Ontario

Room 569, Fifth Floor
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Toronto, Ontario M7A 1A2

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 storage building on Lot 16 on Plan 427 in the Town of Caledon in the Regional Municipality of Peel.

B E T W E E N :

GUY E. MUSCHETT

Appellant

- and -

CREDIT VALLEY CONSERVATION AUTHORITY

Respondent

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

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to issue permission to construct a storage building on Lot 16 on Plan 427 in the Town of Caledon in The Regional Municipality of Peel. By O.Reg. 114/81 the power and duty of the Minister of Natural Resources to hear and determine the appeal was assigned to the Mining and Lands Commissioner. The appeal was heard in Toronto on May 21, 1981.

At the commencement of the appeal, on consent of both parties, the appointment for hearing was amended by striking out "647" in the sixth and twenty-third lines and inserting in lieu thereof "427".

The appellant has owned Lot 16 on Plan 427 for some time. This lot measures approximately 70 feet in perpendicular width with 80 feet of frontage along the west limit which is the easterly limit of Credit Road. The lot measures approximately

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343 feet in length and extends from the Credit Road northeasterly to the centre line of the Credit River. Presently there are three buildings situate on the subject lands. In 1973 a summer residence was converted into a full time residence. This residence is situate at approximately 125 to 145 feet above the centre line of the river. In addition there are situate above the residence two storage buildings, one of frame construction and the other with metal siding construction. It is proposed to remove the metal building and replace it with a building measuring approximately 20 feet by 35 feet. This building is to be located approximately 30 feet upstream from the existing residence. The building would be laid out in a position perpendicular to the flow of the Credit River. It is interesting to note further that although plans were submitted with the application, these plans are not plans of the building it is proposed to erect because plans were not available. The evidence indicated that the building was to be erected without studding. In passing it may be noted that this concept leaves considerable doubt as to the strength of the building from the point of view of withstanding a flood or from the point of view of remaining in location in the event of a flood.

The position of the appellant was that he was not aware of the meaning of the concept of loss of storage capacity which had been given as a reason at the hearing before the respondent. The appellant has had ample opportunity to question the witnesses of the respondent and it is trusted that the meaning of this concept has been brought home to him. Secondly, the appellant based his case on a number of other instances in which permission had been granted and submitted that by reason of the granting of the permission in these cases the respondent was able to and should have granted permission in his instance. Each of these cases will be dealt with in the light of the evidence of both parties.

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Before dealing with the individual cases suggested as having precedential implications, the evidence of the respondent indicated that the regional flood line in the area in question has been established on two occasions. In 1965 prior to the enactment of the present regulation of the respondent, i.e. O.Reg. 211/73, as amended by O.Reg. 398/79, the regional flood elevation was established by mapping done by H.G. Acres & Co. Ltd. which mapping showed the regional flood elevation to be in the vicinity of 860 to 862.5 feet. With the elevation of the site of the proposed shed being 854 feet the site would be subject to nine feet of flooding in a regional storm.

More recently the mapping was updated by Marshall Macklin Monaghan Limited to show the effect of higher criteria, the construction of buildings in the flood plain and the construction of other improvements such as parking lots, streets, etc., which would effect the depth of water in a regional flood. Although the measurements on the mapping which was filed as Exhibit 3 were in metric, the mapping showed that the site of the proposed shed would be in 12 feet of water during a regional storm.

Accordingly it must be concluded that the proposed building, although it replaced a smaller building, made a fairly substantial reduction of the storage capacity of the watershed and was situate in a manner that would be highly vulnerable in the event of a regional storm. The site of the building is approximately 150 feet from the present river and the flood plain extends to the east an additional 1,000 feet approximately by scaling with the result that the location is very close to what would be the main channel of the flows of a regional storm. These facts in themselves illustrate that it would be most unwise to grant permission in such circumstances by reason of the vulnerability of the proposed structure to a regional storm, its likelihood of washing away and causing downstream blockages

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or the restrictive impact on the flow of the river during a regional storm. However, the case was argued on the basis of precedent and this tribunal shall now turn to the precedents that were raised.

The first property raised by the appellant was a garage erected by Arthur C. Dickson (Dixon) on Mill Street in Cheltenham. The appellant suggested that the property was "ten feet in the flood plain". The evidence for the respondent was that permission was granted in this instance on the basis of the removal of an existing garage and the replacement thereof under similar conditions and with additional conditions requiring the floodproofing of the building. With reference to the present application there is no indication of the sizes of the two buildings being comparable and the proposal of the appellant leaves considerable doubt as to whether the building could be considered to be floodproofed.

Secondly, the appellant referred to a 118 by 32 foot addition to a residence in Terra Cota owned by Barry Bell. The evidence of the respondent with respect to this property was that the applicant was required to remove an existing shed containing an equivalent displacement of storage and in addition the residence was required to be floodproofed. Here again similarly to the first example, the conditions are considerably different.

