



The Mining and Lands Commissioner  
In the matter of The CONSERVATION AUTHORITIES Act

IN THE MATTER OF

An appeal against the refusal to issue permission to construct a single-family dwelling on Lot 14 in Concession V in the Township of Flamborough in The Regional Municipality of Hamilton-Wentworth, formerly in the Township of West Flamborough in the County of Wentworth.

B E T W E E N :

JOHN FARKAS and ROZALIA FARKAS

Appellants

- and -

THE HALTON REGION CONSERVATION AUTHORITY

Respondent

S. S. Yanover for the appellants.  
M. Haesler for the respondent.

The appellants appealed to the Minister of Natural Resources under section 27c of The Conservation Authorities Act from the decision of the respondent refusing to issue permission under O.Reg.272/72 to construct a single-family dwelling on the subject lands. The power and duty of hearing and disposing of the appeal were assigned to the Mining and Lands Commissioner by O.Reg. 28/79.

The subject lands comprise part of Lot 14 in Concession V in the Township of Flamborough, formerly West Flamborough. They contain approximately 25 acres and have a frontage of 630 feet and a depth of 1,650 feet. The subject lands were acquired in December, 1977. The appellant, John Farkas, applied for a permit for a typical septic tank and tile system from the Hamilton-Wentworth Regional Health Unit and a permit was issued on September 13, 1978. He applied a week later to the respondent for permission to erect a three-bedroom bungalow and the

application was refused for five reasons.

The subject lands form part of the Beverley Swamp according to the Wentworth County soil map which was filed as Exhibit 2. This is a fairly large swamp and contains the headwaters of Grindstone Creek which flows into Lake Ontario and other creeks. A number of houses have been erected in the past along the concession road at the north of the subject lands. These houses have been erected on fill and driveways have been elevated to provide access as the area is subject to flooding during each spring runoff, the evidence being that on the 6th and 7th of March of this year there was flooding on the subject lands and the lawns of existing houses were flooded at that time.

Under section 3 of O.Reg. 272/72 the construction of a building is prohibited in a swamp or in an area susceptible to flooding during a regional storm. The evidence indicates that the subject lands are situate in an area where there has been no floodplain mapping. William Sears, a professional engineer with considerable experience in municipal and environmental matters and who was called as an expert witness for the appellants, agreed that the subject lands would be flooded during a regional storm although the extent of flooding has not yet been determined.

The thrust of the appellants' case was that, based on the evidence of Sears, the interference with the storage capacity of the two acres of land that would be filled in constructing the home would be immeasurable and insignificant and that in his opinion the granting of the application requested would not have a significant effect on the overall potential of the headwater wetlands in respect of the matters for which the respondent is responsible.

While admitting that headwater swamps play an important role in the control of flooding by providing a storage capacity for floodwaters, Sears was of the opinion that the proposal of the appellants, when taken into consideration in relation to the area of the swamp did not justify the refusal of the permit. It was his opinion that a similar residence could be erected on all properties now fronting on the concession road in question without causing any significant effect on the matters that are the concern of the

respondent. He had not made any study of the land patterns in the area and his theory involved the assumption that smaller parcels of lands would not be created through plans of subdivision. Further he had not taken into consideration a number of studies in respect of the headwaters. It was his opinion that a holding tank would adequately evade any problems associated with pollution.

John Douglas Hall, a planner with the respondent, gave evidence outlining the background of the reasons given by the respondent in refusing the application.

The first reason dealt with the fact that the subject lands are within a regional storm floodplain notwithstanding the lack of floodplain mapping of the area. This fact was admitted by Sears. Of course, in the absence of the establishment of the elevation of the regional storm floodplain, the effect on the storage capacity of this part of the regional storm floodplain cannot be determined but admittedly there is some effect and while the witness admitted that such an effect was not defined the respondent had relied on the precedential and cumulative effect of subsequent applications for intrusions into the floodplain. In the opinion of this tribunal in the absence of the determination of the elevation of the regional storm floodplain it would be irresponsible for the respondent to permit intrusions, particularly of residential buildings, into the floodplain without any knowledge of the risks to the building or the occupants thereof. Such action would be premature and would contain no establishment of risks in respect of which the normal methods of reduction of risks, assuming they were applied to residential uses, could be determined.

