File No. CA 005-10

H. Dianne Sutter) Tuesday, the 8th day
Deputy Mining and Lands Commissioner) of November, 2011.

THE CONSERVATION AUTHORITIES ACT

IN THE MATTER OF:

An appeal to the Mining and Lands Commissioner under subsection 28(15) of the **Conservation Authorities Act**, R.S.O. 1990, c. C. 27, as amended against the refusal to grant permission for development through the placement/removal of fill or site grading on Part Lot 27, Broken Front Concession, Bayshore Road, being Roll No. 4210 510 004 150 30, Municipality of Meaford, formerly the Township of Sydenham, Province of Ontario;

AND IN THE MATTER OF:

Ontario Regulation 151/06, "Regulation of Development, Interference with Wetlands and Alteration to Shorelines and Watercourses".

BETWEEN:

KEN FOX

Appellant

- and -

GREY SAUBLE CONSERVATION AUTHORITY

Respondent

O R D E R

WHEREAS THIS APPEAL to the Minister of Natural Resources was received by this tribunal on the 16th day of July, 2010, having been assigned to the Mining and Lands Commissioner ("the tribunal") by virtue of Ontario Regulation 759/90;

AND WHEREAS a hearing was held in this matter on the 22nd day of November, 2010, with final submissions heard on the 7th day of March, 2011, in the courtroom of this tribunal, in the City of Toronto, Province of Ontario;

1. **IT IS ORDERED** that the appeal be and is hereby dismissed.

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2. **IT IS FURTHER ORDERED** that no costs shall be payable by either party to this appeal.

DATED this 8th day of November, 2011.

Original signed by H. Dianne Sutter

H. Dianne Sutter
DEPUTY MINING AND LANDS COMMISSIONER

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REASONS

APPEARANCES

Mr. Peter C. Pickfield	Counsel for Ken Fox
Donald R. Greenfield	Counsel for the Grey Sauble Conservation Authority (hereinafter referred to as the "GSCA")

The matter was heard in the courtroom of the Mining and Lands Commissioner, 700 Bay Street, 24th Floor, in the City of Toronto, in the Province of Ontario on November 22, 2010, with final submissions heard on March 7, 2011.

A site visit was undertaken by the Deputy Commissioner, H. Dianne Sutter, on November 10, 2010.

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OPENING COMMENTS

This appeal came before the Mining and Lands Commissioner pursuant to subsection 28(15) of the **Conservation Authorities Act**, R.S.O. 1990, c. C. 27, as amended, against the refusal by the Grey Sauble Conservation Authority to grant permission for development through the placement of fill or site alteration. The appellant, Mr. Ken Fox, has also appealed the matter of Ontario Regulation 151/06 being the "Regulation of Development, Interference with Wetlands and Alteration to Shorelines and Watercourses".

Subsection 28 (15) of the **Conservation Authorities Act** states that:

> *"A person who has been refused permission or who objects to conditions imposed on a permission may, within 30 days of receiving the reasons under subsection (14), appeal to the Minister who may (a) refuse the appeal or (b) grant the permission with or without conditions."*

With regard to the filling of this appeal, the proper procedure was followed by the appellant.

The Deputy Mining and Lands Commissioner has been assigned the authoritative powers and duties to hear this appeal pursuant to subsection 6(1) and clause 6(6)(b) of the **Ministry of Natural Resources Act**, R.S.O. 1990, c. M. 31, as amended, and Ontario Regulation 571/00. In addition, the principles outlined in the **Statutory Powers Procedure Act** apply to the hearing.

By virtue of subsection 6(7) of the **Act**, the proceedings are governed by Part VI of the **Mining Act** with necessary modifications. Pursuant to section 113(a) of the **Mining Act**, these proceedings are considered to be a hearing *de novo*. The tribunal stressed this point at the commencement of the hearing and noted that the purpose of the proceedings was to hear all of the evidence in order to make a fair and independent judgment regarding the appeal.

Witnesses for Appellant

Mr. Kyle Simmons	Engineering Consultant-Staff with Genivar Engineering
Mr. Robert P. Armstrong	Planning Director, Town of Meaford

Witness for the Respondent

Ms. Ashley Wilcox	Environmental Planning Technician Grey Sauble Conservation Authority

BACKGROUND

Opening Statements

According to Counsel for the Respondent, Mr. Greenfield, the GSCA's "refusal" of the application was based on the fact that their Policies do not permit filling (development) of a

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regulated area within the 100 year flood limit if there is sufficient land available within the boundaries of the property, outside the regulated area, to allow for the potential development of a residential structure. The Authority maintains that such land exists on the Fox property.

In addition, Mr. Greenfield stated that "it's also clear that the reason for the permit for fill is to raise the elevation of the area in question at the shore so that it exceeds the 100 year flood limit, and then after that, the municipality, the Chief Building official, would be allowed to issue a building permit for a dwelling unit in that location". (Transcript #1 – p.15)

The Respondent stated their understanding that the relevant issue before the tribunal is whether the Authority interpreted their adopted policies properly and legally in refusing the Fox application.

In general, the Appellant's Counsel, Mr. Pickfield, agreed with this interpretation of the main issue. Mr. Pickfield, however, went further, in submitting that it is necessary to review the purposes of the **Conservation Authorities Act** and the implementation procedures and guidelines of the subsequent Regulations and Policies in order to judge this application. Specifically, in this case, the question before the tribunal is to decide whether the granting of the appeal is reasonable and appropriate within the context of the purposes of the **Conservation Authorities Act**?

ISSUES

1. What is the value of the *Provincial Policy Statement (PPS)* in making decisions under the **Conservation Authorities Act**?

2. Did the Grey Sauble Conservation Authority follow the intent of the **Conservation Authorities Act** in developing and adopting their Regulations and Policies?

3. Are the Policies reasonable and appropriate in the context of the **Conservation Authorities Act** and specifically relating to the policy regarding feasible alternative'?

4. If so, how do the facts of the case (application) apply to the adopted Regulation and Policies?

5. What is the impact of an approval in this matter with regards to precedent for the Grey Sauble Conservation Authority and for all Ontario's Conservation Authorities

EVIDENCE

Evidence of the Appellant

The first witness was Mr. Kyle Simmons, an engineering consultant with the firm, Genivar Consultants LP. Mr. Simmons has an Engineer-In-Training designation and has not yet

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acquired a full P. Eng. designation. It was agreed that Mr. Simmons was qualified and provided sworn testimony as a water resources engineer with expertise in flood control and wave uprush issues.

Initially, Mr. Simmons reviewed the alleged facts of his Witness Statement (Ex.3a – Tab 4) He submitted an aerial photograph (Exhibit 11) outlining the property boundaries and other features such as the water boundary, the access points, as well as the cleared and forested areas within the property. The property is approximately 2.5 hectares in size (6.177 acres), the majority of which is densely forested. The cleared area extends about 70 metres east from the shoreline and existing breakwall and lies within the 1/100 year flood line for this portion of Georgian Bay. This area was cleared in the past, prior to the ownership by Mr. Fox, (purchased in 1981) who subsequently added fill to the area in 1994, both being carried out prior to the GSCA's Regulations being adopted. Mr. Simmons indicated that apparently at that time, the GSCA staff informed Mr. Fox that a permit was not required as he was not applying for a building envelope.

The property is accessed from a driveway from Bayshore Road, shared with the adjacent landowner. A swale runs along the north side of the driveway and drains across the water side of the property. In addition, there is a more substantial swale hugging the southern boundary of the property, which is not completely within the confines of the Fox lands. The GSCA considers both these swales as "watercourses". Mr. Simmons, however, questions this designation. He stated that the northerly (driveway) swale runs dry during part of the year and only receives limited surface drainage, while the southerly swale is intermittent. The southerly swale receives surface drainage from the Fox lands. In Mr. Simmons view, both swales or streams are man-made.

