



The Mining and Lands Commissioner
Le Commissaire aux mines et aux terres

G.H. Ferguson, Q.C.)
Mining and Lands Commissioner) Wednesday, the 23rd day
of May, 1990.

IN THE MATTER OF THE CONSERVATION AUTHORITIES ACT

AND IN THE MATTER OF

An appeal against the refusal to grant permission to construct a single family residence and driveway on part of Lot 11 in Concession II S.T.R. in the Township of North Dorchester in the County of Middlesex.

B E T W E E N :

JOHN STOYANOVICH and MARY STOYANOVICH
Appellants

- and -

UPPER THAMES RIVER CONSERVATION
AUTHORITY
Respondent

B.J. Sullivan, for the appellants.
S.R. Mackay, for the respondent.

The appellants appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission to construct a single family residence and driveway on part of Lot 11 in Concession II S.T.R. in the Township of North Dorchester in the County of Middlesex. By Ontario Regulation 364/82 the power and duty of hearing and determining such appeals were assigned to the Mining and Lands Commissioner. The application was heard in London on February 24, 1990.

In 1986 the appellants purchased a 6.5 acre part of Lot 11 in Concession II S.T.R. for the sum of \$45,000. Their intention was to build a home for themselves and not for resale purposes.

The subject lands form part of the Dorchester Swamp, one of the largest swamps in the area under the jurisdiction of the respondent. They are situate in the southeast quadrant of the swamp as quartered by highways 401 and 73. The swamp is the headwaters a tributary of the Dorchester Creek which is a tributary of the Thames River. Accordingly the subject lands form part of the headwaters as well as the

floodplain of the Thames River system. Also the lands in the swamp form part of the storage capacity of the system. In this regard the evidence of R.M. Goldt indicated that the elevation of the regulatory flood was 100.9 metres based on a local datum of 100 metres assumed at a bench mark at the northeasterly corner of the property. The evidence indicates that many parts of the subject lands would be subject to flooding up to .9 metres or approximately three feet in the event of a regulatory flood.

More importantly the swamp provides the additional function of a reservoir of waters, holding back water in times of high flows and slowly releasing water as the downstream areas dry. By Ontario Regulation 171/88 the swamp was added to the schedules of the regulation administered by the respondent.

In addition the swamp has been declared by the Ministry of Natural Resources to be a Class 1 Wetlands within the wetlands classification of lands in Ontario and has been awarded the highest classification, namely, Class 1. This means that the swamp has provincial as well as regional or local significance. In addition the evidence indicated that the swamp contains areas known as "A.N.S.I.", Areas of Natural and Scientific Interest.

On February 9, 1989 the appellants applied to the respondent for permission to construct a driveway, septic tank and a residence on their land. The property lies south of a concession road. An existing driveway has been filled, runs southerly from the concession road and reaches an area shown on Exhibit 7 as a dry area which appears to have an elevation of 100.94 metres. The driveway and dry area extended approximately 230 feet from the concession road. The proposal was to build a further driveway in a southerly direction across a wet area where the elevations are approximately 100.51 metres for the purpose of gaining access to a sand and gravel knoll with an elevation above the regional flood elevation. It was proposed to construct a Class 2 septic tank to the south of the building.

In support of their application the appellants obtained a report from G.M. Pucovsky, M.Sc., a member of the consulting engineering firm of Conestoga-

Rovers & Associates Limited who has had considerable experience in the preparation of plans for septic tanks and sewage disposal. Pucovsky also gave evidence at the hearing in support of the application.

The proposal was to remove the organic soil from the site of the proposed driveway and to shorten it from 100 to 50 feet as was originally applied for by placing it in a different location. It was then proposed that the organic soil would be replaced with aggregate having dimensions of three to five inches in diameter. This aggregate would be placed to a depth of two or three feet and would be covered with aggregate of smaller dimensions. It was also proposed to change the location of the septic tank to the front of the proposed house as the site at which it was shown on the application was at the rear of the proposed building and as a test hole showed a high water level in the test hole. Pucovsky also gave evidence that a Class 6 septic tank could be used at an additional cost of \$2,000 if a higher quality of septic treatment were required. However it was his opinion that there was an adequate cover on the knoll and an adequate area in the subject lands to dilute any expected sewage from a residential household. He dealt solely with nitrates in his report.

Pucovsky also submitted that the construction of the residence would not result in a significant increase in surface runoff by reason of the permeable sands in the knoll and he was satisfied that his proposal would not create any degradation of the existing surface water quality.

Pucovsky admitted on cross-examination that he was only aware of the wetlands program of the province to "some extent" and really was not aware of the implications of whether cold water streams, trout habitat and other matters that are the concern of the wetlands program of the province would be affected.

The evidence of the respondent indicated a concern for a noncompliance with the provincial classification of wetlands, the risk of flooding in a regional storm which would create an island of the knoll on which the residence is to be situated, the risks of pollution arising from the use of chemicals other than nitrates in the septic

system such as phosphates, chlorides, cleaning fluids and other similar household products. Concern was also expressed that the human use of the property would add to the elements of pollution in the Class 1 wetlands area. In addition the evidence raised the matter of the loss of storage capacity and the loss of the qualities of a swamp at the headlands of one of the tributaries of the Thames River.

William J. Diver, the Land Use Co-ordinator of the respondent, was asked to assess the proposal and his impression was that it was an engineering solution to the proposed use of the property but that it failed to deal with the several aspects of the matter mentioned above. It was put to the witness that one of the principles of the provincial policy in respect of wetlands is that "the protection of wetlands should not interfere unreasonably with existing uses of private land either within the wetland or in the surrounding areas". In passing the tribunal notes that there is no existing use of the premises for residential purposes.

