



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 extend an existing road into an area at the headwaters of Grindstone Creek situate in Lot 10 in Concession VI (W.F.) in the Township of Flamborough in The Regional Municipality of Hamilton-Wentworth.

B E T W E E N :

MICHELE RECCHIA

Appellant

- and -

THE HALTON REGION CONSERVATION
AUTHORITY

Respondent

Frank Recchia, agent for the appellant.
M.J. Haesler, O.C., for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to issue permission to extend an existing roadway into an area at the headwaters of Grindstone Creek in Lot 10 in Concession VI (W.F.) in the Township of Flamborough in the Regional Municipality of Hamilton-Wentworth. By Ontario Regulation 129/82 the power and duty of hearing and determining the appeal were assigned to the Mining and Lands Commissioner. The appeal was heard in Toronto on May 12, 1982.

At the appeal Frank Recchia, the son of the appellant, gave evidence for and represented his father. The appellant purchased a 50 acre parcel measuring 684 feet in frontage and 3,200 feet in length in January, 1981. He had examined the property in the previous December and was advised by the real estate agent that the area was a swamp. Although he was represented by a solicitor in acquiring the property he was not

advised of any need to comply with the requirements of the regulations under the Conservation Authorities Act.

During 1981 the appellant constructed an access road from the concession road at the south limit of the property in a northerly direction. The road was constructed from rocks picked up in the vicinity of the appellant's home at Stoney Creek which were covered with gravel. Upon the matter coming to the attention of the respondent the appellant stopped the work and after investigation the respondent decided that it would not lay charges or obtain an order for the removal of the fill that had already been placed. The existing roadway extends approximately 93 feet into the property, depending on the location of the limit of the road allowance. The position of the appellant was that he has a fireplace in his home and is contemplating the acquisition of a wood stove for heating purposes. There are trees on the property both standing and lying on the ground which would provide a suitable source of wood for this purpose. The trees along the front of the property have been trimmed and the fallen trees removed. The current source of wood is the fallen timber at the back of the property. The evidence was that the area immediately beyond the existing roadway was quite wet and if the roadway were extended a further 100 feet a higher dry area could be reached. Wheelbarrows could be used to bring the wood from its place of cutting to the proposed roadway. It was submitted that this could not be done at this time because of the dampness of the area immediately behind the existing roadway and the height of the fill that had been placed to construct the existing roadway. There was a conflict of evidence as to the precise depth of the end of the existing roadway. The witness indicated that there is a cliff eight feet in depth at this area although he also said that the depth along the sides is approximately half a foot. The evidence of John Douglas Hall indicated that he could not recall a substantial

depth of eight feet. Further the application indicates that fill will be placed to a depth of four to six inches and the tribunal can only conclude that the witness intended to mention inches rather than feet.

The appellant does not propose to use heavy equipment in his operation. His existing equipment consists of a chainsaw and some designed hooks to be used for moving the fallen timber. Wheelbarrows will be used to carry the wood from the back of the lot. It was also pointed out that the concession road is narrow and the existing driveway provides a parking area, evading the interference with traffic and the damage to vehicles caused by stones thrown up from the gravel road.

The appellant raised the issue of a township requirement that a culvert be placed on the road allowance at a cost of some \$400. This tribunal considers this to be a matter not related to the existing application particularly as the evidence of the respondent indicated that the use of culverts does not mitigate against the problems under the area of jurisdiction of the respondent.

John Douglas Hall, the Manager of the Resource Planning Division of the respondent, gave evidence. After outlining the consideration of the original placing of fill and the decision of the respondent to allow it to remain, the witness pointed out that the lands of the appellant are situated within an area known as the Haysland Swamp which is of considerable size and forms part of the headwaters of the Grindstone Creek. The soils in the area contain at least 12 inches of decomposed organic material, a typical swamp condition with its usual attributes. The trees on the land are predominantly soft or swamp maple. A photograph of the area taken in April, 1982 was produced showing the existing roadway with snow and flood waters level with the roadway and extending inward for some distance. He pointed out that the appellant had no other access to the property than from the concession road on which it fronts.

with reference to the policy of the respondent, it was pointed out that although there were existing timber operations in the area, no permission had been issued for providing access roads for these operations and the position of the respondent permitting the existing fill to remain is an exception to the existing policy. Reference was made to the Yarkas case which was an application for the construction of a house and tile bed and apart from the building of the house and the construction of the septic tank and tile bed it was submitted that the cases are similar and the policy should be identical. In that case the permission requested was refused and the appeal was dismissed.

The witness outlined the reasons for which the respondent refused the application.

Firstly, the area falls within the regional flood plain of the Grindstone Creek. In this regard the elevations of the watershed have not yet been established although there is a project under a federal-provincial program for this purpose which should be completed during the summer. The precedential implications of the placing of fill in a flood plain were referred to. The witness pointed out two areas downstream from the subject lands where there are serious flooding conditions at present and the reduction of the capacity of the flood plain would tend to have some effect on the flooding of these already exposed areas and would be expected to cause increased property damages in Millgrove and possibly loss of life in the Hidden Valley Road area of Burlington where there are residences presently constructed in the flood plain.

