



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 dwelling on Part Lot 9 in Concession II, N.S. in the City of Burlington, formerly the Township of Nelson in the Regional Municipality of Halton.

B E T W E E N :

VICTOR ODORICO

Appellant

- and -

THE HALTON REGION
CONSERVATION AUTHORITY

Respondent

The appellant, in person.
R.I.R. Winter, Q.C., for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to issue permission to construct a dwelling on part of Lot 9 in Concession II, N.S. in the City of Burlington, formerly the Township of Nelson, in the Regional Municipality of Halton. 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 Toronto on November 15, 1983.

The appellant and his wife own an L-shaped parcel of land at the intersection of Kilbride Street and Frederick Street in that part of the City of Burlington known as the Village of Kilbride. Frederick Street is unopened and there is a frontage of 324.7 feet more or less on this street. The northerly boundary on Kilbride Street measures 305 feet more or less. The easterly part of the parcel has a frontage of 125 feet on Kilbride Street by a depth of 195 feet and a one-storey dwelling is situate on this part.

A tributary of Bronte Creek flows through the westerly part of the parcel in a southerly direction entering the parcel

at a location approximately fifty feet from the northwest corner and flowing southerly parallel to the westerly limit. The appellant proposes to sever the westerly part of the parcel containing 1.2 acres or .49 hectares and create a new parcel with a frontage of 180 feet and a depth of 324.7 feet, more or less. The severance has not been approved pending consideration by the respondent of an application to erect a residence on the easterly part of the area to be severed.

Permission from the respondent was sought for the erection of a one-storey residence situate approximately fifty feet from the east boundary of the creek and to be constructed on the present grade unless otherwise required by the respondent.

The application was refused for the following reasons:

1. The proposed construction site is in an area susceptible to flooding during a Regional Storm. It is a policy of the Halton Region Conservation Authority to avoid where possible the construction of buildings or structures in flood susceptible areas.
2. Having regard for the fact that the proposal to construct a dwelling also requires the severing of a lot within the Regional Storm Flood Plain, the Executive Committee denied the application in order not to set a precedent which would lead to the development of the flood plain in Kilbride through the further severing of lots and construction of dwellings.
3. Having regard for the nature of the flood hazard in Kilbride, resulting from the inability of the Kilbride Road bridge to convey the Regional Storm, the Executive Committee was of the opinion that allowing construction of a dwelling under such conditions, even if flood proofed, would lead to increased flood hazards on the applicant's and other surrounding lands associated with the undersized bridge structure.

The proposed site is located at an elevation of 244.8 metres. The elevation of the regional flood in the area is 245.7 metres which indicates that the proposed building would be subject to .9 metres or approximately three feet of flooding in the event of a regional storm. The velocity of a regional flood would be 1.23 metres per second. The only evidence of the elevation of Kilbride Street and bridge through which the creek flows onto the subject lands is that these structures are 1.34 metres below the

regional flood elevation. The result would be that in a regional flood the road and bridge would be overtopped to a depth of 1.34 metres or 4.4 feet. These calculations are derived from Exhibit 5 which was produced by the appellant from information provided to him by the respondent and have lower figures than the figures provided by the witness for the respondent in his evidence in chief. However, counsel for the respondent adopted for the purposes of argument the elevations shown in Exhibit 5. Exhibit 5 also indicates that the one hundred year flow would pass through the bridge without a significant upstream backwater and would not flood the proposed building site.

There is some doubt as to the elevation of the proposed building site. The original mapping was not reflective of present conditions as the appellant had, with the permission of the respondent, filled a fire pond, the site of which partially included the proposed building site and no accurate evidence of the elevation of the proposed building site was provided to the tribunal. It does appear, however, from Exhibit 5 that in the event of a one hundred year storm the proposed building site would not be flooded. Exhibit 5 also indicates that if the regional flood elevation were to be calculated without upstream restrictions the amount of flooding would be in the vicinity of .1 metre. However, the exhibit indicates that there are two houses and a garage located within the regional flood plain upstream of the bridge and it would seem that the future removal of the existing obstructions to the flow of the regional flood is unlikely as the roads and bridges would appear to be the significant factors.