The tribunal also notes that it has not been its practice to consider at a hearing alternative applications which have not been placed before the executive committee of a conservation authority. For these reasons the tribunal in its practice would not consider the effect of the proposed changes regarding the shortening of the length of the driveway, the increase in depth of the granular material, the change in location of the septic tanks or the change of the septic tank from a Class 2 to a Class 6 system.

Diver also expressed concern over the risk of pollution arising from motor vehicles using the property suggesting that salt and other chemicals would be brought onto the property from the highways on which the vehicles were driven and would add a source of pollution to the waters of the Dorchester Swamp. In cross-examination he was asked to compare the effect of Highway 401 on the swamp with the proposal and his position was that the conservation authority had no jurisdiction over the Ministry of Transportation but have had the ability to make representations regarding the widening

of the highway and the redesign of the interchange of highways 401 and 73. He was unable to make any comparisons of the two matters.

Patrick Hunter, the district biologist of the Aylmer District of the Ministry of Natural Resources, gave evidence regarding the establishment of the wetlands program and in particular the assessment and classification of the Dorchester Swamp as a Class 1 Wetlands being a wetland having the highest factors in the classification process and having factors of provincial significance as well as local and regional significance. He expressed concern regarding the effect of the proposed driveway on the waters particularly the subsurface waters which feed cold water creeks which are tributaries of the Thames River. He expressed concern respecting pollution from the driveway, from the proposed house and from the proposed septic system. He indicated that there was a concern in respect of chemicals such as phosphorus, nitrates and sulfurs and other chemicals which would affect the nutrients in the water and the possibility of soil erosion arising from the use of the area by human beings.

With reference to the proposed roadway he emphasized the removal of the organic material which, although the proposal would permit the movement of waters, removes the retaining qualities of the organic soils. He expressed the opinion that the proposed use of the subject lands was not a "wise use" thereof.

On cross-examination, when questioned regarding various pollutants the witness expressed the opinion that none of the pollution from Highway 401 was deleterious to trout streams.

Counsel for the appellants submitted that with the amendments proposed by Pucovsky the appellants had made out a proposal which met the requirements of the regulation and did not affect the control of flooding, pollution or the conservation of land. He submitted that Pucovsky's evidence should be accepted over the evidence of Diver and Goldt, who he submitted, are not qualified experts. With reference to the evidence of Hunter he submitted that if there was no pollution from Highway 401 it was unreasonable to expect that there could be pollution from the appellants'

proposal. He submitted that a reasonable position had been outlined and the permission sought should be granted.

Counsel for the respondent relied on the evidence respecting the control of flooding, the risk of pollution and the effect on the conservation of land by the removal of the organic material and the removal in effect of the site of the house and the driveway from the benefits of the Dorchester Swamp. He relied on the fact that the subject lands are part of a Class 1 Wetlands requiring the highest degree of protection from pollution and the preservation of the vegetation and animal species noted in the reports filed. Reference was made to a number of decisions that had been made and it was submitted that the present application was not distinguishable from those cases where appeals had been dismissed.

Referring to the authorities, in the case of Hinder v. The Metropolitan Toronto and Region Conservation Authority 16 O.M.B.R. 401 at page 436 this tribunal said in determining the meaning of the phrase "conservation of land",

In the opinion of the tribunal the proper meaning to be attributed to the word "conservation" is the concept of wise use as contrasted with retention in its existing state, where as in the case under the Ontario Statutes there is a distinction between that word and "preservation".

On the other hand, the word "land" although narrower than "natural resources" does not warrant an exhaustively narrow interpretation. It is not preceded by the definite article so as to limit the consideration to the subject lands and there was no argument that it was irrelevant to consider the effect on adjoining lands or other lands within a range of effect. Also the word normally is not restricted to the earth itself. The word is defined in cl. 1(e) as,

- (e) "land" includes buildings and any estate, term, easement, right or interest in, to, over or affecting land;

It would be a strange conclusion to hold that the artificial, both physical and legal, components of land are included but not the natural growth on the land and the tribunal is satisfied that the word includes trees and lesser vegetation. Consequently, the trees and other vegetation have to be considered in the light of the concept of wise use.

In the case of Drover v. Grand River Conservation Authority the tribunal considered many of the policy reasons for the establishment of special controls over swamps.

The case of Parnes v. The Metropolitan Toronto and Region Conservation Authority(1979) deals with the aspect of conservation of land related to soil stability and that issue is not before the tribunal in this case except in respect of the possibility of erosion being caused by human conduct on the sandy knoll.

The case of van den Berg v. Upper Thames River Conservation Authority(1989) dealt with the issue of the change of swamps into ponds, a matter that is not issue in this case.

Very relevant is the case of Almas v. Upper Thames River Conservation Authority heard in 1989. The subject lands in that case lay in the northeast quadrant of the Dorchester Swamp. They had been purchased in 1973 at a time that the zoning would have permitted the construction of a residence. A number of improvements had been made on the property but prior to the time that the appellant applied for permission to construct a residence the zoning was changed, the regulation under the Conservation Authorities Act had been made and the designation of wetlands by the province had been completed. The facts of that case are most similar to the facts of this case and the evidence raised in that case is similar to the evidence given in the present case and the objections are in the same vein. I shall not repeat these issues in this decision beyond what I have noted above in respect of the facts. In the case notwithstanding the long holding by the appellant, the expenditure of funds on the property and the state of the zoning at the time of purchase the appeal was dismissed.

In the view of this tribunal the issues are similar in this case and cannot be distinguished in principle. Accordingly this appeal is dismissed.

1. THIS TRIBUNAL ORDERS that the appeal is dismissed.

2. THIS TRIBUNAL ORDERS that no costs shall be payable by any of the parties to the matter.

SIGNED this 23rd day of May, 1990.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.