In 1992, Mr. Fox received a permit from the Ministry of Natural Resources to construct the existing shore stabilization wall, composed of large rocks. This breakwall is not elevated enough to prevent flooding of the property in a 1/100 year storm event. Minor maintenance has been required over the subsequent time period.

In 1995, the property was rezoned "estate residential" under the Town of Meaford's Comprehensive Zoning by-law, but a hazard shoreline zone was applied to the area within the 1/100 year floodline and wave uprush area.

The 1994 fill consisted of dredged material from the bay itself. It is anticipated that 10 to 40 centimetres of fill would be required over the floodplain area to bring it above the 1/100 year return period flood standard of 177.9 metre elevation, as shown on the Existing Conditions Plan submitted by the Appellant. (Ex.13) This fill, also secured from the dredging, presently is stockpiled on the property.

Genivar Engineering was retained by the Appellant late in 2009 in order to secure a fill permit for development from the GSCA, with the purpose of regrading the lot in question with the future goal of constructing a residential building outside the floodplain and wave uprush setback, after regrading. The work required a site inspection and a review of all applicable GSCA policy documents for the *Administration of Development, Interference with Wetlands and Alterations to Shorelines and Watercourse Regulation*. Once this was completed, Genivar submitted an application in November of 2009, for a permit to fill the lands adjacent to Owen

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Sound Bay (Georgian Bay) on a cut and fill basis in order to create a building envelope. This application was not acceptable to the Authority and further work led to the development of three options for the property. These were submitted to the GSCA staff, along with drawings, indicating how the required work could be accomplished.

After further discussions with Authority staff, "Option 1" (the no-cut option) was selected by Genivar as being the most appropriate and environmentally sound, with the least impact on shoreline habitat and water quality. Mr. Simmons indicated that Genivar believed that the technical requirements of the GSCA's Policy would be met by Option 1. The existing break-wall was to be increased in height by approximately 50 cm. and the belief was that any future maintenance of the breakwall really would not be a significant issue. Waves would still crash over this wall but would be dissipated by its height so the impact would be reduced on the proposed fill.

The land behind the breakwall would be filled to a level above the flood zone. In Genivar's opinion, a balance of cut and fill had already been accomplished by the dredging of the boat slip and the stock piling of that soil to be used as fill. Some alteration to the watercourses would be needed to accommodate the building of the residential unit.

The GSCA Authority had indicated problems with the other two options but did not comment on Option 1. This revised plan was submitted to staff as an amendment to the original application and since the GSCA staff had raised no concerns regarding this particular option, Genivar expected a positive recommendation. However, on December 15, 2009, the GSCA staff advised that refusal of the permit was to be recommended to the Authority. The reason outlined for this recommendation was that the "application, as submitted, does not comply with the *Policies for the Administration and of Development, Interference with Wetland Alterations to Shorelines and Watercourse Regulation-Ontario Regulation 151/06.*" (Ex. 10)

A hearing before the Authority was requested and held on June 9, 2010. On a 5 to 4 vote, the application was denied and the decision recorded as follows:

> "THAT the Grey Sauble Conservation Authority support the staff recommendations in denying Permit Application # GS09-301 as the permit is not in conformance with:
>
> 1. GSCA's *"Policies for the Administration of the Development, Interference with Wetlands and Alterations to Shorelines and Watercourses Regulation 151/06"*;
> 2. The *Provincial Policy Statement*; or
> 3. Grey Sauble Conservation Authority's Hazard Land Policies and Guidelines;
>
> AND FURTHER, THAT in accordance with section 28(2)(1) of the **Conservation Authorities Act**, staff recommend that permit application GS09-301 not be granted on the grounds that the proposed works would affect the control of flooding." (Ex. 1 - Tab D)

This is the decision that has led to the appeal before the Mining and Lands Commissioner.

In arriving at their decision to proceed with the application, Genivar Engineering, through Mr. Simmons, had reviewed the main policy document of the Authority - *Policies for the Administration of the Development, Interference with Wetland and Alterations to Shorelines and Watercourses Regulation - Ontario Regulation 151/06.*" (Ex. 10)

Section 7.1.1. states that:
"Development, interference or alteration will not be permitted within a Regulated Area, except in accordance with policies in Sections 7, 8 and 9."

Section 7.1.2. continues
"Development, interference or alteration within a Regulated area may be permitted where it can be demonstrated through appropriate technical studies and/or assessment, site plans and or other plans as required by the GSCA that the twelve conditions listed can be met in order to permit development within the 1/100 year flood limit." (Ex.10 –p.12)

Section 7.1.3. adds:
"Notwithstanding Section 7.1.2., development, interference or alteration in a Regulated Area may be permitted subject to supplementary policies or stand alone policies as specified in Sections 8 and 9."

Mr. Simmons indicated that reference must then be made to Section 8 of the same Policy document, specifically **Section 8.6.2.** (Ex. 10 – p.38) This section states:

"Development within lands subject to Lake Huron and Georgian Bay Shoreline Flooding or Erosion Hazards may be permitted outside the 1:100 year flood limit in accordance with the policies in Sections 7.1.2.-7.1.3 - General Policies and where there is no feasible alternative site outside the flooding or erosion hazard, provided that" – followed by six conditions that must be met.

The tribunal notes that the preamble to **Section 8.6.** outlines the context for the policy relating to Lake Huron and Georgian Bay Shoreline.

"About 155 kilometres (96 miles) of Lake Huron and Georgian Bay shoreline is within the jurisdiction of the GSCA. For the purposes of defining the extent of the Regulated Area, a 15 metre (50 foot) allowance is added to the furthest landward extent of the flooding hazard, erosion hazard or dynamic beach hazard."

A *Shoreline Management Plan (SMP)* was completed in May, 1994. The plan lays out the technical basis and recommended management plan for the lakeshore. *The Shoreline Erosion Hazard and Dynamic Beach Hazard* are determined based on information from the *SMP* and updated shoreline mapping." (Ex .10 – p.36)

The policy that has provided the greatest obstacle to the approval of the Fox application is the statement that development is only allowed:

"where there is no feasible alternative site outside the flooding or erosion hazard"

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The Authority has taken the position that there is sufficient land outside the regulated area for this development to take place for which no permit would be required. Mr. Simmons, however, indicated that their site inspections "confirmed that there is no other feasible alternative sites on the subject property with elevations above the 1/100 year flood level" where residential development could take place. (Transcript #1 – p.56)

Mr. Simmons indicated that this conclusion was reached because it was determined that:

> "The entire property, other than the lands outside the flood limit, are covered with mature tree cover. Any site development in this area would require the establishment of a new access road and the removal of extensive mature tree cover to establish both site access and building envelope" (Ex.3a – Tab 4- p. 4)

which, he maintained, would cause substantial environmental disruption. In contrast, the proposed lands within the regulated area have been cleared, are easily accessed with the present driveway and a new residence would be in alignment with the existing buildings on the neighbouring lands.

With regard to the control of flooding, Mr. Simmons expressed the opinion that the placement of fill would not have any affect on Georgian Bay. The amount of fill would be minimal. Genivar has calculated that the possible rise in the water level of Owen Sound Bay because of this fill (1000-1200m^3) would equate to approximately 1:100th of a millimetre. (Ex.3a-Tab 4-p.6) The filled area will be covered by some sort of binding vegetation, such as grass.

The proposed building envelope would be accessed by a driveway above the flood level even with the 15 m. wave uprush allowance also in place.