The second reason given by the respondent was the reduction of the storage capacity of the floodplain. This is a sound and a proper reason even though the elevation of the regional storm floodplain has not been established to quantify the risks which may not be comparatively large when contrasted with the entire headwater wetlands but, again, the precedential implications relating to storage capacity are a normal consideration in dealing with flooding

implications.

The second reason, as already dealt with, relates to the matter of the intrusion of buildings and structures into regional storm floodplains, which conduct falls within the legislative control of a conservation authority respecting the control of flooding in areas susceptible to flooding during a regional storm.

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 requires a sustained flow. While there was no evidence of such plants at the present time, such matters are of a long term concern.

The fourth reason related to the fact that the swamp had been recognized as an Environmentally Sensitive Area in a draft official plan and it was suggested that the change of a swamp to a residential area fell within the concept of "conservation of land". This tribunal has considerable doubt that the phrase "conservation of land" is synonymous with the maintenance of a natural state or the creation of conformity to an official plan. However, it is not necessary to rely on this aspect of the matter.

The last objection was that the septic tile bed could cause pollution during periods of high water. I understand that the appellants and their advisor recognize this concern, which falls within the jurisdiction of the respondent under section 4 of the regulation. The alternative suggestion had not been submitted to the respondent for

consideration and this tribunal has no method of determining the regional storm elevation, the determination of which would be essential to approve of adequate specifications of a holding tank system.

It has never been the policy of this tribunal to permit the intrusion of residential buildings into a regional floodplain unless the conservation authority in question has a policy of so doing which has not been applied to the appellant. Counsel for the appellants advised that it was not part of the appellants' case that a policy which was extended to others was not applied by the respondent to the application of the appellants.

The subject lands are undesirable as a residential site from two points of view. They are not only in a regional storm floodplain with its inherent dangers to the buildings and occupants, which dangers cannot be assessed, but they are also in a swamp having annual flooding under normal runoff conditions. It is the opinion of this tribunal that the position of the respondent should not be reversed and that it is appropriate for a conservation authority to rely on the principles of precedent and cumulative effect.

In his reply counsel for the appellants raised an interesting question in respect of the wording of section 4 of the regulation which reads as follows:

4. Subject to The Ontario Water Resources Commission Act or to any private interest, the Authority may permit in writing the construction of any building or structure or the placing or dumping of fill or the straightening, changing, diverting or interfering with the existing channel of a river, creek, stream or watercourse to which section 3 applies if, in the opinion of the Authority, the site of the building or structure or the placing or dumping and the method of construction or placing or dumping or straightening, changing, diverting or interfering with the existing channel will not affect the control of flooding or pollution or the conservation of land.

Counsel submitted that the applicable portion of the section reads "if....the site of the building or structure.....will not affect the control of flooding or pollution or conservation of land.....". It

was submitted that there was no evidence before the respondent that the site had any relation to the three matters at the end of the phrase and that the respondent did not act judicially where there was no such evidence and should therefore be reversed. It is also apparent that, if valid, the principle would be applicable to this tribunal. In passing it may be noted that counsel failed to read into the key phrase the words "and the method of construction".

In the opinion of this tribunal, the answer to the point, which was probably improperly raised in reply preventing an opportunity for counsel for the respondent to respond, is that section 4 is an exception to the absolute prohibitions contained in section 3 and if section 4 by its words, which is not hereby concluded, is meaningless or unsupported by the evidence of the case, the absolute prohibition would govern. If there were an absence of evidence on the relevant issue under section 4 it would seem that such a situation would not assist an applicant and accordingly the decision of the case cannot turn on this point.

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

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

DATED at Toronto this 15th day of May, 1979.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.