



# The Mining and Lands Commissioner

## In the matter of The CONSERVATION AUTHORITIES Act

G.H. Ferguson, Q.C. )  
Mining and Lands Commissioner ) Thursday, the 14th day of  
January, 1988.

AND IN THE MATTER OF

An appeal against the refusal to issue permission to place fill on Lot 23 in Concession III in the Township of Puslinch in the County of Wellington.

B E T W E E N :

EMIL WOZNIAK AND BEVERLY WOZNIAK  
- and - Appellants

GRAND RIVER CONSERVATION  
AUTHORITY Respondent

The appellants, in person.  
J.M. Harris, Q.C., for the respondent.

The appellants appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission to construct a driveway on a ten acre part of Lot 23 in Concession III in the Township of Puslinch. 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 October 15, 1987.

The appeal followed an application to the County of Wellington Land Division Committee for approval of a severance of a ten acre parcel at the southwest corner of the township lot measuring approximately 400 feet on the southerly boundary which faces County Road No. 34 and approximately 1,089 feet along Highway No. 6, also known as the Hanlon Expressway, which is the westerly boundary of the lot. The application to the committee was approved subject to two conditions. The first condition was that the applicant obtain a zoning by-law permitting the change of the zoning of the land from the agricultural and hazard categories to permit the establishment of a veterinary clinic. It was also subject to the condition that the respondent receive

a satisfactory detailed site plan and that the applicant obtain a permit from the respondent under Ontario Regulation 154/86.

An interesting legal argument might be based on the right to appeal from the refusal of the Grand River Conservation Authority based on the position that the respondent was acting as some sort of delegatee from the committee. However, by reason of the reference to the specific regulation, the wording is clear that the reference was intended to be to an area within the jurisdiction of the respondent. Further, counsel for the respondent argued that the matter fell within its jurisdiction. This argument was that notwithstanding that the lands in question did not fall within a schedule to Ontario Regulation 154/86 a driveway constitutes a structure within the meaning of that regulation. No argument was advanced against this position and as the appeal is dependent upon the respondent having jurisdiction this tribunal makes no finding of law with regard to this matter and is prepared to deal with the appeal on the assumption that the application for permission was made pursuant to the Conservation Authorities Act and the regulations thereunder and that the appeal is made pursuant to that Act. It is understood that the decision of the Land Division Committee is under appeal.

The application of the appellants indicated that the proposed use of the land was "Driveway for proposed vet. clinic". With reference to the proposed type of fill the application read "Remove muck & replace with gravel". Notwithstanding the foregoing the appellant Emil Wozniak in his evidence attempted to restrict his proposed use of the driveway to the removal of dead trees existing on the proposed ten acre parcel. It was not made clear to this tribunal that the proposed use had changed from the use mentioned in the application and while there may be two distinct uses of the proposed driveway with the appellants having the purpose of conducting short term operations, there is no doubt that the ultimate purpose of the driveway is to provide an access route to a veterinary clinic to be erected by the son of

the appellants on one of two portions of the ten acre parcel which are above the regional flood elevation.

The application was refused by the respondent on two major grounds. Firstly the site of the proposed driveway is within the regional flood plain of the regional storm of Galt Creek which flows southwesterly across the concession lot owned by the appellants and enters the ten acre parcel along its northerly boundary. It subsequently flows in a southerly direction and at approximately two-thirds of the distance toward the south boundary, it crosses the easterly boundary of the proposed parcel and continues in a southerly direction crossing County Road No. 34. Further south the creek turns in a westerly direction and flows underneath Highway No. 6. The regional flood elevation for the site of the proposed driveway is 310.2 metres. The average elevation of the lands over which the driveway would be constructed is 308.8 metres. The elevation of the five year storm would be 309.7 metres. The elevation of the one in one hundred year storm would be 309.9 metres. The respondent was of the view that the construction of the driveway would interfere with the control of flooding.

The second basis of rejection by the respondent was the conservation of land. Evidence was given that the swamp in question fell within Class 1 of the classes of wetlands designated by the Province of Ontario, the stream is a cold water stream suitable for trout species and the construction of the driveway would interfere with these characteristics.

Dealing with the first defence, the appellants brought no evidence showing a precise site plan or specifications regarding the heights of the proposed roadway above the natural elevation of the swamp. No evidence of the amount of excavation that would be done and the methods to be adopted to stabilize the fill that would be placed was provided by the appellants.

L.L. Minshall, a Professional Engineer trained and experienced in water resources management, after giving evidence regarding the elevations noted above, pointed out that the variation between the regional storm and the one in one hundred

year storm is slight, primarily by reason of the fact that the culvert in County Road No. 34 is undersized in respect of the regional flow. The difference is small because the embankment of the road would act as a dam and create a similar amount of backwater in both instances prior to the overtopping of the roadway.

The engineer considered two culverts for natural drainage through the proposed driveway measuring one and one-half to two feet in diameter which size would be considered small. She pointed out that such a size of culvert would require constant maintenance. With an embankment on the driveway of a similar depth the driveway itself would be flooded frequently with spring freshets and thunderstorms. The engineer further gave evidence that if the roadway were raised higher to permit larger culverts which would lessen the amount of maintenance required, the floodwaters would be restricted to the area between the driveway and the river. The result would be to increase the backwater effect and increase upstream levels of flooding. The position of the engineer was that if the heights could be maintained at one and one-half feet there would be no significant effect because the water, at that elevation, would go over the top of the driveway and spread to its normal elevation but such an elevation would have the difficulties of maintenance mentioned.

