



Ontario

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

AND IN THE MATTER OF

An appeal against the refusal to issue permission to place or dump fill on an area in Lot 19 in Concession VIII in the Town of Vaughan in The Regional Municipality of York for the purposes of a parking area.

B E T W E E N :

POLISH ARMY VETERANS ASSOCIATION
OF AMERICA, POST NO. 114

Appellant

- and -

THE METROPOLITAN TORONTO AND
REGION CONSERVATION AUTHORITY

Respondent

W. Jagiellicz, agent for the appellant.
J. Wigley, for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to issue permission to place or dump fill on part of Lot 19 in Concession VIII in the Town of Vaughan in The Regional Municipality of York for the purpose of a parking area. By Ontario Regulation 128/82 the power and duty of hearing the appeal were assigned to the Mining and Lands Commissioner. The hearing was held in Toronto on April 5, 1982.

The president of the appellant appeared on behalf of the appellant. He brought no expert evidence to this tribunal to support the application. He stated that the area applied for was wet during the summer and harbours mosquitoes making it unsuitable for use as a park area. The appellant contemplates

...2

the erection of a community centre which would be available not only for the appellant but for rental by the community generally and a parking space would be required in connection with the proposed centre. He indicated that three groups of veterans were joining together to provide the funding for building the centre. He stated that the appellant was unable to afford a solicitor and accordingly, he, as the president, was appearing.

In his evidence Jagiellicz, at the suggestion of the tribunal, outlined the history of the creation of the appellant and its role in society. The society purchased an area approximately 30 acres in size approximately 15 to 20 years ago. The parcel lies westerly of highway 27 and easterly of the Humber River. He was unable to provide the tribunal with a definite area of the site on which it was proposed to place fill. He brought no plans to illustrate the existing buildings on the land of the appellant or the proposed location of the community centre or otherwise illustrate any principle of need. He brought no evidence to the tribunal to show that the requested filling was in accordance with any principle respecting the placing of fill in flood plains but he did express his own opinion that in the event of a serious flood the diversion of flood waters would not create a problem.

On cross-examination it appeared that the land had been owned by the appellant for approximately 30 years. The respondent had issued permission for the erection of certain improvements on the land which is situate within the area defined in Schedule 3 to Regulation 170 of Revised Regulations of Ontario, 1980 and its predecessors. There is presently situate on the land of the appellant a kitchen, public washrooms, a small cabin for the use of a caretaker and a platform for dancing with supporting electrical installations.

The witness indicated that at present parking is permitted over the entire property. The proposal is to

construct a hall that would accommodate 1,000 people on the main floor and 500 people on the ground floor. He did admit that if the fill were placed an equivalent volume of water would be expected to overflow other properties in the event of a regional storm.

The evidence of the respondent showed that the subject site was within a scheduled area and further that it was within the area calculated to have been flooded by Hurricane Hazel in 1954 and also within the flood plain of the regional storm as defined in Regulation 170.

John W. Maletich, the Head, Development Control Section of the Water Resource Division of the respondent, identified the subject lands and produced a number of photographs illustrating that the subject site is a low area lying between a rather tortuous course of the Humber River and a higher bank situated on the appellant's property. One of the photographs illustrates a changing pattern in the location of the channel of the river in this area. The photographs also illustrate the existence of a motel and a restaurant to the north of the subject site which are completely within the flood plain and in respect of which permission to place fill has been refused.

With reference to the policy of the respondent, the witness gave evidence that while the use of lands in flood plains for parking purposes was contemplated by the policy of the respondent, the policy does provide that such areas should not be permitted where the flooding would be greater than 18 inches. In this regard the application states that the proposal is to fill to the regional flood elevation which would require fill to a depth of three meters. The witness also pointed out that the purpose of the policy is to prevent flooding including the loss of property or life in the valley system and in lands above the valley system where the filling would change the level of flooding.

Although the agent of the appellant did not cross-examine the witness, the bench inquired as to whether the proposed filling could fall within any of the usual exceptions to the prohibition of the regulation. The witness indicated that the respondent does not encourage the use of the stage storage doctrine and pointed out that in the usual application of such a doctrine the area from which the fill would be removed is usually on the opposite bank of the watercourse and the appellant does not own land on the opposite bank. The witness indicated that the size of the area on which fill was proposed to be placed is approximately one acre measuring approximately 200 feet by 200 feet and that a volume of some 7,500 cubic meters of fill would be required if the permission were granted.

