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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 construct a structure on Lot 33, Plan M-1111 being part of Lot 9 in Concession VII in the Town of Vaughan in The Regional Municipality of York.

B E T W E E N :

JOSEF NAGY

Appellant

- and -

THE METROPOLITAN TORONTO AND REGION CONSERVATION AUTHORITY

Respondent

The appellant in person.
R. G. Doumani for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission under O. Reg. 735/73 to construct, or more appropriately, to complete the construction of a small building on the appellant's property in the community of Pine Grove in the Town of Vaughan in the Regional Municipality of York. By O. Reg. 914/78 the power and duty of hearing and determining the appeal was assigned to the Mining and Lands Commissioner.

The appellant owns a parcel of land on the east bank of the Humber River measuring approximately 140 feet in width and approximately 180 feet in depth. The residence on the property is situate approximately in the centre of the parcel and the land to the west of the residence slopes to the Humber River. There are two predominant slopes and the appellant commenced the construction of a concrete block building measuring 14 feet 8 inches in width and length on the slope closer to the water. The building has not been

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completed. Substantial footings were dug into the bank. Ten inch concrete blocks were placed on the footings. Concrete block walls with the exception of doorways and an area for a greenhouse were erected and a roof was placed on the walls except on the portion that was to cover the greenhouse portion of the building.

The building was constructed without obtaining permission from the respondent or a building permit from the town. The appellant admitted that this was a mistake but that he had been convicted of an offence by the provincial court and paid a fine. He then applied for permission to complete the building. The reason given by the respondent in refusing to grant permission was that the structure will interfere with the control of flooding in the area.

The first submission of the appellant was that the building would not interfere with the flow of a regional storm as it was situate at a location to which no flood waters had risen since 1964 when he purchased the property. It appeared that the appellant misunderstood the nature of a regional storm and had assumed that it meant something less than Hurricane Hazel which is the basis of the definition of the term in O. Reg. 735/73. He further submitted that the building and its contents would not sustain great damage in a catastrophy such as Hurricane Hazel by reason of the strength of the walls of the building and the fact that only garden tools would be stored in the building which tools would not be damaged by flooding.

The appellant referred to other structures that are presently existing in the floodplain such as bridges and while admitting that bridges are a necessity he felt they caused far greater obstruction to the flow of the river than his small building and there should be no objection to permitting him to complete the building. He also took the position that there are a number of buildings including residences in the floodplain, which buildings according to the evidence were constructed prior to the making of the regulations, and that as long as they were permitted to remain the risk from his building was comparatively negligible.

The appellant also submitted that the Town of Vaughan has supported his position. A letter was issued by a planning official of

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of the town stating that the council had tabled his application for a minor variance and a building permit pending resolution of the issue with the respondent and adding such a comment. A copy of the letter was filed.

In conclusion the appellant submitted that the thrust of his appeal was based on a request for sympathy and he could not provide the tribunal with scientific or legal principles to support his position.

The evidence of the respondent indicated that the elevation of the regional floodline on the stretch of the Humber River in question is 485 feet. This elevation was shown on the flood map of the respondent filed with the regulation in question. This elevation is somewhat inconsistent with the hearsay evidence given by the appellant who advised that he had been told that Hurricane Hazel rose to the corner of the residence on the subject lands. If such were the case, the elevation of the regional floodline should have been shown at 490 feet, which elevation passed by the corner of the residence.

Jon Craig Mather, P.Eng., who specialized in water related studies in his undergraduate work at the University of Guelph and who has been employed by the respondent in similar work since his graduation in 1971, gave evidence that a calculation of the regional floodline for the area based on the definition in the regulation places the line at a higher elevation than is shown on the floodline map.

Mather also gave evidence that it is the role of the respondent to manage and conserve the natural resources, with some exceptions, in the area under its jurisdiction. In so doing it attempts to protect land from flooding and erosion and in its program attempts to recognize the problems of urban and rural development. In so doing it classifies land in river valleys into the following four classifications:

(a) river mouth marshes;

(b) lower valleys;

(c) middle valleys; and

(d) upper valleys, which includes the headwaters.

