



# The Mining and Lands Commissioner

## In the matter of The CONSERVATION AUTHORITIES Act

G.H. Ferguson, Q.C. ) Tuesday, the 16th day of  
Mining and Lands Commissioner) September, 1986.

AND IN THE MATTER OF

An appeal against the refusal to issue permission to construct a single family, two-storey home on Lot 11 in Concession IV, 205 Catherine Street, in the Township of North Dorchester in the County of Middlesex.

B E T W E E N :

SAM WATSON

Appellant

- and -

UPPER THAMES RIVER  
CONSERVATION AUTHORITY

Respondent

P.J. Squire, for the appellant.  
T.G. Price, for the respondent

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission to construct a single family, two-storey home on part of Lot 11 in Concession IV in the Township of North Dorchester in the County of Middlesex municipally known as 205 Catherine Street. 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 London on June 18, 1986.

The appellant owns two properties, namely, 199 Catherine Street and 205 Catherine Street, that lie between Catherine Street and the north bank of the Thames River. The appellant has resided in 199 Catherine Street for eighteen years. He acquired 205 Catherine Street approximately eleven years ago. 205 Catherine Street has frontage on Catherine Street of 96 feet and a measurement of 133 feet along the Thames River. The depth of the lot is approximately 200 feet.

There is situate on the property known as 205 Catherine Street, a concrete block building measuring sixteen feet by

thirty-six feet. It is situate 165 feet from the water's edge and is serviced with gas from Union Gas, municipal water, hydro and telephone. The property is assessed as residential property. The proposal is to renovate and update the existing barn into a residence for the appellant's mother-in-law.

It is proposed to create a new building containing 2,700 square feet. The application shows the use of the existing footings and the construction of a back wall or a southerly wall at the fill line to flood control specifications and placing of the first floor of the building above the regional flood elevation. This floor would be cantilevered southerly. Fill would be placed along the easterly and westerly sides of the building to an elevation of one vertical to two horizontal. The regional flood elevation is 833 feet. The southerly limit of the existing building is at an elevation of 427.5 feet. This elevation is the fill line established by the Regulation of the respondent and has not been adjusted since the recent establishment of the regional flood elevation. According to the report of Atkinson, Davies Inc., a member of which engineering firm gave evidence on behalf of the appellant, it is apparent that the entire property is below the regional flood elevation and the northerly boundary of the property is lower than that elevation. It is proposed to have a tile bed which will require additional fill.

An alternative proposal made by the engineer for the appellant was to place fill below the fill line and eliminate the retaining wall. The suggestion was that this would reduce the cost of construction and the loss of flood plain area would be insignificant when compared with the total valley area and the distance of about 200 feet from the normal river channel.

The appellant gave evidence that the existing building was constructed prior to the 1937 flood and survived that flood. His evidence was that during the period of eighteen years he had lived in the area he had never seen water higher than eight feet below the back of the house in which he resides. He had made some inquiries and was told by older persons that they were

unaware of any flooding. He also gave evidence that properties to the east were fenced for the retention of cattle and that these fences had not been destroyed by spring floods.

The subject lands are zoned as hazard lands and any building project would require the amendment of the zoning by-law.

Collin James Wexford Atkinson, a professional engineer specializing in soils and materials, gave evidence on behalf of the appellant. In addition to the previous mentioned elevations, he indicated that the elevation of the one in one hundred year storm was 828.74 feet. He indicated that 350 cubic yards of gravel would be required to meet the proposal. He pointed out that this was above the existing fill line. However, it is obvious that such fill would be below the regional flood elevation. It was his opinion that filling to the elevation of 833 feet would remove any risk of harm to the occupants of the proposed building. He made reference to one or two other properties where it was believed that construction was being permitted in the regional flood plain. However, it appeared from the evidence that such construction did not have permission from the respondent. He also suggested that the Pitock Dam might be of assistance in controlling flooding.

The evidence on behalf of the respondent indicated that it was not the policy of the respondent to permit residential construction in the floodway. Reference was made to the provincial policy of a two-zone policy where construction may be permitted above the one in one hundred year flood line. However the site is below that flood line. Witnesses indicated that the policy of the respondent was more flexible in the flood fringe but the policy was not to permit any residential construction in the floodway.

The tribunal is not aware of any policy of flood plain management that permits residential construction in areas that are subject to a regional flood. In this situation the site is subject to five and one-half feet of flooding in a regional storm. Although the proposal is to flood-proof the building and

fill in the flood plain such a procedure is not within any recognized provincial policy and is contrary to the policy of the respondent as it appeared from the evidence given at the hearing. With reference to the suggestion of the engineer of the appellant that the flood-proofing was adequate and would not affect the flood elevations, this tribunal can only accept the representations in respect of the former but with reference to the latter it has always been a principle of flood plain management that the precedential implications of utilizing the flood plain channels are not acceptable and this type of exception is only created where there are recognized steps taken to ensure the flow of the regional flood. The proposed application does not in any way conform with the incremental balance principle which is a recognized exception to the general prohibition of a regulation under the Conservation Authorities Act. Accordingly, there is no recognized principle of flood plain management which would justify the construction proposed by the appellant.

The tribunal has considered the examples brought forth in the evidence. In each of the cases there was either an application of some recognized principle or the building was proceeding without the permission of the respondent. The tribunal is not able to conclude that the respondent has a policy of permitting residential construction in circumstances such as the present case and cannot find that the respondent has a policy, either express or implied which is being denied to the appellant.

For the foregoing reasons 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 of the parties to the appeal.

SIGNED this 16th day of September, 1986.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.