Perhaps more significantly the respondent relied on the fact that the swamp was part of the headwaters of the Grindstone Creek. Part of the function of a swamp is to retain runoff during high periods and to augment low flows that

occur in drier periods providing a more constant flow to downstream users or owners. Closely related to this principle is the need for a sustained flow of water through a waterway where sewage disposal plants are located on that waterway. In the particular case reference was made to a report of J.M. Tomlinson and Associates in 1965 referring to the flows of Grindstone Creek at the site of an existing sewage plant. The report concluded that there would be a very limited ability to carry effluent in periods of low flows. It was submitted that the existing capacity had been reached in the community of Waterdown and there is an essential need to provide a constant flow of water through the creek which flows can be maintained through the storage abilities of the Haysland Swamp. The alternative is the provision of expensive reservoirs. Again the respondent relied on the cumulative effect of filling in the swamp rather than an attempt to establish the exact effect of the particular proposal.

Thirdly, the respondent adopted the position that the purpose of the application, namely, of providing access for fuel log cutting, would not accrue a substantial benefit to the landowner and the extension of the existing access road was not necessary for the purpose and accordingly there was no reasonable justification for making the proposal. In this regard it was pointed out that the commercial timber operations in the area were carried on without the necessity of constructing logging roadways.

The submissions on behalf of the appellant were that the existing road was not of any use to the appellant and would only be useful if it was extended an additional 100 feet into the swamp to level ground.

Counsel for the respondent relied on the three reasons given by the evidence of the witness for the respondent and relied on the cumulative effects and the precedential implications of granting permission. It was suggested that the

granting of permission in this case would constitute the thin edge of a wedge with a result that there would be subsequent applications for further and other uses of the particular property as well as the present case, if granted, providing a precedent for similar applications in respect of other properties.

This tribunal has considerable difficulty in accepting the position of the appellant that the extension of the 93 foot roadway is a matter of necessity. The evidence in support of this position was that the area at the end of the existing roadway is damp during the summer and the wheelbarrows cannot be moved up the end of the roadway because of its perpendicular nature. There was no evidence of the contours of the area. The only photograph filed indicates that the area beyond the existing roadway is quite similar to the area at the existing roadway and there appears to be little change in elevations. The evidence of the witness for the respondent was that the area was quite level and confirms the impressions of the photograph. This tribunal cannot see any value in extending the roadway and the needs of the appellant, if summer operations are the type of operations that he proposes to carry out, could well be met by the use of a temporary boardwalk and wooden ramp.

Dealing with the first issue there was some questioning by the representative of the appellant as to whether the flooding in the spring that was established meant that the subject lands are part of the regional flood plain of the Grindstone Creek. The evidence of the witness of the respondent was that it considers the area to be within such flood plain. In the Farkas case the issue was considered. The evidence indicates that the subject lands in the Farkas case are close to the subject lands in the present case and it is noted that in that case the appellant was supported by a qualified engineer

who admitted that the lands were in the regional flood plain. In the view of this tribunal the fact that the subject lands are within the regional flood plain is not the significant consideration particularly as the amount of filling would be minimal contrasted with the entire area of the headwater swamp. The end result is that the real concern in respect of the filling of the flood plain is based on precedent rather than specific reduction of the flood plain.

This tribunal is of the opinion that there is greater concern in respect of the second reason adopted by the respondent. In this regard this tribunal said at p.4 in the Farkas case,

In contrast, the third reason related to another area of legislative control of conservation authorities, namely, swamps. This reason dealt with the ability of the swamp land to absorb and retain runoff and not only during regional storms but also during any period of runoff. The ability to absorb water is an element in the control of flooding and although the report was not available for study it appears that there are areas downstream that would be affected during a regional storm as a result of increased discharge from the headwater wetlands. Again while it may be minimal, the precedential implications with cumulative results are appropriate considerations. Also involved in this aspect is the reduction of the ability of the swamps to retain water during periods of low flow and to augment downstream flows which are reduced. This aspect of the matter relates to the control of pollution. The operations of sewage disposal plants require a sustained flow. While there was no evidence of such plants at the present time, such matters are of a long term concern.

The evidence in this present case outlined considerable details of the concerns regarding the existing sewage disposal plants on the Grindstone Creek and in the view of this tribunal these considerations warrant the rejection of the application.

With reference to the third issue, this tribunal has, in the past, expected an appellant to establish either through

his own evidence or through cross-examination of the witnesses of the respondent, that he has been denied the benefit of an exception within the policy of the particular conservation authority or that should have been within such policy. In this case there was no evidence that similar permission had been granted in any other case. In fact, the evidence was that more commercial operations had been carried on without the need of access roads.

Under the circumstances this tribunal is of the opinion that the decision of the respondent in the matter was an appropriate one and that there are no reasonable grounds for reversing the decision that was made by the respondent.

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

2. AND IT IS FURTHER ORDERED that no costs shall be payable by either of the parties hereto.

DATED this 19th day of May, 1982.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.