The appellant based his appeal on three approaches. Firstly, it was submitted that there was doubt as to the validity of the flood plain mapping as it applied to the building site. Secondly, it was submitted that there were errors in the reasons given by the respondent. Thirdly, it was submitted that the practices of the respondent in respect of his application were inconsistent with practices in other parts of the area over which the respondent has jurisdiction and with the practices followed by

other conservation authorities. While the tribunal can only commend the appellant for the extent of his research and the thought that he has given to the points that he has raised, it is apparent to the tribunal, which thought is supported by the comment of the appellant that he is not an engineer, that he did not understand the principles that are adopted in the management of flood plains and while many matters appear as conflicts to the appellant, when viewed in the light of flood plain management practices the positions questioned are sound.

Firstly, the appellant questioned the underlying premise of the calculations that were contained in Exhibit 5 with respect to the headwater areas. The exhibit postulates that the headwater areas affecting the subject site contain fifteen square miles. The appellant questioned this underlying premise as the site is situated on a tributary and there are four other tributaries in the area of the headwaters which in total might occupy fifteen square miles but as far as the particular stream on which the subject lands are situated the fifteen square miles was in error. He also produced evidence that in the past there was a series of dams through the area which might have affected the calculation of the elevation. He also gave evidence, hearsay though it be, that he had consulted with long-time residents and none of the residents could recall flooding to the extent of the one hundred year storm as calculated by the respondent or the regional storm. He referred particularly to a house on the north side of Kilbride Street that was said to be 112 years of age which showed no damage from flooding.

The weakness of this submission is that the flood plain mapping was established by a recognized firm of engineers who specialize in this work and Exhibit 5 was prepared by a watershed technician of the respondent. The tribunal has considerable doubt that the fact that the technician may have made an assumption that a fifteen square mile basin was involved for his calculations would significantly affect the work of the consultants engaged to prepare the flood elevations in the area. The elevations above Kilbride Street are 247.71 metres and if this roadway which

presently acts as a dam were to break a wall of water would immediately reach the proposed residence with a depth of something in the vicinity of three metres. Further the appellant seems to have assumed that the one hundred year storm has reference to the highest level obtained in the past one hundred years. However, the tribunal is aware from experience that the one hundred year storm is not so determined but is based on engineering calculations. Accordingly, the tribunal cannot accept on the evidence produced to it any suggestion that the elevation of the regional flood on which the decision was based is inaccurate.

With regard to the second submission the appellant gave evidence that there were no other potential locations in the Village of Kilbride the owners of which might in the future use a positive decision in this matter as a precedent. On the other hand the evidence for the respondent pointed out that there had been an application for a subdivision in the flood plain areas which had been resolved by requiring that no building be permitted on the portions of the lots laid out that are in the flood plain. Agreements have been registered pointing out that the land is in a flood plain to prevent the possibility that future owners might attempt to sever the lower portions of their lots with a view toward creating a row of housing in the flood plain. In this regard the appellant submitted evidence that Kilbride Street is lower at a location forty feet east of the bridge than it is at the bridge itself. The tribunal has considerable difficulty in determining how this strengthens the appellant's position, particularly as the evidence produced by the respondent indicated that this location would be directly in line with the proposed residence and if the roadway broke at this location prior to any other location the proposed residence would be in the centre of the channel of the waters released by the over-topping or breaking of the roadway. The evidence on behalf of the respondent was that the elevations were such that the water would flow toward the south and would not find its way to the river prior to reaching the proposed residence.

With reference to the third reason, namely, the issues relating to constriction of the flow resulting from the placing of

buildings in the flood plain, the appellant apparently does not understand the principles respecting the placing of constrictions in the flood plain. These engineering principles are twofold. Firstly, there is a matter of loss of storage capacity which in this case may not be significant but does have precedential implications by reason of subsequent applicants demanding a right to utilize the storage capacity on the basis of permission having been granted to a prior applicant. In addition the implications of constriction of the flow are far more involved and the placing of a bungalow which would be at right angles to the stream in the event of a regional flood would have significant effects on flooding. In effect the residence itself would be tantamount to another dam which would create additional flooding to that which would occur if the residence had not been constructed.

With reference to his third submission, the appellant produced evidence of buildings that had been permitted to be constructed in other areas including areas under the jurisdiction of other conservation authorities.

