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The Mining and Lands Commissioner

In the matter of The CONSERVATION AUTHORITIES Act

G.H. Ferguson, Q.C.) Wednesday, the 15th day of
Mining and Lands Commissioner) January, 1986.

AND IN THE MATTER OF

An appeal against the refusal to issue permission to construct a concrete block workshop on the premises municipally known as 174 Amaranth Street in the village of Grand Valley in the County of Dufferin.

B E T W E E N :

KATHRYN GAIL THOMSON

Appellant

- and -

GRAND RIVER CONSERVATION AUTHORITY

Respondent

D.G. Thwaites, for the appellant.
J.M. Harris, Q.C., for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to issue permission to construct a concrete block workshop on the premises municipally known as 174 Amaranth Street in the Village of Grand Valley in the County of Dufferin. 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 January 6, 1986.

The appellant is a glass blower and over the last ten years has carried out her craft at a number of places in Southern Ontario. During the last year she has been looking for a place in which she could establish her own business and carry on her craft. During the week of the 24th of May, 1985 she viewed 174 Amaranth Street on which there was located a residence and frame building suitable for a studio but the asking price was greater than she was prepared to pay. On May 31, 1985 a tornado passed through the Village of Grand Valley and the smaller building was completely

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destroyed. Some damage occurred to the residence. On the day of the tornado the appellant was travelling to Grand Valley to negotiate on the property but was unable to attend as she fell behind her schedule and fortuitously she was not in the village at the time the tornado occurred.

In June the appellant continued her interest in the property learning that it was still on the market. Through an agent on June 27, 1985 she made an offer for the damaged property on an "as is" basis and subject to three conditions which were to be valid until July 5, 1985. The first condition was that the Village of Grand Valley would issue a building permit for the rebuilding of the workshop. The appellant consulted with the chief building inspector and on July 3 obtained a letter dated July 2 indicating that the village was prepared to issue the necessary permission. Thereupon she attended upon Terrance S. Carter, a solicitor in Orangeville, who raised the matter of whether she could obtain permission from the respondent to rebuild the workshop. In her presence on a speaker phone, Mr. Carter discussed the matter with G.M. Coutts, the General Manager of the respondent, and he developed the impression that while permission was necessary it would be in effect a matter of a "rubber stamp".

Attempts were made to extend the date for the conditions but the appellant indicated that the vendor refused to grant such an extension. The appellant was satisfied the property was the property she wished and waived the conditions. The transaction was closed at a subsequent date. In the interval the appellant applied to the respondent for permission to construct the workshop on the same location but with a reduced size measuring fifteen feet by twenty-four feet rather than twenty feet by twenty-four feet as it was originally constructed.

Following the tornado, provincial and other officials held a number of meetings and made attempts to alleviate the hardship to the people affected by the tornado. One of the steps taken was an approach said to have arisen from the suggestion of the Minister of Housing and Municipal Affairs that where the buildings were situate in the flood plain the requirements of the

conservation authority would be relaxed. The respondent accepted this approach and following receipt of a letter of June 11, 1985 from R.J. Burgar, Assistant Deputy Minister, Southern Ontario, of the Ministry of Natural Resources passed a resolution.

The three significant paragraphs of the letter are as follows,

> I understand that a number of homes destroyed in the May 31 tornado disaster in the Village of Grand Valley were located in the flood plain. Your General Manager, Mac Coutts, has recently advised me that the Grand River Conservation Authority is approaching the affected property owners but the Authority's offer to purchase the flood plain properties may not be accepted.
>
> The Ministry of Natural Resources supports the GRCA's attempt to encourage land owners in the flood plain to locate elsewhere. Given the circumstances and the preferences of local residents, however, we are prepared to accept the reconstruction of the homes destroyed by the tornado on the original lots located within the flood plain.
>
> This Ministry is working with other public agencies to reduce the personal suffering and disruptions facing those whose homes were destroyed in the storm. We will, therefore, support the reconstruction of homes in the flood plain as noted above or, should the property owner prefer, we will support the Authority's offer to purchase the flood plain lands and permit the residents to locate elsewhere.

The resolution numbered 233-85 reads as follows:

> THAT the Chairman and General Manager be authorized to continue efforts on behalf of the Authority to co-operate with municipal councils in the disaster area, Provincial ministries, and other agencies to assist Council and residents in developing and implementing where possible plans that will reduce the risk of flood damages.

Coutts' evidence was that following these two steps two general approaches were taken. Firstly, the position in respect of the rebuilding of existing buildings was reviewed and it was determined that the policy, particularly based on the letter of the Assistant Deputy Minister, Southern Ontario, would be that this policy would be limited to firstly, residences and secondly, to victims of the tornado. Secondly, a program was implemented to acquire the lands in the flood plain. Pursuant to the latter policy, an offer was made to the vendor of the subject lands. This offer contained a condition added thereto presumably by the vendor that it was subject to termination of the previous contract and apparently such a termination could not be arranged. Adjacent

properties were acquired under the same program. The offer made in respect of the subject lands was dated July 5, 1985. Evidence was introduced that the General Manager attended a meeting on July 3, 1985 at which the appellant was introduced as a potential purchaser and that he should have been aware of the appellant's position both at the time the subsequent offer to purchase was made and at the time he discussed the application for approval with the solicitor for the appellant. In this regard the evidence of the General Manager was that he had no firm recollections of the details of the appellant's position as they were put forward at the meeting on July 3, 1985 as it was only one of many problems discussed at the meeting. It is not difficult to understand that the thrust of such meetings would be directed to the problems of the existing landowners rather than a person who was said to be a prospective purchaser.

