

R. Yurkow)
Deputy Mining and Lands Commissioner)

Friday, the 12th day
of August, 1992.

IN THE MATTER OF THE CONSERVATION AUTHORITIES ACT

AND IN THE MATTER OF

An appeal to the Minister under section 28(5) of the Conservation Authorities Act against the refusal to issue permission to construct a residential structure on Lots 33 and 44, Hannah Street, in the Town of New Hamburg (formerly Township of Wilmot), in the Regional Municipality of Waterloo.

B E T W E E N :

Amended on
August 12, 1992

MR. & MRS. BRUCE JUNKER

Appellants

- and -

GRAND RIVER CONSERVATION AUTHORITY

Respondent

D E C I S I O N

Ross Steckley appeared as agent on behalf of the appellants.

John Harris appeared as counsel for the Grand River Conservation Authority.

B A C K G R O U N D T O T H E A P P E A L

The appellants, Mr and Mrs. Junker (Junkers) own a serviced building lot in the Village of New Hamburg. The lot is within the Nith River flood risk area of

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the Grand River watershed and is caught by the Grand River Conservation Authority (Authority) regulations governing fill and construction. It is, also, the last vacant, serviced lot, subject to the regulations, on Hannah Street. It is zoned residential with a qualification that it is in a hazard area.

The Junkers own a home further along Hannah Street. They also own the lot adjoining the subject lot. On this adjoining lot, they have a triplex, the development of which was approved by the Authority in 1987.

- Reasons for refusal

The Junkers application to build a home on this lot was refused by the Authority.

The reasons¹ given for the refusal are:

1. That the lot is in a "one-zone" policy area in which new residential development is not permitted.
2. Building a home would cause unacceptable risk to life and property in the event of a regional storm.
3. The placing of fill on the lot would result in the loss of flood storage area. This would be the case if cumulative effect of allowing other similar buildings is taken into account.

APPEAL GRANTED

I am allowing the appeal and granting to the appellants the permission applied for.

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¹ The refusal contained other "reasons" that were less reasons than background explanation. One such reason was that the site was in a floodway of the Nith River; another, that the lot was in a regulatory flood plain. The three reasons given here are the three neatly summarized by Mrs. Minshall, witness from the Authority, at the conclusion of her testimony in chief.

REASONS

RISK TO LIFE AND PROPERTY

I will deal first with the second reason given by the Authority for refusing permission: this deals with the unacceptable risk to life and property.

- Objectives of Authority - conservation of natural resources

Section 20 of the *Conservation Authorities Act* sets out the objectives of authorities. They are, briefly, to further conservation, restoration, development and management of natural resources.²

- Government policy statements - not law, not binding

I am aware that conservation authorities adopt provincial flood plain planning policy statements. These policies refer to "preventing loss of life". Government policies are not, however, law. By adopting these policies, an authority cannot acquire a jurisdiction greater than it is given by statute. Nor can an authority use the policy statements to expand on its objectives as they are set out in legislation.

The government can, and does, create various policies that regulate and, one hopes, improve our general well being. There are several agencies whose function it is to implement these policies. There are environmental concerns, zoning concerns, safety concerns and conservation concerns to name only some.

In order to get permission to build a house, a prospective home builder must get approval from many bodies, each of which views an application from a different perspective. Approval from one does not imply that approval will be forthcoming from the others. Each is intended to satisfy a different need.

The government, through its policy statements, tries to co-ordinate the various agencies so that the different perspectives mesh into a sensible objective encompassing all concerns.

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²S. 20 says: The objects of an authority are to establish and undertake, in the area over which it has jurisdiction, a program designed to further the conservation, restoration, development and management of natural resources other than gas, oil, coal and minerals.

- Authority exceeds jurisdiction - concern for life not within mandate

The perspective of conservation authorities is set out in the Act. The Act is quite clear: concern for life is not one of the statutory objectives of conservation authorities. Anyway one reads the Act, the concern of conservation authorities is the conservation, restoration, development and management of natural resources.

Authorities have been taking risk to life into account in refusing permission to build. This is beyond their authority. That all authorities seem, without challenge, to use concern for risk to life as a reason for refusing permission is amazing. They, clearly, do so without authority.

Land use restrictions are a subtle form of expropriation. That they are useful and, often, essential is not questioned. However, since they take away property rights, they must be exercised with caution and, most certainly, within proper statutory authority. However desirable it may be that people be prohibited, for their own safety, from building a home, there has to be legislative authority to do so.

ONE ZONE CONCEPT

There are areas in which it is not considered desirable to have more development - this is the one zone area. Under appropriate circumstances, areas can be redesignated as "two zone" which does allow controlled development. Designations may change from time to time as more research is done, new policies are developed and new perspectives are formed.

In a one zone area, it is possible to get permission to "in fill". This means that a home may be built on a lot that has other homes on two sides of it. In the case under appeal, there is only one building, a triplex, adjoining the lot in question.

The Authority does not inevitably refuse permission to build in a one zone area. Properly, permission is not lightly granted but may be in the appropriate circumstances. In other words, building is not absolutely barred in a one zone area.

- In fill

The lot is the last on the street, and perhaps in the area, that is zoned

residential and has municipal services, and is still caught under the regulations. Although, this is not an "in fill" situation as defined by the Authority, it comes very close to it.

I see that what the in fill policy does is permit development to be completed in an area where it had been started. The objective, presumably, is to avoid having a residential area where lots with homes are interspaced with empty lots that have been zoned residential. What it aims to avoid, I think, is more new homes being added to ever expand a string of built-on lots.

From the evidence, it does not seem that this can happen here. It seems to me that, although not "in fill" in a strict sense, it is within the spirit of the in fill concept.

I find that this is a proper case for the exception to the no new development policy.

FILL AND CUMULATIVE EFFECT

I am discounting this as a reason to refuse permission in this case. There was no evidence to show that there are other lots for which this would serve as a precedent. The Authority is still developing its policies for the area. Considerable redevelopment has been and will continue to be permitted. There is nothing wrong with this, but it would be unfair to deny this one application, which may have no comparable, under the concept of cumulative effect when we know that much new development will be allowed.

- Fill and loss of water storage

It is conceded by the Authority that the fill required on this one lot and the resulting loss of water storage in a flood would not be measurable. The concern is that permission here creates an undesirable precedent and that many such projects would have a measurable effect. If there were evidence of many similar situations that, combined, would have significant effect, I would consider this a proper ground for refusal.

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Grand River Conservation Authority

ORDER

The application of the appellants is approved and the permission asked for in application #83/91 is granted.

DATED this 12th day of August, 1992.

Original signed by R. Yurkow

R. Yurkow
DEPUTY MINING AND LANDS COMMISSIONER