The site in question is classified as lower valley. In this

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category the respondent attempts to maintain the natural valley storage and the physical characteristics which pass the flood flows. He pointed out that in the area of the subject lands there is a relatively well defined valley and the river has well defined banks. It meanders considerably. There is a considerable amount of development in the valley which occurred prior to Hurricane Hazel and which is, in his professional opinion, an unsatisfactory and unacceptable level of development which is in conflict with the respondent's policy of maintaining the natural condition of the lower valleys.

With reference to the site of the building, the evidence based on the floodline map indicates that the flooding in Hurricane Hazel reached eleven feet above the stream bed, which would have the result that in a regional storm the building would be surrounded by five to six feet of flood waters.

The site would also be susceptible to lesser flows by reason of its location. It was his opinion that the building itself would be damaged during a regional storm in that the glass areas would undoubtedly be broken by floating debris.

With reference to whether the building affects the control of flooding Mather stated that in his opinion such was the case. He defined the control of flooding as the prevention of things that interfere with or obstruct the natural flood flows through the valley. As the building is located next to the river and in an area where the regional flood would reach heights of at least five to six feet there would be interference with such flows.

With reference to storage the witness submitted that the volume of 2,500 cubic feet was insignificant but that the granting of permission would have a domino or precedential effect and once a policy of granting permission for such types of building is established it would be difficult to determine a level at which such policy should terminate.

The witness pointed out that obstruction of flood flows in a regional flood would be caused not only by the building itself but by debris such as large trees and cars being blocked by the building and

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creating a dam effect resulting in additional upstream flooding.

During the cross-examination of this witness nothing was brought out to show that the appellant had been treated any differently than any other landowner. No cases were brought to my attention in which the respondent had granted permission in similar circumstances. Reference was made to bridges but, of course, bridges by their very nature fall into a class of well accepted exceptions.

The submission of counsel for the respondent was that the evidence clearly established that the building comes within clause a of section 3 of O. Reg. 735/73 and did not fall within the exception in section 4 in that there was adequate evidence to establish that the building would have an effect on the control of flooding. It was further submitted that while this effect per se may be insignificant, the granting of permission in such circumstances creates a dangerous and uncontrollable precedent in an area having an undesirable amount of obstruction that occurred prior to the making of the regulation. Reference was made to the petition mentioned but not filed by the appellant indicating agreement of the neighbours to the construction of the building and it was submitted that reliance should not be given to such evidence as the persons who placed their signatures on the petition may well be interested in constructing similar buildings and are part of the cumulative precedential problem. In this regard reference was made to a lawsuit brought by a golf course in Scarborough against the respondent, which is not resolved, as an indication of the expectation of landowners in regard to the programs of a conservation authority.

The governing law respecting the construction of buildings or structures in floodplains is contained in clause a of section 3 and section 4 of O.Reg. 735/73. These provisions read as follows:

> 3. Subject to section 4, no person shall,
>
> (a) construct any building or structure or permit any building or structure to be constructed in or on a pond or swamp or in any area susceptible to flooding during a regional storm;
>
> (b) .....
>
> (c) .....

> 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.

The sole argument of the appellant was that he was requesting the sympathy of the tribunal as the only answer to his plight. It is assumed that the appellant used the word "sympathy" in a layman sense as contrasted with a scientific sense. In the latter there is an element of causal relation or association and it is not understood that the appellant argued that there is any such relation or association. It is understood that his position was based on the loss or hardship that he is occurring through a mistake.

One of the matters to be considered in relation to the hardship of the appellant is that his case is not one of these cases in which it is necessary to construct buildings, if they are to be constructed, below the regional floodline. There is adequate land in his parcel above that line for the erection of a residence and outbuildings.

