elevation at the site of the construction is 265.03 metres or 869.52 feet. This means that in a regional storm the site would be subject to 2.77 metres or approximately nine feet of flooding.

In an attempt to provide some measure of flexibility in its administration the respondent has established the elevation of the regional flood in the event the culvert in Highway 6 would pass the flows of the regional flood. Near the site of the construction the elevation of this line is 265.6 metres or 871.4 feet. The construction site is closer to the creek than this line and, as indicated above, at a lower elevation.

Notwithstanding that there would be a depth of flooding in the event of a regional storm varying from 7.25 feet at the lower edge to no flooding at the upper edge, the respondent has developed the policy of permitting the construction of buildings in the area between the actual regional flood elevation and the elevation that would exist if the culvert in the highway did not restrict the flow. This policy is conditional on the maintenance of the flood storage volumes and flood-proofing of the buildings and access thereto in accordance with the stated policy.

The respondent found at its hearing and it was again established before this tribunal that the proposal of the appellant did not fall within this policy as the location of the construction was at a lower elevation than the "natural" regional flood elevation. It was also apparent from the evidence that

there are locations on the land of the appellant at which the proposed building could be located which would fall within the policy of the respondent. It was further apparent that if an application were made at one of these locations the appellant would receive the permission of the respondent subject to the conditions of its policy which would involve a matter of providing alternative storage capacity as well as flood-proofing.

The argument put forward by the agent for the appellant, who was a consulting engineer with experience in water related matters, was based on his calculation of the effect on the elevation of the flood waters caused by the proposed structure as contrasted with the loss of storage capacity resulting from the constriction of the flows of the regional flood by Highway 6.

The agent was not able to refer the tribunal to any principle of flood plain management that indicates that this is a satisfactory theory for the placing of buildings at locations that are subject to approximately nine feet of flooding during a regional flood. Further the tribunal is not aware of any such policy of the Province of Ontario.

The tribunal is satisfied from the evidence that the refusal of the application was in accordance with the policy of the respondent and that the appellant was not being denied permission in circumstances under which the respondent has given or would be prepared to give permission to another applicant. There was no evidence that the proposal of the appellant was based on any federal, provincial or municipal policy or requirement that would justify the reversal of the decision made by the respondent and although the proposal was at an elevation of one foot, ten and one-half inches below an elevation at which the respondent would have been prepared to have granted approval subject to conditions, it can only be remembered that the location was subject to nine feet of flooding in the actual conditions of the site and in view of this depth of flooding with the accompanying loss of storage capacity, effect on flows and risk of damage to property this tribunal is of the opinion that

the decision of the respondent should not be reversed on appeal and 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 matter.

SIGNED this 25th day of April, 1988.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.