



The Mining and Lands Commissioner

In the matter of The CONSERVATION AUTHORITIES Act

G.H. Ferguson, Q.C.) Friday, the 24th day of
Mining and Lands Commissioner) May, 1985.

AND IN THE MATTER OF

An appeal against the refusal to issue permission to construct a new mini-warehouse on the premises known municipally as 108 Mutual Street, in the Town of Ingersoll, in the County of Oxford.

B E T W E E N :

JAMES R. STANNARD, JR.

Appellant

- and -

UPPER THAMES RIVER
CONSERVATION AUTHORITY

Respondent

The appellant, in person.
T.G. Price, for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to issue permission for the erection of a mini-warehouse on premises known as 108 Mutual Street in the Town of Ingersoll. 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 Ingersoll on the 11th day of April, 1985.

The subject lands measure approximately one hundred and sixty feet on Mutual Street, which is a north-south street, and approximately seven hundred and eight feet in an easterly and westerly direction. The lands are situate on the south side of Jane Street which runs in an easterly and westerly direction along the southerly bank of the Thames River as diverted in the early fifties. A plan of survey filed as Exhibit 3 indicates that the Thames River has been diverted at this location. The old title documents indicate that the Town or the respondent had the title to the lands at one time and in the early fifties sold the lands to

Canada Silo Company Limited subject to a covenant restricting the placing of fill beyond an elevation mentioned in the deed.

The appellant purchased the subject lands in August of the year 1982. At that time there were a number of silos, a ramp and a number of buildings on the lands. He caused the silos to be removed. The ramp leading to one of the silos was excavated and the fill taken from the property. In addition part of a building was removed. The appellant proposes to construct a mini-warehouse on a low lying part of the lands. The land to the south of the embankment or berm or brim as the appellant referred to it is fairly level and it is on this level area that the appellant proposes to erect the warehouse which would measure approximately forty feet by two hundred feet and contain eight thousand square feet. It is proposed to erect a warehouse type building approximately fifteen feet in height that would be rented out to individuals in small portions each having access through a garage type door. There is no indication of any flood-proofing considerations or insurance considerations having been taken in connection with the proposed project. The appellant indicated that he had consulted an engineer but he would not be available to give evidence to the tribunal.

The appellant failed to provide any scientific or technical information relative to the matters of flood plain management. His evidence to the tribunal was along the lines that in the late forties or the early fifties there had been channelization work and as far as he could determine there had been no floodings in the precise area since the completion of that channelization work.

On cross-examination of the appellant it was brought out that the greater part of the structures that had been removed by the appellant since he acquired the subject lands had been situate on the higher portion of the subject lands, namely, the portion referred to as the brim. The only structure that was not situate on the higher portion was one silo.

In the appellant's evidence reference was made to other properties in respect of which the appellant felt permission had

been granted and in his opinion his property was no more subject to flooding than the properties in respect of which permissions had been granted by the respondent.

The evidence on behalf of the respondent indicated that in 1980 a program of flood plain mapping was undertaken by MacLaren Engineers, Planners and Scientists Inc. and following this study floodlines were delineated in 1981, a copy of the relevant area being filed as Exhibit 2. The elevations determined by this study show that the elevation of the site on which the appellant proposes to construct the mini-warehouse is 266.7 metres. The elevation of the one in one hundred year storm is 267.92 metres with the result that in a storm classed as a one in one hundred year storm the site of the proposed building would be subject to one metre of flooding. In addition the elevation of the regional storm, which in this area is established as the Hurricane Hazel standard, is 269.65 metres with the result that in such a storm there would be three metres or nine feet of flooding on the site on which the building is proposed to be erected.

The flood plain mapping indicates that while the site of the proposed building is in what is commonly referred to as the floodway, i.e. the area that would be subject to the one in one hundred year storm, the flooding would be a backwater effect by reason of the embankments along the southerly side of the river. The flooding conditions are influenced by the Hall Creek which enters the Thames River from the south at a location shortly downstream from the subject lands and by the Henderson Creek which enters at a similar location from the north.