Mr. Simmons expressed the opinion that the development poses no adverse environmental impact. The physical changes to the shoreline and environmental features (swales / streams, etc) are negligible. The swale relocations will not affect their required function.

He reiterated the opinion that the relocation of the building envelope to the area outside the flood zone would have substantially greater impact than the present Fox proposal. There is a firm belief that no new hazards would be created or existing hazards aggravated by the proposal. "Implementation of the development can be completed in compliance with all GSCA policies". (Ex 3a – Tab 4 – p.7)

Mr. Pickfield directed Mr. Simmons to Section 8.6.2. of the *Policies for the Administration of the Development, Interference with Wetland and Alterations to Shorelines and Watercourses Regulation – Ontario Regulation 151/06.* (Ex. 10), specifically the issue of "where there is no feasible alternative site outside the flooding or erosion hazard". (Transcript #1 – p.71) Mr. Simmons reiterated that the existing cleared area is the logical place for this development since the environmental impact is insignificant compared to the impact of relocating the development to the treed area of the property

Mr. Simmons reviewed the six conditions that must be met in order to develop within the regulated area "where there is no feasible alternative site outside the *flooding or erosion hazard* and indicated his view that they all could and would be met.

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a) the recommendations of the Shoreline Management Plan for the applicable shoreline reach are met,
b) flood proofing standards, protection works standards and access standards as determined by the GSCA are met,
c) protection works are designed to create or restore aquatic habitats to the extent possible,
d) vehicles and people have a way of safely entering and exiting the area during times of flooding, erosion and other emergencies,
e) no basement is proposed and any crawl space is non-habitable and designed to facilitate services, only,
f) a maintenance access of at least 6 metres (20 feet) is retained to and along existing shoreline protection works." (Ex. 10- p.38)

The development proposes to fill the building envelope to meet the Regulatory Standard of 177.9 m. GSC plus the 15 m. setback, which would take the land out of the Regulatory area. As a result, the six issues basically would no longer be issues. Mr. Simmons stated that any flood or erosion hazard that presently exists will be corrected by the land stabilization and breakwall expansion. No basement is proposed and the access driveway will be above the flood level when the fill is in place.

With regard to the policy's direction in Section 7 and the twelve conditions attached, Mr. Simmons again believes that all of these are met by the proposal. The minimal amount of fill will have no effect on the level of Owen Sound Bay and the swales will adequately handle the flows as they are at the present. The development envelope is well away from the small wetland located in the southeastern corner of the property. Silt fence collectors will be used during construction and there are no groundwater discharge areas on site.

Safe access for all needs would be available.

Mr. Simmons concluded by suggesting a few conditions of approval that the tribunal could impose if the application is approved. He views the application as a site specific case in that the site has been cleared and some fill placed on site. A permit would be required for the relocation of the northerly watercourse/swale and an agreement is needed with regards to the driveway with the neighbouring property owner. The later is not related to any conditions the tribunal might impose.

In cross examination, Mr. Greenfield, on behalf of the respondent, clearly reiterated the Authority's position that the main issue is the fact that there is land outside of the regulatory zone in order to develop a residential unit and accompanying services. Mr. Simmons responded that the question for the tribunal was "was the Authority right in coming to this conclusion?" (Transcript #1- p.85)

Mr. Simmons was asked about the tree species on the property, indicating that Ms. Wilcox's evidence would be that the trees are mainly poplar, beech, and cedar. Mr. Simmons indicated that he had no expertise with regard to the nature of the tree cover and admitted that no study had been done to determine if any endangered species exist on the property.

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In response to questions about other possible tree loss, Mr. Simmons admitted that some trees will be affected by the relocation of the northerly swale but stated that only one or two trees will be affected, as the swale will wind through the trees. In addition, if a new driveway is needed, it can be placed in an area that has already been cleared minimizing the loss of tree cover.

Mr. Simmons further verified that the lot measured 1300 feet from the municipal road allowance to the water's edge. The driveway will be approximately 4 metres wide, the width of a single-lane driveway. Of the 2.5 hectares involved, 1.4 hectares is outside the regulated area.

In response to the possibility of setting a precedent, Mr. Simmons recognized this as a concern but thought that

> "the key thing to look at is the fact that this particular lot is a bit site-specific in terms of the fact that it is cleared along the shoreline, it is an area that has been filled previously with the intention of building on that site". (Ex. - Transcript #1 – p.93)

If Mr. Fox had filled the Bay frontage to the level presently required when he did the original filling, there would have been no need for any application, since no permit was needed at that time. He could have proceeded to build his residence and "we would not be having this conversation because it would be out of the floodplain as of to-day". (Transcript #1 – p.93)

Mr. Greenfield stressed the amount of shoreline under the GSCA regulations (155 kilometres) along which there could be many other requests for fill and residential development. As a result, approval of the Fox applications could be used as a precedent. Mr. Simmons reiterated his view that this was a site-specific case where it made sense to build on the proposed envelope rather than to have an impact upon the rest of the land through the removal of tree cover.

Mr. Greenfield referred to the high water levels, specifically in 1986 and 1987, when extensive damage occurred and the Province had to provide substantial financial aid to homeowners along the Great Lakes shorelines. He indicated that many homeowners had placed fill on their lands after this event, similar to Mr. Fox's actions in 1994. Mr. Greenfield indicated that if this application is approved by the tribunal, the Authority would be in the difficult position of being unable to refuse future applications from land owners who also would view their proposal as site-specific.

Mr. Simmons was questioned about the proposal to raise the level of the breakwall up to the 100 year flood level. (about 50 cm) and the fact that it tails off to the south where the watercourse enters the Bay through a culvert connection. (The Authority staff, were concerned about the use of a culvert, preferring a direct connection and a natural swale.) This area is not to be filled and basically will provide the drainage outfall for the property. The breakwall, however, will bear the brunt of the wave action. The proposal has a 30 metre set back for the house from the breakwall whereas the Authority standard is 15 metres. Mr. Simmons admitted that there are two breaches in the proposed wall where both watercourses/swales discharge and flooding will occur in a 1:100 year storm. The proposal anticipates "front yard" flooding as well as wave uprush into the swales during the peak storm event.

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With regard to a possible erosion hazard in the south west area, Mr. Simmons agreed to the possibility but countered that proper vegetative cover would assist in reducing the impact. No evidence was provided regarding the type of vegetation to be used other than it would be "grass".

Referring again to the breakwall, Mr. Simmons indicated that it will be wider and higher. He estimated that the height would be increased by about one layer of similar sized rocks. The construction will be done according to the existing standards for this type of work. Regular maintenance will be required to avoid exposing the soil behind the breakwall. Ongoing inspection is required by the homeowner. This type of inspection is not carried out by either the municipality or the Authority. Mr. Greenfield indicated that this leads to a concern that if the homeowner does not maintain the breakwalls and they fall into disrepair, they could be breached and erosion could occur due to storm wave action. This could occur in the Fox case when and if the property is sold.

Mr. Greenfield directed his cross examination to the location of the building envelope itself. Apparently the Genivar review did consider locating the building envelope about 200 to 250 metres back from the shoreline and outside the regulatory area but due to the need for substantial tree removal as well as other factors, such as the preference of being closer to the water a house could be located, the better, the view being an important factor. Mr. Simmons agreed that there was some ability to move the envelope further back slightly in one location where the tree removal would not be too serious and it would be outside the 1/100 year flood limit and wave uprush zone. However, the view would be only directly toward the Bay since adjacent property tree cover would eliminate any peripheral views. This is the same situation confronting the existing neighbor to the north, privacy also being an important issue.