Jon Craig Mather, P.Eng., the Administrator of the Water Resource Division of the respondent, gave evidence confirming the location of the subject site within the boundaries of the regional storm flood plain. He gave evidence of serious flooding in the spring of 1979 and on another occasion when flooding was created by ice-jams and gave his opinion that the proposed site was very subject to flooding during normal spring break-ups. He indicated that he had recalculated the amount of fill required to satisfy the application and that the appropriate volume would be in the vicinity of 14,500 cubic yards. He expressed his concern in respect of the application in the loss of the natural valley storage which would increase the depth of flooding on adjacent properties and the precedential implications of granting permission in this case, particularly where permission had been refused in respect of adjacent properties. In his opinion, an application of the stage storage principle would not be advisable in the particular case. In this regard it was pointed out that if on subsequent applications permission is granted to the motel property and the restaurant property an embankment in

a north-south direction would be created which would block off a substantial quantity of the flood plain which lies to the east of Highway 27.

The agent for the appellant made no formal submissions to the tribunal. The submissions on behalf of the respondent were that the placing of fill was clearly prohibited by Regulation 170 and was within the area of control and concern of the respondent. It was submitted that the only grounds for granting an exception to the general prohibition of Regulation 170 is if the control of flooding would not be affected by the granting of the permission and it was submitted that the appellant had failed to meet the burden of establishing that his proposed application would not affect the control of flooding. In this regard it was submitted that the agent for the appellant had admitted that there would be an effect on flooding and the evidence of the two witnesses for the respondent establishes that there would be a significant effect on the storage capacity of the river with its usual effect of increasing the area to be flooded in the event of a regional storm, particularly emphasizing the fact that a repetition of the issue of permission would remove a very substantial portion of the flood plain now available in the event of a regional flood.

In reply, the agent for the appellant suggested that the building of an embankment to the east of the river would provide some measure of protection to Highway 27 in the event of a regional flood. In this regard the view of this tribunal is that in the absence of any evidence to support such a finding of fact of a scientific nature it would be unwise to come to this conclusion and it would be better to give weight to the loss of storage capacity rather than the possibility of protection of the highway.

Without repeating the submissions of counsel for the respondent, this tribunal adopts the submissions with one exception.

The exception relates to the admission that the proposed filling would have an effect on flooding. This potential occurrence in itself does not preclude the granting of permission by the respondent or this tribunal on appeal from a refusal of the respondent. Section 4 of Regulation 170, Revised Regulations of Ontario, 1980, reads as follows:

4. Subject to the Ontario Water Resources Act or to any private interest, the Authority may permit in writing the construction of any building or structure or the placing or dumping of fill or the straightening, changing, diverting or interfering with the existing channel of a river, creek, stream or watercourse to which section 3 applies if, in the opinion of the Authority, the site of the building or structure or the placing or dumping and the method of construction or placing or dumping or the straightening, changing, diverting or interfering with the existing channel will not affect the control of flooding or pollution or the conservation of land.

With regard to this section this tribunal has pointed out on a number of occasions that the key phrase is "will not affect the control of flooding...." which is not a reference to an opinion that the proposal will increase flooding or have an effect on flooding. Accordingly, consideration must be given to a broader view of an application and consideration directed not solely to the effect on flooding of the proposal but also to the question of whether the proposal is compatible with or will not affect the control program of the conservation authority making the regulation.

The appellant failed to establish before this tribunal that it had been deprived of any policy of the respondent under which it would have been entitled to the granting of permission to place fill in an area that is subject to the regulation of the respondent. No evidence was brought to

the tribunal of the granting of permission to place fill in similar circumstances or the scientific effect of the placing of fill with regard to the diminishing of control over flooding. The tribunal is particularly concerned that a very substantial amount of fill would be required in the particular case and the precedent which would be set in allowing the appeal would be very significant.

Accordingly, the tribunal is not aware of any grounds on which it should allow the appeal and grant the permission requested. The tribunal did raise a number of approaches that are frequently raised in these matters and the scientific evidence produced on behalf of the respondent indicates that it is not a proper case for an application of these principles.

In the absence of any such evidence to the contrary, or such evidence that could be accepted by the tribunal in preference to the evidence of the respondent, the evidence of the respondent is accepted and it is found that the proposal would have an effect on the control of flooding as contrasted merely with a concept of effect on flooding. Such being the only evidence given before this tribunal there was no evidence produced on which this tribunal could conclude that the proposal has no effect on the control of flooding.

1. IT IS ORDERED that the appeal in this matter be and is hereby dismissed.

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

DATED this 13th day of April, 1982.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.