Regarding the relevant technical aspects of the application, the proposed site was situate in the floodway of the Grand River. The elevation of the site is 1,491 feet. A maximum observed floodline has been established at 1,493.3 feet indicating that at some time in the past the site was subject to 2.3 feet of flooding. The regional storm elevation has been established at 1,496.9 feet indicating that in a regional storm the subject site would be covered by approximately six feet of flood waters. The policy of the respondent was established as being that in the floodway only structures of government and related agencies such as roads, bridges and other public utilities would be permitted in the floodway. Certain recreational uses and storage are permitted but the establishment of a commercial operation does not fall within the policy of the respondent for buildings or structures within the floodway.

With reference to the technical aspects of the matter, there was filed as Exhibit 6 a report of R.J. Burnside and Associates Limited dated December 18, 1985 suggesting that the construction of the proposed building would not affect the regional floodline and that it would be feasible to reconstruct the workshop provided the overall dimensions were less than the former

structure. The evidence indicated that there was one technical error within the report in that an assumption was made that the present establishment of the regional floodline would include the effect of the previous building. A further misconception contained in the report was that it suggested that the respondent had floodproofing principles and the evidence indicated that such is not the case. The evidence indicated that where floodproofing was to be considered it was the responsibility of the applicant to obtain proper engineering advice and have that proposal approved by the respondent.

It may be noted that the proposal fails to completely consider the policy of the respondent in respect of the management of the floodway portion of the flood plain of the Grand River.

Evidence was introduced on behalf of the appellant that indicated that since 1929 there was no evidence of damage from flooding to either the residence on the subject lands or the previous workshop. This evidence was also consistent with evidence that there had been no recording of the existence of a regional flood at the site with a difference of 3.6 feet between the maximum observed floodline and the regional floodline. The evidence of the past experience cannot be accepted as evidence that there would be no serious risk in the event of a regional storm. Accordingly, the arguments presented to the tribunal on the basis of the technical evidence of the case do not convince the tribunal that the decision made by the respondent in this matter was incorrect. In passing it may be noted that the case is fraught with the implications that arose in the 1982 decision of Schmude v. Central Lake Ontario Conservation Authority. This case is different from the Schmude case in that in the Schmude case the permission granted was applicable to an existing building rather than in respect of a new building as is the present case. However, the Schmude case is indicative of the problems involved in continuing a commercial business in a flood plain, particularly where the enterprise may expand and require enlargements of buildings and structures to meet the growth of the enterprise. In this case there is no existing building and the only reasonable view can be that a commercial

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enterprise should not be commenced in the floodway of the Grand River at this particular location.

Two other arguments were submitted on behalf of the appellant. These arguments were more of a legal nature than a technical nature. The first argument related to the apparent conflict of interest of the respondent in dealing with the application and in making a competitive offer to the vendor. The obvious legal answer to this submission is that the Conservation Authorities Act imposes upon conservation authorities the responsibility to undertake projects within its funding capabilities to control flooding and included in such programs is the acquisition of lands and buildings within flood plains. In addition the Conservation Authorities Act clothes the conservation authority with legislative and administrative duties and powers. The situation cannot be construed as one of a conservation authority assuming a conflict of interest position but is one in which, if there is a conflict of interest position, the conflict arises from the statute under which conservation authorities are created and operate. It may be trite to observe that the same statute provides for the appeal and an opportunity for an independent consideration of applications to the conservation authority and the tribunal is satisified that the conflict, if such does exist, is not a grounds for granting permission in a case which would not otherwise warrant such issue.

The second argument was that the action of the respondent was "unfair". I assume that this means that the refusal constituted a breach of natural justice. There is nothing in the evidence that indicates that the appellant was not afforded the normal protection of the principles of natural justice. The usual hearings were provided. The thrust of the argument was that the appellant was being denied permission where adjacent property owners were being permitted to do similar things without any controls whatsoever. The tribunal is not satisfied that such was the case. Without commenting on the validity of the policy adopted, the tribunal is satisfied that the special policy was limited in its nature and furthermore was based on the hardship of

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persons owning property that was affected by the tornado. The subject of the application was not a residential building or a normal outbuilding of a residential building such as a garage. The proposal was for a new commercial use. No commercial use in recent years was shown by the evidence. The evidence indicated that a previous owner who died in 1960 had at one time used the building for ornamental iron work but it appeared that such use had long since terminated and that any commercial use of the property had not taken place for more than twenty-five years. The policy was extended to people who suffered hardship as a result of the tornado. The appellant was a volunteer to the situation. Further it is not apparent that any hardship has been sustained by the appellant. Although the amount was not given in evidence it is apparent that the purchase price was less than the purchase price that had been asked prior to the tornado and the appellant is not a person who suffered any physical damage to property as a result of the tornado. In this concept of unfairness the tribunal is satisfied that the appellant's position has not be established.

As indicated above on the merits the tribunal is satisfied that the appellant's application should have been refused. The proposed building is a new use being introduced into not only a flood plain but into a floodway. The site is at the easterly end of the street in question and the proposal would constitute in effect a further incursion of use into the flood plain. The use not being one recognized by flood plain management principles in respect of floodways, the appeal will be dismissed.

1. THIS TRIBUNAL ORDERS that the appeal in this matter is dismissed.

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

SIGNED this 15th day of January, 1986.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.