The second witness for the appellant was Mr. Robert Armstrong, MCIP, RRP currently Director of Planning and Building Services for the Municipality of Meaford. Mr. Armstrong has dealt with the GSCA since 1987, but this was his first involvement with a permit application. He was sworn by the tribunal to give factual and planning evidence with regard, specifically, to the *PPS*. The tribunal made it clear that any evidence regarding the actions and motions of the Council of the Town of Meaford were of some interest, but not relevant to the discussion under the **Conservation Authorities Act**.

Mr. Armstrong indicated that the Town's Zoning By-law prevents any habitable building from being within 15 metres of the 177.9 metre flood level. This includes the wave uprush area. During the examination in chief, Mr. Armstrong clarified that his report to the Town of Meaford Council was that if the GSCA accepted the proposal to fill the land, then the proposed site would be in compliance with the Zoning By-law. Therefore the site closest to the Bay would be the appropriate location for a residential unit because it would not disrupt the existing wooded area and would be in line with the existing homes along the Bay. (Transcript #1 – p. 152-153)

Mr. Pickfield queried Mr. Armstrong about the *PPS* which was listed as one of the three reasons for the GSCA refusing the Fox application. In the view of the GSCA, the application was not in compliance with this provincial policy. Mr. Armstrong indicated initially that he did not believe that the *PPS* applies to the Fox application, the reasons being:

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1. it is a planning document to be used for planning approvals;
2. it does not require "conformance", but requires decisions to be "consistent with";
3. it needs to be read in its entirety and not just by its separate sections;

(Ex. 15 – p.1)

Section 3.1.1. deals with the natural hazards associated with lands adjacent to the Great Lakes and states that "Development shall generally be directed outside of `hazardous lands`". The definition for flooding hazards cites the 100 year flood level plus an allowance for wave uprush as the guideline for the Great Lakes.

Mr. Armstrong admitted that there was a consistency between this part of the *PPS* and the GSCA's policies in question. With regard to Section 3.1.2. however, he was of the opinion that Mr. Simmons' technical evidence proves that the section does not apply in that "It's not a location where development would under no circumstances be permitted". (Transcript #1-p.147).

Section 3.1.6. appears to be the most relevant section to the Fox application,

> "Further to policy 3.1.5. and except as prohibited in policies 3.1.2. and 3.1.4., *development and site alteration* may be permitted in those portions of *hazardous lands* and *hazardous sites* where the effects and risk to public safety are minor so as to be managed or mitigated in accordance with provincial standards, as determined by the demonstration and achievement of all of the following:
>
> a) *development* and *site alteration* is carried out in accordance with *floodproofing standards, protection works standards* and *access standards*;
> b) vehicles and people have a way of safely entering and exiting the area during times of flooding, erosion and other emergencies;
> c) new hazards are not created and existing hazards are not aggravated; and
> d) no adverse environmental impacts will result;"

Again, based on the evidence provided by Mr. Simmons, Mr. Armstrong was of the opinion, from a planning perspective, that there would be no adverse effects or increased risks if the Fox application was allowed to proceed. He indicated his opinion was that it would meet the test of consistency with the *PPS*.

Discussion moved to the issue of policy versus regulation with regard to the GSCA's *Policies for the Administration and of Development, Interference with Wetland Alterations to Shorelines and Watercourse Regulation-Ontario Regulation 151/06*." (Ex. 10) Mr. Armstrong's view is that:

> "A policy is not a regulation, it's not a by-law, so it's read in a more broader sense, and that's how I typically interpret policy in providing plenty of opinions to council, so it was also looking at factors such as the economics, the nature, and the character of the area. And it also talked about the safety in ensuring -- so I was satisfied, based on the technical evidence, and I am based on the technical evidence I heard today as well, that location of a building in this location would

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> not result in any environmental -- it would not result in any flooding of a house or the property, subject to the fill. So in my belief it would meet the objectives, overall objectives of the policy."

The final summary of Mr. Armstrong's evidence was that the application could be considered consistent with the *PPS* (despite this being a planning document) and with the GSCA's policies. The necessary criteria can be met, if the fill is allowed, including the "no feasible alternative" policy.

With regard to this issue of policy and regulation, during the cross examination by Mr. Greenfield, Mr. Armstrong agreed that a conservation authority is not bound by the *PPS* but like any other public body in the province, including this tribunal, they should have "regard for" this document in making their decisions, it being acknowledged that the tribunal's chief concern is the **Conservation Authorities Act**, out of which the regulations and the policies stem.

Mr. Armstrong agreed that neither the Town of Meaford's Zoning By-law nor Official Plan speak to the need for tree preservation property which, in effect, would prevent the development of a residential unit on any property within the town. There also is no recognition in these documents of a significant woodland being located on the Fox property.

In addition, Mr. Armstrong also agreed that the Meaford Council did recognize that the GSCA had the final approval, and all their resolution did was support the application for approval by the GSCA.

Evidence of the Respondent

Mr. Greenfield introduced Ms. Ashley Wilcox as the sole witness for the Respondent. Ms. Wilcox has an Honours Degree in Environmental Studies. In her capacity as the Environmental Planning Technician, she is a contract employee of the Grey Sauble Conservation Authority. With regard to this application, she was the one who reviewed and processed the Fox application and has been the staff person responsible for compiling the Respondent's Document Book. Ms. Wilcox was sworn on the basis of giving evidence regarding the interpretation of the GSCA's Regulations and Policies in relation to the **Conservation Authorities Act**. She did not discuss the technical engineering aspects as provided by Mr. Simmons. (Transcript #1 – p. 176)

Ms. Wilcox indicated that she would be dealing with Exhibit 4a – the Respondent's Document Book and Exhibit 14 - a map on which the impact of the Authority's Regulation is shown.

Ms. Wilcox began her submission by outlining the procedure that is followed when an application under Ontario Regulation 151/06 is submitted to the GSCA. The property limits are superimposed on an aerial photograph depicting the relevant flood prone area. This would include the 1:100 year flood line, the wave uprush area, the extra set back plus any hazard, erosion or wetland features connected with the property, the tree cover, the shoreline and property access also would be shown on the photo-map.

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A review of this information and the impact of the Policy document would follow. At this point, discussions could be held with the applicant. A report with recommendations would then be prepared and reviewed by Senior Authority staff, at which time a decision would be made to amend or to directly submit the report to the Authority.

This was the procedure that was followed in the case of the Fox application. The aerial photo-map for the application is found in Exhibit #14. Ms. Wilcox's report, recommending denial of the application, led to a request by the applicant for a hearing before the Authority. The subsequent denial of the application by the full Authority then led to the appeal before the tribunal.

Mr. Greenfield established with Ms. Wilcox that:

1) The proposed shifting of the watercourse is not part of the application and would require a further permit application.

2) The Authority's policy does not deal with the issue of tree cover and/or tree removal, unless some trees were listed under the Provincial legislation - the **Endangered Species Act**. Only then would the issue need to be considered. It was noted that the Authority staff had not observed any such specie, nor had any evidence been submitted by the appellant to suggest such an issue exists on site.

With regard to the Fox application, Ms. Wilcox stated that the following regulations and policies were reviewed.

1) The *Provincial Policy Statement* (2005)
2) The *Grey-Sauble Shoreline Management Plan* (1994)
3) The Grey-Sauble Conservation Authority *Hazard Land Policies and Guidelines* (1994)
4) Grey-Sauble Conservation Authority *Policies for the Administration of the Development, Interference with Wetlands and Alterations to Shorelines and Watercourses Regulation - Ontario Regulation 151/06* (2009)

Ms. Wilcox spoke of this final document (#4) in two ways. It was referred to as the primary policy that would be reviewed with respect to permit applications and also as our Ontario Regulation #151/06. On page 184 of Transcript #1, Ms. Wilcox stated:

> "primary policy that we would review with respect to permit applications, which is the *Policy for the Administration of the Development, Interference with Wetlands and Alterations to Shorelines and Watercourses*, which is our Ontario Regulation 151/06."