The evidence also indicated that in the event of a regional storm the aspect of a backwater condition would no longer exist and the site of the proposed building would be in the direct channel of the regional flood which would have a depth, as indicated above, of nine feet and also would have a velocity of one metre per second, which is not an insignificant velocity.

The policy of the respondent is in line with the two-zone policy recently recommended by the Province of Ontario to

conservation authorities. Under this policy a more lenient approach is permitted in the area lying between the elevation of the one in one hundred year storm and the elevation of the regional storm, which area is known as the flood fringe. However, the policy requires that there be a strict control of the area in the floodway and in accordance with the provincial guidelines the respondent has adopted this policy. Applying this policy to the facts of the case and finding that the proposed building lies within a floodway, the permission requested was refused. As the proposed use involved a new use of property within the floodway and in particular a use of property in connection with which there would be no control for the protection of the building or the contents of the building either in the event of a regional flood or in the event of a one in one hundred year flood where there would be approximately three metres or one metre, respectively, of flooding, the requested approval was denied.

With reference to the issue of the policy of the respondent as it may be inferred from its conduct in granting other permissions evidence was produced regarding a number of properties. It was pointed out that a public works yard on Pemberton Street was constructed in the flood fringe and consisted of additions to existing buildings which would not be seriously affected by flooding and would not require flood-proofing. Reference was made to a restaurant called Gigi's Restaurant on Charles Street. This construction involved an application of a cut and fill principle some two thousand feet from the river and with the filling the building was raised above the flood plain, having been in the flood fringe prior to the filling.

With reference to Gardo Products, a feed mill, the permission was granted in respect of an extension of an existing building and was coupled with requirements for flood-proofing by the strengthening of foundations and raising the elevation of the first floor. This site was said to be a greater distance away from the river than the subject lands.

Reference was made to a Dairy Queen in the area. This application involved a small structure in the flood fringe and was

approved subject to flood-proofing to the regional storm elevation. The Ingersoll Planing Mill was granted permission to construct new buildings but only on the location of existing buildings which were removed. In that project, several buildings were torn down and compared with the present application it was pointed out that the buildings that had been removed were in the flood fringe and that only one silo had been removed from the floodway in which the appellant proposed to construct an 8,000 square foot building.

Lastly, the possibility of acquisition of the subject lands by the respondent or the Town of Ingersoll was raised. There is no indication that such an acquisition is imminent or has the first priority of these public bodies.

The submissions of the appellant were not based on any scientific approach but on the fact that there had been no flooding problems in respect of the subject lands since the re-alignment of the Thames River.

The submissions on behalf of the respondent were that the application had been dealt with in accordance with the policy of the respondent which policy is in accord with the recommended policy of the Province which prohibits the construction of new buildings in floodways. Reference was made to the lack of access, even in the one in one hundred year storm, the risk of damage to the building and to the contents of tenants and the lack of access to and egress from the buildings both in the one in one hundred year storm and in the regional storm. It was also submitted that the size of the building created a considerable obstruction of the floodway in the event of a regional storm and would create a significant additional flooding hazard by reason of its location in the main channel during such an event. Reference was also made to the policy to acquire the subject lands when time and funds permitted.

It is apparent to the tribunal that the decision in this case was based on the policy of the Province of Ontario as adopted by the respondent. In addition the tribunal is satisfied that the policy as adopted was in fact applied and that by inference or

otherwise it cannot be said that the policy of the respondent entitled the appellant to be granted permission in respect of the proposed building on the proposed site. The size of the building creates a significant loss of storage. The extent of the building creates, particularly in the event of a regional storm, a interference with the cross-section of the watershed and its construction cannot be said to be in accordance with any recognized policy of flood plain management. The risk of damage to the building and to the contents both in a one in one hundred year storm and in a regional storm are apparent and the evidence of the appellant that such had not occurred since the rechannelization does not have any significant weight in assessing the risk in the light of the flood plain mapping that was done in the years 1980 to 1982.

The tribunal is satisfied that the appellant has not been denied the application of any policies administered by the respondent under which other applicants have been granted permission and as the application is clearly inconsistent with the accepted policies of the respondent and of the Province, the tribunal has no alternative but to dismiss the appeal.

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 appeal.

SIGNED this 24th day of May, 1985.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.