Under Ontario Regulation 154/86 the respondent is authorized to issue permission where it is of the opinion that the proposal will not affect the control of flooding, pollution or the conservation of land (Section 3(a)). It was the opinion of the engineer for the respondent that permission should be refused because of the effect on flooding that would be created if a driveway suitable for commercial use were installed. In such a case the engineer indicated that all organic soil should be removed and a firm base of gravel fill placed.

In addition to the reasons provided by the engineer for the respondent it is apparent to the tribunal that the proposed driveway will be the only access for the proposed veterinary

clinic. It is likely that Highway No. 6, if not already, will become a controlled access highway and the residents, employees and customers of the clinic will be restricted to the driveway in the event of a regional flood or floods of lesser significance which would overflow the driveway if it were constructed to a very low height. The tribunal is satisfied that as a matter of principle no access to a building housing people should be provided across an area that is subject to a regional storm unless that access is clearly at an elevation higher than the regional storm and is flood proofed to the degree that it will withstand the erosive effects of a regional flood. There was no evidence before this tribunal to show either the proposed height of the driveway or the steps proposed to stabilize the driveway in order that it might be a safe egress in a regional flood or floods of lesser intensity to which the land will be subject at more frequent intervals. Further it seems unlikely that any such proposal could evade the implications of increased flooding.

Turning to the second aspect of the case one can readily understand the inability of the appellants to appreciate or accept the argument that the portion of the Galt Creek flowing through their lands should be classified as a significant cold water trout stream and that the area which according to their evidence was a cedar swamp, could be said to be a significant hardwood stand. Although a number of photographs were shown of the westerly and southerly periphery of the ten acre parcel they did not fully disclose the species on the ten acre parcel. The photographs did indicate a serious amount of blow down of what appeared to have been cedar trees that were uprooted and which probably resulted from wind throw from the widening of the highway and from flooding at the southwest corner of the property as a result of interference with drainage. The evidence of the appellants and this was to a considerable extent supported by reports of the Ministry of the Environment, Natural Resources and Transportation and Communications was that the stream had become overgrown and ceased to flow on a gravel bed as had been the situation at one time. The reports indicate that the change in

the stream and in the level of the underground water table apparently resulted from the highway construction and from pumping operations at an aggregate operation a short distance to the east of the appellants' land. These matters were investigated at the turn of the decade and apparently the Ministry of Transportation and Communications as a result of the surveys drilled a well for the appellants on their property. Whether such was done in fact, the significant issue is whether the stream retains the quality that it once had of a cold water stream providing habitat for brook trout. Evidence was called from the Ministry of Natural Resources to show that the stream had been adopted as a Class 1 site in the wetlands classification. The evidence indicated that the classification was based on thermography taken from satellites during the wintertime, which process illustrates the presence of flowing water which would be warmer than the frozen ice and snow normally covering the ground. Unfortunately neither of the witnesses for the Ministry had made a detailed study of the creek. Evidence was given suggesting that even though the creek dried up in the mid-summer it could still provide a habitat during the fall and winter for trout species.

The evidence brought on behalf of the Ministry of Natural Resources indicated that, although in the past the biological expert opinion had been that trout require gravel beds with fast flowing water as spawning areas, the more current view is that brook trout will spawn in areas that have an organic base. There was no evidence to contradict these expert opinions brought to the tribunal by the respondent and the tribunal concludes that the area should be treated as it once was even if it is not now and particularly if in the future it may revert to its original ground water levels on termination of the aggregate operation. Assuming that such is the case the tribunal is of the view that with a proper approach based on swamp management principles, these existing qualities of the appellants' property could be retained.

Concern was raised in the evidence of the officials of the Ministry of Natural Resources that the construction of the

driveway would create a risk of sedimentation. This evidence was qualified in that if the driveway were located at least thirty metres from the bed of the stream this risk would not be significant. An examination of the plans filed indicate that such a location for the driveway would be possible.

Whether or not the evidence justifies a finding that the stream itself continues to be a cold water trout stream of significance as a spawning and nursery area for brook trout, the evidence clearly establishes that the area is a swamp and as such, steps should be taken to preserve the swamp aspect of the land on either side of the driveway. Apart from the matter of control of flooding this tribunal, had the appellants brought evidence of a qualified engineer specializing in soils management showing test pits and setting forth specifications for a roadway capable of servicing the intended use and allowing the natural swamp functions to continue, notwithstanding the construction of the driveway, this tribunal would have been in a better position to favourably consider the appeal. However, the matter of the control of flooding is not satisfied in the opinion of this tribunal and the tribunal has no alternative but to dismiss the appeal.

1. THIS TRIBUNAL ORDERS that the appeal is dismissed.
2. THIS TRIBUNAL ORDERS that no costs shall be payable by either party to the appeal.

SIGNED this 14th day of January, 1988.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.