



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 single family dwelling at 73 Beach Road in the City of Brantford in the County of Brant.

B E T W E E N :

GEORGE NABLO and LOIS NABLO

Appellants

- and -

GRAND RIVER CONSERVATION AUTHORITY

Respondent

F. B. Wray for the appellants.
J. M. Harris for the respondent.

The appellants appealed to the Minister of Natural Resources under section 27c of The Conservation Authorities Act from the refusal of the respondent to grant permission to construct a single family dwelling at 73 Beach Road in the City of Brantford. By O.Reg 613/78 the power and duty of hearing and disposing of the appeal was assigned to the Mining and Lands Commissioner.

The appellant, Lois Nablo, is the owner of the subject lands which are known as 73 Beach Road in the City of Brantford. They are part of Lot N, Plan 29 for the City of Brantford and lie between the right of way of the T.H. & B. Railway and the Grand River. They were illustrated on a plan of survey by West & Ruuska Ltd. dated May 1, 1978 accompanying the application for permission which was filed as Exhibit 1. There is a frontage of 190 feet along the railway right of way and by scale the width at the edge of the river is approximately 150 feet. The distance between the river and the railway right of way is approximately 150 feet although the survey evidence produced at the hearing showed the distance according to Plan 29 as being

approximately 240 feet.

There is some doubt as to the boundaries of the parcel as a towpath is shown on Plan 29 extending 66 feet from the water's edge. There was no evidence to clarify the legal nature of this path and its effect on the title. Even assuming that it is an exception extending above the water's edge from time to time, it did not appear from the survey sketch filed to extend to the site of the proposed building.

Although the subject lands are known as 73 Beach Road the evidence was that the parcel did not front on Beach Road which apparently terminates at the southwesterly limit of the parcel. The property to the northeast has access across the northerly part of the parcel over a twelve foot right of way.

A one storey frame house approximately seventy years of age is erected at the northwesterly corner of the subject lands. The appellants do not reside in this house. It is proposed to tear down this house and erect a new house closer to the southeasterly limit of the parcel. The plans submitted for the proposed house were acquired as a "stock item" and I have been unable to relate the grades and slopes of the proposed plans to the elevations of the subject lands in the context of the issues that are relevant in an appeal of this nature.

Although the Grand River flows in a southerly direction into Lake Erie the flow past the subject lands is in a northeasterly direction. This is because, as was illustrated by a plan of the City of Brantford that was not filed, the river flows in an oxbow in a northeasterly direction at a location southeasterly of the City of Brantford. The subject lands are situate near the end of the oxbow and the river begins to turn in the vicinity of the subject lands. The curve is to the right and the subject lands are on the left side of the bank, facing downstream, with the result that the force of any increased flows must be turned or deflected by the bank at this location. The elevation of the water when not in flood is less than 620 feet. There are two distinct banks in addition to the first bank and the elevation rises to 655 feet at a location approximately 55

feet from the railway right of way (vide the profile on plan of survey filed as Exhibit 1).

The subject lands have a very scenic view. They overlook the Grand River at a location where there appears to be trees along both banks. The ground on the opposite side of the river has a lower elevation, is flatter and is used for agricultural purposes. From an ascetic point of view it provides a pastoral and a natural panorama from the fringe of the City of Brantford.

The regional flood elevation is 656 feet. The regional floodline is close to the railway right of way and is situate on the private right of way. According to the plan of survey the maximum observed elevation is 646 feet and an elevation of 649 feet lies between this elevation and the lower side of the proposed house. Elevation 649 is very close to the lower corners of the proposed house. In contrast, the evidence of the respondent was that the maximum observed line in this area is between 650.2 feet and 648.3 feet and H. A. MacKrell, P.Eng. concluded that the elevation of this line was 649.2 feet. From the plan of survey he was unable to determine whether the proposed house was totally above the maximum observed floodline. Further in contrast Mary Jennings, who has lived in the area for 55 years, gave evidence that the maximum elevation of the May, 1974 flood was at a telephone pole which on her estimation was situate at an elevation of 639 feet. However, the evidence of the respondent indicated that the flood peaked in this area about midnight but it does not appear that Mary Jennings made observations at this hour.

MacKrell also gave evidence that his recent studies in the area indicated that the establishment of the regional floodline at 656 feet may not be accurate and that the proper calculation of the regional floodline may show a higher elevation. He has observed certain weaknesses in the roughness coefficient used in the calculations and it may be that this elevation should be revised.

In addition MacKrell gave evidence that from his examination the subject lands are subject to more than one aspect of erosion. Firstly, there is some indication that the subject lands are subject

to slumping. This is an erosion process which results in landslides caused by the weakening of the banks of the river by saturation with water at higher flows and frequently occurs where a river meanders. In his opinion the railway line was situate on a slump of earlier days. He gave the opinion that a geotechnical report should be obtained in respect of the property prior to its further use as a building site. The steep elevations of firstly an overall change of approximately 40 feet in a distance of approximately 160 feet and secondly of slopes of 1.5 to 1 on the more pronounced banks coupled with the fact that the property is on the side of the curve against which the force of increased flood flows would deflect convince me that this concern of erosion should not be overlooked.

The evidence of the respondent indicated that there are a number of problems in respect of the proposed house from the point of view of complying with the zoning and building requirements of the City of Brantford. Some of these concerns relate to the concept of infilling and the proposal would be refused on the grounds that property did not front on a public street. The practical significance of this requirement is the ability of the municipality to provide the usual services to the subject lands and any other adjacent lands on which residential buildings are erected.