With regard to the *PPS*, Ms. Wilcox acknowledged that the GSCA is not bound by this document and noted that the **Planning Act**, Official Plans and Zoning By-laws also do not have any relevance to the staff when reviewing permit applications. The *PPS* is directive with regard to planning decisions. However, as a public agency, the GSCA must have "regard to" the *PPS* and in the case of the Fox application, Ms. Wilcox indicated that the Authority did not believe that it is consistent with the policies outlined in the *PPS*. (Ex. 4a – Tab13)

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Section 3.1.1. clearly states that "Development shall generally be directed to areas outside of:

a) Hazardous lands adjacent to the shorelines of the Great Lakes-St. Lawrence River System and large inland lakes which are impacted by flooding hazards, erosion hazards and/or dynamic beach hazards;" (P. 22)

This would be the overriding provincial directive of this Policy for the Authority, but she noted that Section 3.1.6. provides some options, again as guidelines, which would allow development where the "effects and risk to public safety are minor so as to be managed or mitigated in accordance with provincial standards" such as flood proofing the building, safe access and egress, no new hazards are created or existing ones aggravated, and no adverse environmental impacts will result. (P. 23)

Ms. Wilcox disputed Mr. Simmons' assertion that the application appears to comply with all of these conditions, and stated that the Authority's overriding position is first and foremost that of keeping development outside the shoreline/floodplain and wave uprush area of the Great Lakes area within their jurisdiction. Just by locating new development in the area, a new hazard would be created. This position becomes stronger when it is clear that alternative locations outside the hazardous areas exist on the property. Flood proofing and active protection measures would be required indicating that a new hazard occurs when development occurs. The proposal "would be placing new development in an area we've identified as being a hazard". (Transcript #1 – p.196) In addition, she does not view the application as minor in nature since, in her opinion,

> The test for 'minor' is to be employed only in instances where development has historically occurred and there are no lands outside the identified hazard area" (Ex. 4a – Tab 1 – p.6 (29)

Ms. Wilcox also referenced the need for maintenance of the protective works. This would need to be done by the owner since the GSCA has no measures under which to enforce this maintenance nor are any funds available to do so. (Mr. Greenfield had already referenced the past cost to the Province originating from the 1986 event.)

The second document referenced by Ms. Wilcox in her review of the Fox application was the ***Grey-Sauble Shoreline Management Plan***, adopted in May of 1994. The Wilcox witness statement indicates that the purpose of developing this Plan was to "incorporate shoreline prevention and protection options, environmental impact, monitoring, emergency response and public education into an overall management plan of the shoreline resources". (Ex. 4a- Tab 3) This plan was adopted prior to the Regulation being enacted and its preparation was guided by the Ministry of Natural Resources guidelines for such plans, published in 1987.

The Management Plan placed the property in **Shoreline Reach G-18** (Ex. 4a – Tab 14) and recommends that any new development be located outside the Regulatory Shoreline limits. This is the limit that is used to review any new development applications.

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The GSCA's ***Hazard Land Policies and Guidelines*** (Ex. 4a –Tab 16) were adopted in July of 1994. These hazards include the lands below the 100 year flood level plus the 15 metre wave uprush allowance. As in the other documents, new development generally is not permitted in the hazard area and it is in this document that the issue requiring 'new development to be placed outside the flood limits if sufficient land exists' is first stated.

Section 6.2.2.1. states:

> "With the exception of the structures and uses listed in 2.1, 1 and 2, new development within the shore regulatory flood standard will be prohibited. With the exception of the creation of new lots and the structures /uses listed under 2.2, new development may be permitted on an existing lot of record that by definition is considered eligible for development subject to the following:
>
> a) there is sufficient area within the lot to place the new development outside the 100 year lake flood limit."

The GSCA continues to review and adhere to this document today, noting that the newer (2009) document does incorporate these policies. It can be shown that the issue of keeping new development out of the hazard area when sufficient land exists outside on which development can occur has been part of the Authority's position since the early '90's. The new policies reflect these earlier policies.

Finally, Ms. Wilcox dealt with the most current policy document - *Policies for the Administration of the Development, Interference with Wetlands and Alterations to Shorelines and Watercourses Regulation - Ontario Regulation 151/06* (2009). (Ex. 4a-Tab 17 and Ex.10 in full).

In 2006, the GSCA adopted *Ontario Regulation 151/06.* This document was intended "to be consistent across Ontario for all of the conservation authorities and was reviewed and approved by the Minister". (Transcript #1 – P. 205) The guidelines for producing these regulations had been provided by the Minister (MNR) and led to standardized regulations across the province. The Policy document followed in 2009 and was modeled on the policy document for the Grand River Conservation Authority with the main emphasis being no development below the 100 year lake flood level and no development if there is a feasible alternative site on the property.

The relevant policies are found in **Section 8.6.2**.

> "Development within lands subject to Lake Huron and Georgian Bay shoreline flooding or erosion hazards may be permitted outside the 1/100 year floodlimit in accordance with the policies in sections 7.1.2 , 7.1.3, general policies, and where there is no feasible alternative site outside the flooding or erosion hazards." (Ex. 10-P.38)

In the case of the Fox application, there is 1.4 hectares (3.459 acres) of land outside the hazard area and the designated wetland area. Ms. Wilcox indicated that the GSCA has been consistent in implementing this policy of directing development away from the hazard if a feasible alternative exists.

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Ms. Wilcox outlined the origin of the 2008 Draft document which provides the *Guidelines to Support Conservation Authority Administration of the Development, Interference with Wetlands and Alterations to Shorelines and Watercourses Regulation*. (Ex.4a-Tab 19) This document was prepared by a collaborative peer review committee consisting of Ministry of Natural Resources and Conservation Ontario staff.

Ms. Wilcox dismissed Mr. Armstrong's land use planning opinion on matters such as the location of neighbouring buildings or the view of the Bay as not applicable to the GSCA's review of the Fox application as it is not within the scope of the **Conservation Authorities Act** or the applicable GSCA policies and guidelines. She reiterated that:

> "The primary objective of Ontario Regulation 151/06 is to prevent loss of life, minimize property damage and social disruption, and avoid public and private expenditure for emergency operations, evacuation and restoration due to natural hazards and associated processes. The intent of section 8.6.2 of the Authority's policies is to require development occur on that portion of the property which is not subject to shoreline flooding or erosion hazards. There is ample space on the property suitable for development outside the identified hazard area." (Ex. 4a – Tab 3 – P.21)

Ms. Wilcox indicated that the Authority had also been concerned with the intent to relocate the existing stream or watercourse. No details have been provided to the GSCA to date by the applicant regarding this issue.

With regard to the concept of "cut and fill" submitted by Mr. Simmons, Ms. Wilcox countered that this concept applies only in riverine floodplains not on shorelines of large lakes. (Ex. 4a – Tab 1 – P. 4) She also indicated that the GSCA had a concern about the ongoing maintenance of any active protective measures.

The amount of fill was stated by Mr. Simmons to be a small. (1200 cubic meters.) Ms. Wilcox disagreed that the amount was small. She did agree that the amount would not noticeably change the level of Owen Sound Bay, but the amount is relevant from the point of view of precedence, in particular because of the large amount of shoreline under the jurisdiction of the GSCA and the impact of other landowners who might wish to do the same as Mr. Fox.