With reference to financial implications the appellant did not disclose in his evidence the amount of his investment and it was only on questioning from the Bench that he indicated that the material consisting of wood and concrete blocks had cost approximately $1,200 and that the partial building had been constructed by him and his brother. While this amount could not be said to be insignificant there was no evidence to indicate that the loss would be financially crippling to the appellant or that he would be involved in any significant expenditures in removing the partial building if he undertook so to do.

If sympathy is a relevant consideration it must also be relevant to consider the nature of the act of the appellant. The inherent wrongfullness of the act should not be viewed in the light of

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an infraction of a building by-law or a restricted area by-law under The Planning Act. With the exception of a hazard lands categorization, the nature of a restricted area by-law is a political restriction on the use of land based on a political decision as to the general benefit and well-being of the landowners of the municipality or the area governed by the zoning control. In contrast, control of flooding under The Conservation Authorities Act is based on the inherent weakness or risk of exposure of the land itself. In the zoning situation the nature of the control permits the making of minor variances to accommodate the idiosyncracies of individual parcels of land or mistakes of landowners. It cannot be said that such a flexibility exists in the floodplain where the control is related to risk as contrasted with general public interest.

Accordingly principles acceptable in applications for minor variances are not applicable to applications for permission under The Conservation Authorities Act and in this light it is not relevant to follow the thinking of the planning staff and other officials of a municipality in considering the application by the appellant for a minor variance. I have no assurance that the municipal officials understood or considered the proper issues in indicating a support for the appellant in the letter filed. Such is one of the difficulties of filing letters and not producing the author in order that he may be cross-examined. There is no question that the act of erecting the building by the appellant was legally wrong. It is also clear that there is an element of actual as contrasted with political (i.e. as a result of the planning legislative process) wrong. The nature of this actual wrong or harm was demonstrated by the respondent's engineer, even though it was classified as insignificant, in that some of the storage capacity in the floodplain was removed and an element of obstruction or constriction of the flood flow was created. I have some doubt as to the insignificance as admitted by the engineer. He did indicate that there are flat lands to the east that could absorb the effect of the constriction. Such lands may have been owned by the respondent or some public body but if privately owned it appears that the prevention of such additional flooding is one of the matters to be

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considered by a conservation authority.

In addition serious emphasis was placed on the precedential effect of granting permission. The final words in section 4 of the regulation illustrate that in the granting of permission under section 4 the significant consideration is not the prevention of flooding but the broader concept of an interference with the control of flooding. It is in this broader concept that issues of precedent become significant. While the individual case may not cause significant flooding the consideration of the application must relate to the broader concept of control of flooding and whether the granting of permission would create a precedent that could not be distinguished on its merits in subsequent applications. It is proper for a conservation authority to consider the doctrine of precedent because of its relation to the "control of the prevention" of flooding as contrasted with mere prevention of flooding.

Considering the submissions of the appellant against the background that the respondent had properly considered a matter of precedent and that the erection of the building was legally wrong and scientifically wrong and that the financial impact on the appellant is not unduly serious and there is adequate land on which outbuildings could properly be erected, I cannot conclude that it is appropriate to grant permission on the basis of sympathy.

Inherent in the facts of the case, but not argued by the appellant, is a question of whether there should be a de minimus principle i.e. a principle that small matters of insignificant concern although containing the elements of the risk over which the conservation authority has been given jurisdiction, should be permitted. The principle is met by the principles of precedent and of cumulative effect. In the opinion of this tribunal a significant consideration should be whether the conservation authority in question applies such a principle and in the absence of evidence that the respondent applies such a principle and failed to apply it in this case, this tribunal is not prepared to impose the application of such a principle on the respondent.

In addition the evidence of the engineer weighed against the

application of such a principle in that the elevation of the regional flood as currently applied by the respondent is lower than the elevation thereof calculated from an application of the definition of regional storm in the regulation. If the standard applied in fact is less than the legal standard, it would be unwise to reduce the standard further by the application of a de minimus doctrine.

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

IT IS FURTHER ORDERED that no costs shall be payable by either of the parties to this matter.

DATED this 19th day of March, 1979.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.