An element of apparent confusion in respect of the application while it was being dealt with by the respondent was the elevation at which walkouts from the proposed building would be installed. Officials of the respondent wrote to the appellants advising that it was assumed that these walkouts would be placed at an elevation of 641 feet and the elevation of the main floor would be at 649 feet. The appellants did not reply to this assumption and accordingly the respondent dealt with the application on the basis that the main floor and the lower walkout would be at elevations below the maximum observed floodline. Even at the hearing before this tribunal the elevations of the proposed building and the land on which it would be situate have not been clarified to the degree that would enable this tribunal to determine the relevant elevations and this tribunal is left with the concern that even if it did grant permission

the conditions normally applicable by way of precautions would frustrate the architecture and ascetic principles of the proposed house.

From the plan of survey (Exhibit 1) it is not clear that a new residence can be constructed that will comply with the requirements of the municipality in respect of a new building. MacKrell indicated in his evidence that from a brief consideration of the plan of survey he could not determine that there is on the subject lands a building site that would comply with the building requirements. From the evidence before me I too cannot make an affirmative conclusion in this regard although I should be primarily concerned with the issue of whether O.Reg. 356/74 can be applied. After prohibiting the construction of a building or structure in an area susceptible to flooding during a regional storm, and there is no doubt that the subject lands fall within such an area, section 4 of the regulation reads:

"4. Subject to The Ontario Water Resources Act or to any private interest, the Authority may permit in writing the construction of any building or structure or the placing or dumping of fill or the straightening, changing, diverting or interfering with the existing channel of a river, creek, stream or watercourse to which section 3 applies if, in the opinion of the Authority, the site of the building or structure or the placing or dumping and the method of construction or placing or dumping or the straightening, changing, diverting or interfering with the existing channel will not affect the control of flooding or pollution or the conservation of land."

It is noted from section 4 that the principles upon which exceptions may be created are three-fold, namely,

- (a) control of flooding;
- (b) pollution; and
- (c) conservation of land.

The issue of pollution does not appear to be significant in the present case. With reference to the issue of control of flooding the proposed building lies within the regional floodplain and in the event of a regional flood parts of the building, depending on the

elevations, could be flooded to depths of approximately seven feet. From such a utilization of the regional floodplain arises the concerns of utilization of the storage capacity of the floodplain and constriction of the channel capacity for the regional flood flows. Also associated are the problems of injury to the property itself and risk of personal injury to the occupants of the proposed building with the inherent costs of rescue and rehabilitation programs.

With regard to the matter of control of flooding, part of the evidence related to the principle of infilling. Counsel for the appellants argued, and rightfully so, that the principle to be applied to this case should not be infilling but one of replacement. The infilling principle is not a principle of this tribunal. It is not applied by all conservation authorities in the province and this tribunal does not apply the principle where it is not adopted by the conservation authority in question. Accordingly, where the doctrine is applied this tribunal would not intervene where the policies of the particular conservation authority were being applied uniformly.

The evidence did not disclose whether the respondent applies a replacement principle and the considerations that are normally applied by the respondent if it allows such an exception. Assuming that such a principle were to be applicable there would have to be certain precautions imposed. The replacement should not create any greater interference with the storage capacity or the channel capacity than the building being replaced. Although there was no scientific evidence on this point it appears, from an examination of the plan of survey (Exhibit 1), that the area of the proposed house is considerably greater than the area of the existing house. By scaling the area of the existing house is approximately 950 square feet while the area of the proposed house is approximately 1,650 square feet. More significantly from the point of view of flood control the elevations are significant and it appears that the new house may be situate in an area where the depth of water in a regional flood would be greater than at the existing house. As far as storage capacity is concerned it is apparent that there would be some doubling of the loss of storage capacity. With reference to constriction of the flood flows

the proposed house is further away from the regional floodline and extends closer to the river. There is a probability that it would create a greater constriction of the regional storm flows. Further a replacement building should be constructed in accordance with conditions designed for the prevention of flood damage to the building itself and the risk of injury to the occupants of the building. Counsel for the appellants appeared to leave this aspect with me but as I have indicated above there is not sufficient information on the elevations of the relevant part of the subject lands to determine whether adequate precautions can be designed without completely destroying the proposal. Such matters can only be considered when the plans of the proposed house are applied to the site.

Even if the foregoing considerations can be resolved there is the matter of conservation of land. One aspect of conservation of land which is considered in such matters is the possibility of erosion. While the concept of slumping, as described by MacKrell, may involve a somewhat different geomorphological process, the end result and the hazards sought to be prevented by the legislation are the same. The jurisdiction over conservation of land was given to the conservation authorities in order to prevent, among other things, the construction of buildings in filled areas such as an area in East York where a number of houses constructed on fill moved with the supporting fill causing destruction of the houses and the death of an occupant. Whether the risk be from natural causes or from artificial man-made causes the concern is the same and I am satisfied on the evidence that there is a need for the investigation recommended by MacKrell and that even if the concerns respecting flooding can be resolved it would be premature to grant permission unless this additional area of concern under the jurisdiction of the respondent was also resolved.

The evidence of the appellants referred to new construction in the general area but the evidence of the respondent indicated that these properties were above the regional floodline.

IT IS ORDERED that the appeal in this matter be and is hereby dismissed.

IT IS FURTHER ORDERED that no costs shall be payable by

either of the parties.

DATED this 16th day of January, 1979.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.