Ms. Wilcox concluded by pointing out that the GSCA identified the hazard area on the property when the lot was created by severance in 1995. According to Exhibit 4a – Tab 1 - p.12, the report from the GSCA to Grey County included the following statement:

> "An existing hazard zone on the property is accurately mapped and should remain in effect" and that "GSCA policy prohibits new development within the Regulatory Shoreline (Shoreline Hazard) when there is sufficient area on the proposed lot outside this area".

In his cross examination, Mr. Pickfield focused on the actual **Regulation 151/06** and outlined the first part of Section 2 – Development Prohibited:

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> "Subject to section 3, no person shall undertake development or permit other persons to undertake development in or on areas within the jurisdiction of the Authority that are (a) adjacent or close to the shoreline of the Great Lakes/St. Lawrence River system or inland lakes that may be affected by flooding, erosion, dynamic beaches, including the area from the furthest offshore extent of the authority's boundaries to the furthest landward extent of the aggregate of the following distances."

Ms. Wilcox agreed that this is the section that provides the GSCA with the jurisdiction to regulate flooding, among other issues.

Section 3 provides for Permission to develop - it gives the Authority permission or the discretion to allow development within the 1:100 year flood zone. Mr. Pickfield introduced the point that the *Policies for the Administration of the Development, Interference with Wetlands and Alterations to Shorelines and Watercourses Regulation - Ontario Regulation 151/06* (2009) do not have "regulatory authority" stemming from Regulation 151/06. He stated an opinion that the title of the Policy document implies this and suggested that this is misleading.

Subsection 3 (1) of the Regulation states that:

> "The Authority may grant permission for development in or on the areas described in subsection 2 (1) if, in its opinion, the control of flooding, erosion, dynamic beaches, pollution or the conservation of land will not be affected by the development".

It was agreed that the issue involved is the one referencing 'flooding'. It also was agreed that the Regulation does not speak to the "feasibility" question. This arises within the policy document, not within the Regulation.

Mr. Pickfield queried why the staff report and subsequent decision itemized the *PPS* as a reason for the Fox application to not be in 'conformance' when she had stated that it was not a relevant document in making a decision about an application. She amended her comments to "I do believe the *PPS* provides direction but I don't believe that our policies and our decisions are bound by it". (Transcript #1 – p 252) The amount of weight that the Authority Board put on the reference to the *PPS* cannot be determined.

Through discussion regarding the actual Statement, Ms Wilcox acknowledged that her Witness Statement's comment that:

> *"3.1.2 through 3.1.6 are intended to give more specific direction on how this policy is to be implemented in situations where there is no alternative location on the subject property outside the identified hazard area."* (Ex 4a – Tab 3 – p.18)

could not be backed up by anything in the *PPS* and in effect, it is her own interpretation of the document and a reiteration of her belief that the existence of an alternative location is the relevant issue.

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Ms. Wilcox went on to reiterate the position that development would create new hazards and would aggravate existing hazards to the point where protective measures would be required for safe development to take place.

Mr. Pickfield, however, noted Mr. Simmons evidence that once the fill was in place the land would be raised above the flood hazard area and will not create any new hazards. How then can Ms. Wilcox's statement be valid. Her response was that there is no guarantee or evidence from a technical point of view that engineered protective measures will preserve future development. She reiterated the GSCA's policy goal of keeping new development outside identified hazard areas that would require active protective measures, such as the construction of a breakwall. Such activity would create a new hazard that was not there before. It remains that the GSCA policy supports development where active protective measures are not required.

Ms. Wilcox indicated that in the case of smaller lots where there was reduced flexibility for alternative locations, the Authority would consider allowing development in the wave uprush area, but not below the 1/100 year flood level. The development would require flood roofing, as would the Fox application, but not engineered active protective measures. Since there can be no guarantee regarding the maintenance of the protective measures, the potential of a hazardous condition arising is of concern to the Authority.

Final Summations

A large volume of material was submitted to the tribunal by both parties prior to the final hearing on March 7, 2011. Much of it was repeated evidence. The tribunal again noted that the evidence by the Respondent focused on the land as it exists whereas, the Appellant focused on the assumption of the land as it would be, if filled.

1. For the Appellant

Mr. Ken Fox
Mr. Peter Pickfield

Mr. Pickfield reiterated the position that the application was not about building a residence in the flood plain of Owen Sound Bay but the fact that once the fill is in place, the proposed residence would not be in the flood hazard area that is regulated by the GSCA and would not require a permit. This is the most important point for the tribunal. (Ex. 20a- p 10: 28)

Mr. Pickfield believes that the evidence has shown that development can take place without creating any further hazards of any nature and that all the technical problems can be resolved at a later stage.

He outlined some issues which he believes are of great import to the making of a decision.

1. The Regulatory test is the first issue and the one that he believes has "lost its focus" through the hearing. Section 3 of **Ontario Regulation 151/06** provides the Authority with a discretionary power to permit development in or on a regulated area (described in section 2) "*if in its opinion the*

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> *control of flooding will not be affected by the development*". Therefore, in Mr. Pickfield's opinion, that is the question that needs to be answered. It is the only regulatory (and legal) test established under legislation (**Conservation Authorities Act**) that the tribunal needs to deal with.

It was noted that neither the "authorizing statute nor the Regulation makes any mention of a test related to feasibility of alternative locations for development". (Ex. 20a – P 13 : 42)

> 2. The second issue surrounds the role of policy and in particular, the administrative policy of "no feasible alternative", as found in the GSCA's document, *Policies for the Administration of the Development, Interference with Wetlands and Alterations to Shorelines and Watercourses Regulation - Ontario Regulation 151/06*. (Ex. 10). Section 8.6.2. outlines the issue of feasible alternative site.

Mr. Pickfield maintained that the Authority has relied basically on policy documents to decide on the Fox application. In making such decisions, Mr. Pickfield contends that the decision maker must have reasonable grounds based on the intent and purpose of the regulations that the decision maker is administering." (Ex. 20a-p.14: 47) As a result, policy documents are prepared to allow for fairness and consistency in the decision making process. These documents need to be properly interpreted or unreasonable and sometimes, unlawful decision can be made.

In the case of the GSCA's documents, Mr. Pickfield believes that all of the technical policies are met by the Fox application and it comes down to the statement about "*no feasible alternative site outside the flooding area*". As a result, he is of the opinion that errors of interpretation have been made as follows:

> 1. The interpretation is narrow and rigid without taking into account the flexibility intended by the legislature when granting discretion to the decision-makers; and
> 2. Failing to interpret the policy in a manner consistent with the legislation, leading to a decision based on improper reasons which are outside the jurisdiction of the decision-maker.

Policies are not statutes or regulations and do not have the force of law, unless like the *PPS*, they have a regulatory basis. They are only aids to decision makers. He pointed out that the Mining and Lands Commissioner has exercised caution in being too rigid and has considered whether policy application was reasonable under the circumstances being considered. Reference was made to *Segal v. The General Manager, the Ontario Health Insurance Plan* as being quoted in various decisions of the Commissioner.

Mr. Pickfield referenced *Strey v. Lakehead Region Conservation Authority*, which further referred to *Segal v. The General Manager, the Ontario Health Insurance Plan*, (Appellant's Book of Authorities – Tab 5, p.38) pointing out the following steps that can be taken in reviewing an appeal:

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"1. Consider the policy and determine whether generally it will be adopted or rejected by the tribunal.
2. If adopted, it need not be reconsidered, unless a party pleads exceptional circumstances.
3. If rejected, the tribunal will give reasons.
4. If adopted, consider whether it is reasonable to apply the policy in the circumstances."

