



The Mining and Lands Commissioner In the matter of The Act

CONSERVATION AUTHORITIES

G.H. Ferguson, Q.C.) Friday, the 14th day
Mining and Lands Commissioner) of July, 1989.

AND IN THE MATTER OF

An appeal against the refusal to issue permission to place fill on Lot 12 in Concession I, S.T.R., and the South half of Lot 3, Plan 158 in the Township of North Dorchester in the County of Middlesex.

B E T W E E N : WILLIAM HENRY ALMAS

Appellant

- and -

UPPER THAMES RIVER CONSERVATION
AUTHORITY

Respondent

B.R. Card, for the appellant.
S.R. MacKay, for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission to place fill on part of Lot 12 in Concession I, S.T.R., being the South half of Lot 3, Plan 158, in the Township of North Dorchester in the County of Middlesex. Under 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 London on May 4, 1989.

The appellant purchased the South half of Lot 3, Plan 158 in 1973 for the purpose of building a retirement home. Before he was able to proceed with the construction of his retirement home the zoning by-law was amended and the zoning was changed to "Environmental Protection" with a very limited number of uses. Thereafter the appellant has built a small shed on the property and cleared part of the property for a garden. The only uses that he has of the property are gardening, the utilization

of trees that have fallen for firewood, bird-watching, sunbathing and walks in the wintertime.

Shortly after the purchase of the property the appellant obtained an entrance permit from the Ministry of Transportation and Communications. In 1986 and 1987 he started to develop a driveway at the northerly side of his property. He adopted the approach of erecting signs inviting the placement of fill and a considerable amount of fill was dropped by contractors on the property. Included in such fill was asphalt material which the Ministry of the Environment required to be removed. During the same period officials of the respondent became aware of his activities and wrote a number of letters pointing out their concern that he was filling in part of the Dorchester Swamp.

The subject lands have a frontage of 250 feet and a depth of 989 feet with an area of approximately five acres. Notwithstanding the correspondence from officials of the respondent the appellant continued his filling until such time as Ontario Regulation 171/88 was made replacing Regulation 180 of Revised Regulations of Ontario, 1980 and including the swamp in Schedule 12 of the new regulation.

The appellant, from the fill deposited by contractors and others and with the use of a contracted bulldozer, constructed approximately 250 feet of laneway and proposed to add another 100 feet in length to the existing driveway and then add at a right angle thereto approximately 100 or 150 feet so that the driveway would end approximately in the centre of the parcel. At this location it would serve the gardening and woodcutting activities of the appellant. Counsel for the appellant indicated that the request for approval covered not only the part of the driveway that has been constructed but also the proposed additions thereto. In discussions with the bench the appellant indicated that he had spent approximately \$500.00 including the cost of the bulldozer but was unprepared to expend a sum in the nature of \$5000.00 to complete the operation. He had not made

any tests by way of bore holes nor had he consulted a geotechnical or soils engineer in respect of the development of his property. He did propose to place a culvert near the end of the existing driveway as a stream flows in a northerly direction across the property during some if not all of the time. The appellant was of the opinion that there was a very shallow depth of organic soil. In his view there is approximately six inches of organic soil with good growing soil beneath the six-inch layer. However this evidence is somewhat inconsistent with the evidence provided by the respondent in respect of the classification of the subject lands and without any bore holes having been made the tribunal finds it difficult to make any assessment of the soils in the area.

The Dorchester Swamp is one of the few remaining swamps in southwestern Ontario. It has an area of approximately twelve hundred acres. It is badly impacted by the intersection of provincial highways numbered 401 and 73 and the attributes of the swamp have been seriously affected by this highway construction. Accordingly it becomes more essential to preserve the remaining portions of the swamp.

The swamp was considered in the analysis of the wetlands in southern Ontario that was carried out by the respondent in conjunction with the Alymer District Office of the Ministry of Natural Resources. Pursuant to the standards for such assessment the swamp was designated as a Class 1 Wetlands, one of the highest levels in the classification process and accordingly being of the highest level of provincial significance, as classes 1 and 2 are classified as having provincial significance. Classes 3 to 7 are classified as having regional and local significance. The evidence for the respondent indicates that the depth of organic material is approximately fifteen inches and consequently the swamp has a high level of ability to fulfill the role of a swamp particularly in connection with the storing of water in periods of high rainfall and the release of waters during dry

periods, the control of nutrients and the purification of water. In this regard the waters from the swamp are considered to be associated subterraneously with the wells used as a supply of water for the community of Dorchester and any increase in pollutants or chemicals to the water table is a risk to the water supply for that community.