With reference to the first category the evidence of the respondent indicated that in all of the cases the permissions had been granted in accordance with recognized principles of flood plain management. One exception was a case involving an inter-provincial pipeline. This matter is under litigation at the moment and is being strenuously opposed by the respondent. The other cases were shown to be cases where the subject properties were either outside the flood plain in respect of the portions that were being used for building or fell within some other recognized principles such as renovations of an existing building. Without dealing with all of the examples in detail it may be noted that particular emphasis was placed on the policy in the area known as Carlisle. The evidence here indicated that the conservation authority had adopted, in accordance with recognized principles, a two-zone concept. This area is the only area in which the principle is adopted on the Bronte Creek and the present case even if it were considered to fall

within that concept geographically does not fall within the policies adopted for that area. The evidence was that the policy for that area was that building would be permitted in the fringe area provided the degree of flooding was not in excess of one metre and the velocity of the flow was not in excess of one metre per second. The evidence in this case is that the velocity of the regional flood would be 1.23 metres, a velocity which is not insignificant. Accordingly, even if the principle were extended to the subject lands, the subject lands would not fall within the principle. As was explained by the evidence this exception to the general policy was adopted by reason of the particular attributes of the area in question and as is usual in such cases floodproofing requirements would be a condition of all permits. There is no indication that adequate floodproofing of the proposed building could be provided as there would appear to be no provision for access from the proposed residence in the event of a regional flood.

With reference to the policies of an adjoining conservation authority in respect of properties at Georgetown, counsel for the respondent pointed out that the very properties that were referred to had been subject to a one hundred year flood with the result that the road and bridge in question had been washed out. Apart from the issue of whether the policies of the particular conservation authority were sound it must be remembered that the approach of the Conservation Authorities Act is to provide for management of the watercourses of the Province on a watershed basis. The Act provides for the establishment of areas of jurisdiction on a watershed basis and programs are authorized under the Conservation Authorities Act in respect of such watersheds. It may well be that some authorities have more resources than others to implement their programs and a comparison of the decisions in individual cases between conservation authorities would not be sound in law by reason of the fact that each conservation authority is, by the Act, treated as an entity and the resources, policies, programs and decisions of conservation authorities are not necessarily identical. For these reasons it may well be that a policy of an adjoining conservation

authority is stricter or less strict in respect of properties that appear to be similar. Accordingly, the tribunal cannot adopt the argument that differences in policies from those of an adjacent conservation authority is a grounds for allowing appeals. To do so would be to say that the policies adopted by the adjoining conservation authority in respect of its lands that are subject to its programs are equally applicable in an adjacent conservation authority where there may be no program whatsoever.

In conclusion the tribunal is not aware of any policy of flood plain management under which the construction of residential property, particularly new residential construction, in a portion of the flood plain subject to three feet of flooding in the event of a regional storm should be permitted. The evidence indicated that the cut and fill or incremental balance principle is not applicable to the subject lands. The tribunal has carefully considered the other examples brought to its attention by the appellant and is satisfied that the policy directed toward the appellant in his application was not inconsistent with the policies in the instances raised. It does not appear to the tribunal that the appellant has been deprived of any policy of the respondent under which permission has been granted to other applicants or that permission has been granted to other applicants in analogous circumstances. The tribunal is not aware of any principle of flood plain management which would warrant the granting of the permission sought in this case.

The appellant raised an issue which could only be categorized as bias. He inferred that it appeared that the policy of the respondent is such that it permits large corporations and municipalities to have permits in circumstances in which an individual without resources would be denied permission. I may say on the evidence I saw no evidence to support such an inference. It must be remembered that there are principles of flood plain management and larger corporations or municipalities frequently have more resources than an individual and are able to bring their case either through remedial works or adoption of other practices within recognized principles of flood plain management. On the evidence

produced in respect of cases drawn to the attention of the tribunal, the tribunal is satisfied that the cases were either cases in which the building site itself was outside the regional flood elevation or there was a recognized principle in respect of a building within the regional flood plain.

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

AND IT IS FURTHER ORDERED that no costs shall be payable by either party to the appeal.

DATED this 1st day of December, 1983.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.