



# The Mining and Lands Commissioner

## In the matter of The CONSERVATION AUTHORITIES Act

G.H. Ferguson, O.C.  
Mining and Lands Commissioner ) Monday, the 22nd day of October,  
 ) 1984, Friday, the 9th day of  
 ) November, 1984 and Thursday, the  
 ) 7th day of February, 1985.

AND IN THE MATTER OF

An appeal against the refusal to issue permission for the construction of a single family residence on part of Lot 11 in Concession VIII in the Township of North Dumfries in the Regional Municipality of Waterloo.

B E T W E E N :

ANNABEL DROVER and  
WILSON DROVER  
Appellants

- and -

GRAND RIVER CONSERVATION  
AUTHORITY  
Respondent

G.E. Loker, for the appellants.  
J.M. Harris, O.C., for the respondent.

The appellants appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission for the construction of a single family residence on part of Lot 11 in Concession VIII in the Township of North Dumfries in the Regional Municipality of Waterloo. Under 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 22, 1984, November 9, 1984 and February 7, 1985.

In March, 1983 the appellants purchased the east half of the north half of Lot 11 in Concession VIII containing fifty-two and one-half acres. The quarter lot is a forested or swampy area and is situate in the tract known as the Beverly Swamp, the boundaries of which are not of precise definition. However, for the purposes of this appeal it must be assumed that the area was a swamp. If such is not the case the respondent and the Minister on appeal from the respondent have no jurisdiction in the matter.

Following the purchase, which apparently was achieved at a relatively cheap price, the appellants filled an area at the

northwest corner of the land for the purpose of conducting timber harvesting operations. Approximately two feet of fill has been placed in an area measuring 200 feet by 200 feet. Although the respondent had no jurisdiction in the matter, it had been advised of the proposal in respect of a smaller area than was actually filled and an official of the respondent indicated that it had no objection to the proposed filling. It was pointed out if there was any further development the matter should be dealt with by the respondent.

On November 8, 1983 the appellants applied to the respondent for permission to construct a residential structure on the area that had been filled. The application was refused and the matter was appealed to the Minister.

The evidence indicated that the policy of the respondent in respect of the administration of swamps was that residential construction would not be permitted in those areas that could be defined as swamps under their jurisdiction. The issue in the case became one of whether that policy of the respondent was applied in respect of other lands in the area. The subject lands are situated on the south side of the King's Highway No. 97. The swamp area extends to the east, to the west and across the road to the north of the subject lands. A number of precedents were drawn to the attention of the tribunal which were said to form a basis of the policy of the respondent of creating exceptions to the general prohibition and regard will be had to these properties. In passing it may be noted that policies for swamp management as contrasted with flood management have only been developed recently by the respondent and the Province. Evidence was given of a fairly recent policy statement of the Province regarding wetlands management which has been instrumental in the development and enforcement of policies related to the preservation of wetlands.

The most significant precedent was a property lying to the east of the subject lands known as the Foxcroft property. Although no formal permission in the normal way has issued in

respect of this property, letters have issued indicating that the respondent would not object to the construction of a residence. The evidence of the enforcement officer of the respondent was that this type of permission had been indicated prior to the establishment of the current policy of the respondent and the correspondence issued on the basis of the prior commitment. On the other hand the evidence indicates that Foxcroft may not proceed with the construction of a residence under the permission and the general manager of the respondent in the witness box indicated that it was not the policy of the respondent to treat permissions as being transferable and if the land is transferred the purchaser will undoubtedly have to deal with the current policy of the respondent. For these two reasons this tribunal does not consider that the Foxcroft property should be established as creating an existing exception to the general policy of the respondent.

The second property was a property owned by a Mr. Bandoni, who is an employee of a local municipality. This is a fairly large property and the position of the enforcement officer of the respondent was that the portion on which the proposed building would be erected was well outside the boundaries of the Beverly Swamp and accordingly beyond the jurisdiction of the respondent. Counsel for the appellants fairly successfully argued that there would be some risks of pollution arising from construction on this higher, rocky ground but if the area is completely outside the jurisdiction of the respondent it is difficult to conceive that the respondent would have authority or that the action taken in respect of the property would serve as a precedent in respect of a property that is clearly within the area under the jurisdiction of the respondent.

Other properties were drawn to the attention of the tribunal but these properties were further to the east and to the west and either are of considerable age and predate the existence of the policy of the respondent or are beyond the area over which the respondent could reasonably be said to have jurisdiction.

It was also argued on behalf of the appellants that as a result of the filling by the appellants, which in itself was

perfectly legal, the swamp attributes of the site in question have ceased to exist and accordingly there are no swamp aspects to be protected. In the view of this tribunal the weakness in this argument is that the filling of the area in question was done for the purpose of the legitimate use of the swamp area, namely the harvesting of timber growing thereon, and, assuming the respondent had scheduled the area, an application for filling for the purpose would receive serious consideration if the removal of the timber was a reasonable husbandry of the swamp. Consequently, this tribunal views the area in question as an area that has been set aside as the holding and sale area for the forest products. In the event the site were changed to a residential site it would be most likely that the appellants would then have to select an additional site for the purpose of conducting the wood harvesting operations. Accordingly, this tribunal is of the opinion that the filled site in itself has a definite purpose in the management of the swamp and that purpose should not be terminated through the construction of a residential structure thereon. It may well be that some persons would feel that a residence and wood harvesting operations are compatible and could be conducted on the same site but its equally likely that the occupants of the residence would not wish to have those operations conducted on the same site. The tribunal is not prepared to conclude that the removal of the swamp characteristics of the specific site renders the specific site as being subject to treatment as if it were completely outside of the swamp. Its purpose within swamp management as a filled site continues and although some of the qualities or attributes for which swamplands may be managed have been lost, a purpose remains to be filled for the site within swamp management concepts and this tribunal is not prepared to find that the site should be treated as if it no longer serves a purpose within the management of the Beverly Swamp and hence would be available for whatever uses might be made of the site.

The tribunal is of the opinion that the policy of the respondent is clear and prohibits the proposed use contained in the

application. There was no evidence that this policy, since its inauguration, has supported any exceptions and further, assuming there were exceptions or modifications of that policy, that the appellants were being denied the benefits of such exceptions. Under the circumstances the appeal will be dismissed.

THIS TRIBUNAL ORDERS that the appeal is dismissed.

THIS TRIBUNAL ORDERS that no costs shall be payable by either of the parties to the appeal.

SIGNED this 7th day of March, 1985.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.