Concern was expressed by W.J. Diver, the Land Use Co-ordinator of the respondent in respect of the construction of the driveway. He did admit however that there is a significant source of chlorides from the highways in the area which could result in chemical pollution of the water in the area. In addition there is risk of pollution from agricultural fertilizers, pesticides and herbicides. Reference was also made to the risk of sedimentation which might be created by the building of the driveway and the funnelling of the flows of water through a culvert. With reference to the conservation of land the witness indicated that if the driveway through the swamp were to reduce the water retention ability of the swamp there could be a change in classification with the result that the remaining attributes of Dorchester Swamp could be lost. His evidence, particularly on cross-examination, in respect of flooding, per se, indicated that this risk was not significant as there is usually no serious implications of flooding, per se, in the headwaters of streams. Concern was expressed for the change in the quality of the water for such a change could affect the fish habitat in the area.

Evidence was also given by P. Hunter, the District Biologist for the Ministry of Natural Resources in the Aylmer District. He confirmed that the Dorchester Swamp had been rated as a Class 1 Wetlands pursuant to the classification conducted by staff under his supervision. He outlined the four considerations for such an evaluation, namely, the hydrological, the biological, the social and the special features. With reference to the hydrological features the witness indicated that the augmentation

of flows in dry periods and the retention of flows in wet periods are the qualities of swamps that are intended to be preserved by the policy of the province. In his view the building of a driveway some 500 feet in length into this swamp would have serious effects on this aspect of the Dorchester Swamp. He pointed out that the construction of the driveway would compact the organic soils at the site of the driveway and interfere with the surface and subsurface flows through the swamp. He also pointed out that there would be a funnelling of water into the stream which could cause erosion and sedimentation.

The witness also referred to the fact that the waters from the swamp fed a sensitive cold water trout stream and that the changing of the water flows in the area, particularly in the dry summer days, could have an effect on the downstream habitat for fish. While there was no precise evidence of the existence of fish populations on the subject lands the evidence did indicate that there were fish populations immediately downstream from the property in question. In the witness' opinion he stated that he did not consider that the proposed use of the lands of the appellant by the construction of a roadway and the carrying out of gardening was a wise use of a Class 1 Wetland.

On cross-examination the witness agreed that the percentage of the overall area of the swamp affected is minimal and that the risks of pollution and chemical contamination from other sources in the area are severe. With reference to flora and fauna the witness gave evidence on cross-examination that the swamp, if not the particular site, was known to be a place where orchids grow, herons build heronries and other fur-bearing animals inhabit.

The argument of counsel for the appellant was that the matter should be approached from a site specific basis and because of the smallness of the area of the subject lands in relation to the area of the swamp the rights of the landowner to

use his property as he wishes should prevail over any public policy. It was pointed out that the existing driveway had been built before Ontario Regulation 171/88 was made and any attempt to control the driveway at this time was an unreasonable interference with a legally executed use of the property.

It was submitted that the risks raised in connection with the proposed use were infinitesimal and small, that the loss of storage capacity for flooding would be insignificant and that the area to be lost from the swamp was only one-twentieth of an acre out of some 1200 acres. It was submitted that the tests that were being applied to the subject application are very severe contrasted with the controls that have been executed in the past in respect of highway lands and agricultural lands in the vicinity which usage creates pollution and interference with the natural flows of the waters of the swamp. It was submitted that with control of the source of the fill the risk of pollution resulting from the fill that would be placed on the lands could be controlled and that the request of the applicant in the matter was so minute and insignificant that relief should be granted from the refusal of the respondent.

Counsel for the respondent took the position that with the general prohibition of the placing of fill by Ontario Regulation 171/88 the onus was on the appellant to establish that the decision of the respondent was not sound. It was suggested that the argument that the rights of the landowner were being interfered with could be met by the recent provincial legislation providing for tax grants for wetlands. It was submitted that the alleged lack of seriousness of the issues raised by the respondent are met by the cumulative effect of the risks and the results that would occur if similar considerations were given to other landowners in the swamp. It was concluded that, based on Hunter's evidence, the proposed use of the land by the appellant was not a wise use of the swamp in accordance with the principles

laid down in the case of Hinder v. Metropolitan Toronto and Region Conservation Authority (1984) 16 O.M.B.R. 401.