In summary on this point, Mr. Pickfield wrote:

"there is a duty on the decision-makers tribunals, when considering appeals to ensure the application of the policy was reasonable in the circumstances and not applied in an overly rigid or narrow manner……..This caution is particularly important in the case of the GSCA policies, since the creation of them are not specifically authorized by law and have not been subject to a formal public and agency review process." (Ex 20a-p.18: 59)

3. The control of flooding – is it affected by this application? Mr. Pickfield contended that this is the key issue. The only evidence provided to the tribunal is that of the appellant's expert engineering witness, Mr. Simmons. His evidence was that all the policy requirements could be met by the application. There would not be an impact on the control of flooding on the basis of:

1) the amount of fill to be added is negligible;
2) any rise in the level of Owen Sound Bay would be negligible;
3) the fill actually came out of the Bay;
4) the break wall is a permanent control solution and requires little maintenance;
5) vegetation will reduce the possible impact of erosion;
6) no precedent will be set as it is a site specific application;
7) no new hazards will be created;
8) the existing woodland would not be disturbed;

Mr. Pickfield noted that no further technical evidence to the contrary has been provided to the tribunal.

Mr. Pickfield believed that if the GSCA had been concerned about flooding, the Authority would have produced a witness to deal with the issue. However, the Staff did not consult with a water resource engineer nor did the staff report mention a concern about flooding. This is the gap in the Authority's case and this is the issue about which Mr. Fox deserved answers. Instead, he received a decision based on an administrative policy. The GSCA did not address this issue thoroughly and provided no contrary evidence.

Mr. Pickfield contended that the Authority has gone beyond its jurisdiction of the **Conservation Authorities Act** and Ontario Regulation 151/06 by basing its decision on other considerations than the control of flooding, namely the Policy document. This document is an internal document which the tribunal certainly should review but should not give it the weight that the statute and the regulation have.

Mr. Pickfield believes that the GSCA made its decision, solely on the fact that there was sufficient land available on the site to build a house outside the hazard zone without dealing with the actual issue of the impact of the control of flooding. The feasibility of relocating outside the flood hazard zone has not been linked to the issue of flood control requirements.

The only points raised by Ms. Wilcox that could be classified as technical evidence were:

1. The breakwall needs on going maintenance (which will have to be carried out by the landowner as neither the Town nor the Authority have funds to do this);

2. The flood control issue can be linked to the maintenance of an 'active protective measure' which is present in the form of the breakwall.

It was noted that Mr. Simmons had submitted that, in his professional opinion, only visual inspections, best performed by the landowner, would be required on the breakwall.

Two other points have appeared in the GSCA's Submission documents which had not appeared until that point in any reports or evidence documents. These concerns dealt with liability and precedence

No evidence was presented by the Authority regarding a valid safety concern which might arise if the application is approved, resulting in possible liability to the Authority if a problem occurred after the fact. On the other hand, Mr. Simmons stated that there were no safety concerns/issues presented by the proposed development.

The other concern introduced refers to the matter of precedence. Mr. Pickfield outlined four reasons why precedence is not applicable to the Fox application:

1. If applied to this case, it would result in a blanket prohibition on all applications;

2. In prior cases cited, the concern has been tied to storage capacity in a floodplain whereas that is not the situation with the Fox application;

3. Evidence has been submitted indicating that the impact would be negligible on the Owen Sound-Georgian Bay basin. If a permit was granted for every kilometer of shoreline under the GSCA's jurisdiction (155 kilometres) the 100 year flood level over the basin would rise by 1.55 kilometres, a negligible amount;

4. This application presents a unique case – a small amount of fill, a breakwall already is in place and requires minor improvements, the fill was secured from dredging of the bay itself, the fact that the filling had commenced before the regulation came into force and that the building envelope is located on the only cleared area of the property.

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Mr. Pickfield reiterated the respondent's position that "no permit should be issued which allows the placing of a dwelling within the 100 year flood limit of 177.9 metres." He stressed that is not what is proposed. The proposal is to allow fill to be placed so that the site no longer would be in the hazard zone. It would only be after that occurred that a house would be built. The fill would be part of the flood proofing for a new dwelling.

A discussion followed between the tribunal and Mr. Pickfield regarding the issue of the application itself, it being for development in the form of fill. A building envelope is shown but the application itself is for fill. So a question arises for the tribunal as to 'why' it is necessary for the fill to be placed in a hazard zone. The answer obviously is so that a house can be built outside that zone. After the fill has been put in place, no further concerns would exist for the Respondent from the point of view of flooding. (Transcript #2 – pages 50 through 56)

Mr. Pickfield concluded by emphasizing that the overriding regulation does provide for discretion in approving a permit for development in a hazard area and through this, could have protective measures and an engineering solution imposed. If this discretion was not allowed, then no application within a flood plain would ever be approved. The question remaining for the tribunal is stated in Appellants' Submission – Issue 4 on page 39:

> *"Is the approval of the application appropriate, taking into account the evidence with respect to control of flooding and the circumstances of this case?"*

2. For the Respondent, The Grey Sauble Conservation Authority:

Mr. Donald Greenfield

Mr. Greenfield acknowledged that Mr. Fox has been totally up front about placing a house on the property once the fill is in place. He indicated that the tribunal will have difficulty approaching the decision without considering the true intent behind the application. If this is not done, the question, as indicated by the tribunal, is 'why is the land to be filled?'

He made it clear in his submissions that the respondent's case "really stands or falls based on its regulation". (In this case, it is again noted that the Policy document is being referenced as a Regulation – Tab 6 in Book of Authorities) He agrees that the starting point is the **Conservation Authorities Act** wherein clause 28 (1) c states:

> *"Subject to the approval of the Minister, an Authority may make regulations applicable in the area under its jurisdiction,*
> *(c) prohibiting, regulating or requiring the permission of the authority for development if, in the opinion of the authority, the control of flooding, erosion, dynamic beaches or pollution to the conservation of land may be affected by the development."*

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The Grey Sauble Conservation Authority, following the sample regulation developed by the Ministry of Natural Resources and Conservation Ontario, enacted and had Minister approval of Ontario Regulation 151/06. (Book of Authorities – Tab 5) This document went through the public review process used by conservation authorities in Ontario, which included MNR, Conservation Ontario, the Authority itself which is composed of municipally elected officials (and probably the local municipalities which are represented by the Authority members. Once done, the Policy document was developed (Book of Authorities-Tab 6). However, Mr. Greenfield continued to describe this document as the regulation "as the Authority calls it". (Transcript #2 – p. 62)

Mr. Greenfield reiterated Ms. Wilcox's point that there is no current danger on the property to a structure or to human life, so it is better to leave it alone rather than place something there that would then be prone to the high waters of Georgian Bay. As a result, the Authority follows the policy of consistently refusing any application which has a 'feasible alternative site' on the lot where development on the existing floodplain can be avoided. Mr. Greenfield stated that the case stands or falls on that point in the regulation. He maintains that the document is a policy but it is also a regulation under clause 21(1) (c) of the **Act**.

The issue of precedence was reviewed. The concern deals with the potential number of persons who may have filled some of their lands following the 1986 storms and before the regulations were implemented who might see a Fox approval as something that they should do or have the right to do. It would be difficult for the Authority to then refuse such applications in the future.

Mr. Greenfield referenced the *Russell v. Toronto and Region Conservation Authority* as an example of a decision dealing with the authority of a conservation authority to make decisions based on policies, developed under a regulation and the **Conservation Authorities Act**. (See book of Authorities –Tab 1)

Debate recurred on this point with Mr. Pickfield reiterating that the Policy document entitled *Policies for the Administration of the Development, Interference with Wetlands and Alterations to Shorelines and Watercourses Regulation - Ontario Regulation 151/06.* (Ex. 10) is not a regulation. It is a Policy. Mr. Greenfield's response was that it is a regulation of the Authority but not an Ontario Regulation.