Thirdly, the appellant referred to a 4,500 square foot addition to the Glen Williams Public School, in respect of which according to his evidence the loss of storage was partially compensated by the removal of a small barn on the property.

In addition the evidence for the respondent pointed out that the degree of potential flooding in a regional storm was approximately 2 feet, substantially less than the amount involved in the present case and in addition to the removal of the existing building there was required lot grading and

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and removal of fill to compensate for the loss of storage capacity of the floodplain. In addition changes in the plans required floodproofing to prevent floodwater entering into the addition.

Fourthly, reference was made to a seven foot by twenty-one foot addition to a residence at 22 Park Avenue, Georgetown, owned by J. Clarke. The evidence of the respondent indicated that a violation, presumably a summons, had issued but ultimately approval was granted on the basis of the provision of equal storage and floodproofing of the building by removing all openings which would permit flooding of the building.

Fifthly, the appellant referred to the reconstruction of a house on Confederation Street in the community of Glen Williams which had been destroyed by fire and on which conditions had been imposed to floodproof the building such as the installation of the furnace and plumbing on the main floor. The evidence for the respondent was that in approving the rebuilding of this residence, it was required that all residential areas in the new building be constructed only above the regional storm level and that the lower level be constructed of reinforced concrete especially designed to deal with a flood situation and permit water storage capacity with the result that the new building actually restored a loss of flood storage capacity and provided a measure of protection for the residence. Many conservation authorities permit the rebuilding of buildings destroyed by fire. This element is not involved in the present case and in addition the conditions improved the storage capacity situation and provided other floodproofing measures.

Sixthly, the appellant referred to a property of Ormie Carter in Norval where a house was torn down and a new house erected in an area that was subject to six to eight inches of flooding. In this regard the evidence of the respondent was that the new building maintained an equivalent storage capacity

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and pointed out that the degree of flooding was only six to eight inches.

Lastly, the appellant referred to the property of his neighbour, Jeffs, who has been granted permission to reconstruct a residence on the lot on the south side of the appellant's property. Although the appellant produced a photograph of the building which is presently under construction, the comparative sizes of the two buildings were not clearly established. It does appear that a one-storey building was being replaced with a two-storey building which would tend to reduce the amount of loss of storage capacity. In addition floodproofing measures were required by the respondent and it must be noted that similar permission had been granted to the appellant in respect of his property in 1973.

On cross-examination the appellant referred to two instances where he felt that violations of the regulation had been incurred. Without mentioning the name of the violators, as was requested by the appellant, the evidence of the respondent indicated that no permission had been granted in either of the two instances.

On the merits of the appellant's application, which was not the basis of the argument of the appellant, this tribunal cannot see any reason for granting permission. The loss of storage capacity is not insignificant, if not substantial. The storage building is substantially large and in the absence of any floodproofing designs would make a significantly larger effect on the storage capacity than the existing building that is being removed. In addition, as indicated above there are matters of interference with the flows in the event of a regional storm and the implications of loss of the building itself and the causing of additional flooding in the event the building were moved into a constriction where it would, along with other debris, form a dam. With regard to the issue of significance or insignificance of loss of storage

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capacity it is relevant to again reiterate the comments that were made in the case of Van Galder v. Rideau Valley Conservation Authority,

> Perhaps the best way of illustrating to applicants that the law requires consideration to be given to matters which individually would appear to be insignificant would be to point out the fact that the subject matter of the consideration by the conservation authority in determining whether permission should be granted is the matter of the control of flooding. The standard is not whether the particular application would affect or have a serious effect on flooding. The test is the effect on the control of flooding. Where the hazard, though not in itself significant, is representative of the hazard to other property in the flood plain it is essential in establishing approaches to consider the precedential implications even though there may not be a significant change in the risk by particular proposals. The obligation of the conservation authority is to establish a program to control flooding and the significant consideration is the effect on the control program rather than an attempt to measure the percentage of the storage capacity involved in the particular case. In order that all landowners can be treated equally it is essential in granting exceptions that there be an assessment of the effect on the control program and in such an assessment the issue of precedent becomes vital. Unless it can be shown to this tribunal that a valid exception can be made to the program it is essential that no principle be established that would detract from the overall approach of the program.

For the reasons indicated above in respect of each alleged precedent this tribunal can see nothing in the alleged precedents that would justify treating the present case on the same basis as the alleged precedents. None of the principles adopted in the precedents are relevant to the present case. It must not be forgotten that counsel for the respondent indicated that it was still open to the appellant to discuss with officials of the respondent his problem of maintaining some security over his boats and cars which are frequently left on the property without anyone being there and this decision of course is without prejudice to any such discussions or the

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position of either party at such discussions.

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 parties to the appeal.

DATED this 8th day of June, 1981.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.