In reply it was submitted that the tribunal should have regard to the needs of the landowner and should disregard the sensitivities of the principles put forward by the respondent in this matter. It was suggested that, the regulation provides for the issue of consent in the discretion of the respondent and on appeal in the discretion of the Minister. It was further submitted that the tax refund was not adequate compensation particularly where the zoning had changed so that the original intended use of the land by the appellant was no longer available to him. It was submitted that Hunter's evidence should not be regarded for its weight in respect of hydrology as he was qualified as a biologist. It was submitted that the concerns expounded by him were academic concerns and that the matter should be regarded with the balancing of the interests of the landowner and the public interests in swamplands and it was submitted that the present application should be treated as a trade-off that could be accommodated.

The recently established wetlands policy of the Province of Ontario is a recognition of the significance of the remaining wetlands in southern Ontario. It is an attempt to preserve, although it be at a very late date, the benefits from swamps and other wetlands which have long been recognized as being essential but only recently have received the appropriate attention they deserve. The province has set up recommended policies and passed them to the local authorities such as municipalities and conservation authorities to administer within the areas under their jurisdictions. In the case of conservation authorities the issues fall primarily under the concept of "conservation of land", one of the tests that are set out in most regulations made under the Conservation Authorities Act respecting the placing of fill.

It is apparent to this tribunal that with the small

remaining percentage of wetlands in southern Ontario every step should be taken to preserve the wetlands and the benefits therefrom in the general public interest. While the tax refunds may not be wholly compensatory they do reflect a recognition by the Province of the potential economic loss to an individual landowner from the control of his property in that public interest.

As indicated above the issue of flooding of land is not the significant issue in connection with the preservation of headwater swamps. The swamps containing the headwaters of creeks have very little storage capacity in the sense of a consideration of flood plain storage capacity. The related benefits of swamps are in the sponge-like activities of the vegetation and organic soils and the ability to retain water in periods of high flows and augment the flows downstream in dry periods.

In this particular case the evidence respecting pollution appears to be minimal as contended by counsel for the appellant. However, if the project were to proceed and the culverts inserted, there would be a funnelling of water into a slowly releasing creek. The evidence indicates that this activity would funnel the waters which would create sedimentation which would change the growth patterns and the habitat downstream and have an effect on fish habitat and fish populations if not on the subject lands at least on the downstream lands.

The serious consideration in this case in the view of this tribunal is the conservation of land. With the recently announced provincial policies in respect of the preservation of wetlands the tribunal has little alternative but to apply the principles recommended by the province and to apply them strictly having regard to the paucity of the remaining swamplands in southern Ontario. The concept of conservation of lands includes the principles of swamp management. Inherent in swamp management principles are concepts of limited use and methods of the

constructing of necessary driveways and other roads. These principles involve the preservation of the flows of the surface and subsurface waters through the swamps. The construction of the part of the driveway already completed apparently was performed without any recognition of swamp management policies. This was done notwithstanding the advice of the respondent's officials that there was concern for the type of project that was being conducted. By way of illustration the usual method of building access points and roads is to excavate the organic soil to prevent it being compacted and to replace it with aggregate of sufficient size to permit the continued operation of the removed organic soils. This method of use is relatively expensive and it is apparent to the tribunal that the overall use of the lands of the appellant would not justify on an economic scale the removal of the existing fill and the compacted organic soil beneath the fill, the placing of a requisite depth of aggregate and whatever other drainage devices would be recommended by a geotechnical or soils engineer.

In the view of this tribunal the decision of the respondent should not be reversed. It has been made in accordance with provincial policies although they are relatively new and although they do restrict the use by the landowner of swamplands. Such restriction of use is the obvious intent of the provincial policies and in view of the need for the preservation of swamplands the tribunal can only dismiss the appeal. As indicated above the existing portion of the driveway was not constructed in accordance with swamp management principles and the appellant apparently and justifiably is not prepared to make the expenditure that would be necessary to apply the presently recognized swamp management practices to that portion of the driveway or to the proposed addition thereto. 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 matter.

SIGNED this 14th day of July, 1989.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.