Mr. Pickfield reiterated that it is just a policy. In law, you can be prosecuted under a regulation but not under a policy. A policy is not authorized under the **Conservation Authorities Act**. The document cannot be treated as a regulation under clause 28 (1)(c). The fact that the GSCA appears to assume that this document is a regulation could be an error that they made in refusing the application. They let this policy document dominate their decision.

Mr. Greenfield reminded the tribunal that the decision to be made is the tribunal's responsibility now, since the hearing is *de novo.* Assuming it is a policy and not a regulation, "it would still be appropriate for you to apply the policy as a reason for refusing the permit". (Transcript #2 – p. 78) Mr. Pickfield concluded by reminding the tribunal that in his opinion the Ontario Regulation 151/06 does not follow the guideline document as they did not provide for "an exemption for minor fill", and that's what I say this is. (Transcript #2 – p. 79)

FINDINGS

Preliminary Comments

From the outset, the exact nature of this appeal was a question. Was it for development in the form of fill only or for development in the form of fill for the subsequent development of a residential unit.

Simply put, this application is about filling the floodplain and wave uprush area of Georgian Bay in order to take the land out of this floodplain and wave uprush area. However, the tribunal believes that it cannot be dealt with without acknowledging the appellant's intent of applying to build a residential unit on the lands once they have been 'removed' from the floodplain.

The appellant's arguments were that everything will be fine once the fill is approved. The evidence was led in this direction. The appellant maintained that no problems would exist anymore once the land was filled, so there would be no reason for the Authority to be concerned. By taking this position, it seems to the tribunal the appellant has acknowledged the potential difficulties of the site. In addition, they view this portion of the property as the only place to feasibly build the future residential unit despite the amount of land remaining on the site.

On the other hand, the respondent argues that the land to be filled is a flood prone area of a portion of one of the Great Lakes, namely Georgian Bay (Owen Sound Bay). This Bay has a history of violent storms, which has an impact on the land in question in the past to the point that the owner installed a breakwater or dyke along the shoreline to prevent the land from being washed back and forth in and out of the Bay. The respondent believes the development site should remain empty of buildings in order to continue to fulfill the function nature gave to it. They further maintain that there is a great deal of other lands on the property where the house can be placed.

The 'other' land is covered with trees requiring a great deal of expensive clearing to provide a proper development site, whereas the proposed site has already been cleared of vegetation and would provide a simpler and less costly area for development. Being closer to the water, it also would have greater real estate value. Both positions have their potential impacts. The question this poses for the tribunal is which of these locations has the most relevance to the goals and objectives of the **Conservation Authorities Act** and the GSCA's regulations.

With regard to four issues that caused concern and discussion throughout the hearing, the tribunal wishes to make some preliminary comments and findings.

1. The evidence provided by the planner, Mr. Armstrong regarding the support of the Council of the Town of Meaford has no relevance to a decision made under the **Conservation Authorities Act** decision. In fact, it should be the other way around. In the end, the Town's resolution, prepared by Mr. Armstrong, actually acknowledged that it is up to the Authority to make this decision, not the town. As a result, the tribunal will

make no further reference to this evidence. (The tribunal notes that Mr. Armstrong placed little emphasis on the fact that the property had been designated hazard zone in the Official Plan and Zoning By-Law and the implications of these facts.)

2. The other planning evidence dealt with Mr. Armstrong's suggestion that the proposed residential unit should line up with the front of the neighbouring existing unit. Again, the tribunal finds this irrelevant. If the application is taken at face value, this was completely unnecessary evidence since there was no application to build a house, perhaps create a building envelope, but not a building. At any rate, this is not an urban area where such a consideration might bear examination, but that would be an issue to be dealt with by the municipality, not the GSCA.

3. The issue raised by the respondent of the fill being stockpiled as a result of dredging of the Owen Sound Bay itself also has no relevance to the decision regarding the filling of the floodplain. It was put forward as a cut and fill proposal, but as Ms. Wilcox pointed out ((Ex. 4a – Tab1 – P. 4), the cut and fill method only applies to riverine circumstances, which this application is not. It does not matter where the fill was to come from. The important point is that it is an application to fill floodplain land on a Great Lake.

4 The continued references by the respondent that the document entitled *Policies for the Administration of the Development, Interference with Wetlands and Alterations to Shorelines and Watercourses Regulation - Ontario Regulation 151/06* (2009) is a regulation is not accepted by the tribunal. The tribunal found that this reference continually caused confusion with regard to the evidence provided. The Authority itself and the staff may consider it their regulation, but it certainly is not a regulation approved directly under the **Conservation Authorities Act** and should be referenced as a Policy document, not a regulation. The tribunal accepts the appellant's argument that this document is only a policy and it will be dealt with as such.

However, the value of this policy document and its importance to the tribunal in making a decision is a further issue to be decided. The weight given to regulations and policies will be dealt with later in the Findings.

A discussion and a decision with regard to the Issues outlined on page 3 of this Reasons and Findings report follows.

Issue 1: What is the value of the *Provincial Policy Statement* in making decisions under the **Conservation Authorities Act**?

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It has been written in many decisions of the Mining and Lands Commissioner that it is a responsibility of the Commissioner, as a provincial appointee, to have regard to provincial policy documents, in this case, the *PPS* itself. The tribunal can cite many decisions where this matter has been discussed, in particular, *Rinaldi v. the Lake Simcoe Region Conservation Authority*, (CA 008-01) in which the tribunal stated the following:

> "The tribunal has a responsibility to have regard to the provincial documents that provide the guidelines and jurisdiction under which conservation authorities act."

The tribunal notes that this responsibility applies to all conservation authorities. It is noted that the GSCA's decision cited the *PPS* as one of the reasons for refusal of the Fox application. The respondent subsequently stated that, although this is primarily a planning document, the GSCA also has a responsibility to "have regard to" the policies enunciated by the province in this document with regard to environmental issues. It was not the main reason for the GSCA's refusal but it was listed among the reasons and therefore raised as an issue by the appellant, on the basis that it was a planning policy document and not subject to the **Conservation Authorities Act**. As a result, the appellant believes that the GSCA made an error by including the *PPS* as a reason for the refusal.

Despite agreement that the document holds less weight within a decision than either the **Act** or any approved Regulation, much discussion took place surrounding the details of the *PPS* document. As in *Rinaldi*, the appellant argued that the GSCA has been too strict and as a result, has made errors in their interpretation and application of this document.

For example, the *PPS* should be read in its entirety not just the sections that obviously apply to conservation issues. Mr. Pickfield stated that "Flexibility in policy interpretation is essential, when – as in this case – the policies relied upon do not have a legislative or regulatory basis". (Ex. 20a - #54 –p.17) In the case of the *PPS*, it was approved under Section 3 of the **Planning Act**.

The tribunal agrees that the entire *PPS* needs to be reviewed. However, as stated in other decisions, such as *Rinaldi*, there are certain policies that are more relevant to the responsibilities of conservation authorities while others relate more directly to municipal planning. In fact the tribunal believes that Part III: How to Read the Provincial Policy Statement implies exactly that:

> "The Provincial Policy Statement is more than a set of individual policies. It is intended to be read in its entirety and the relevant policies are to be applied to each situation." (Ex. 15)

The tribunal accepts this statement to mean that the tribunal should read the entire policy and understand the relationships within it, but take special regard to those areas relevant to the issue or area of responsibility in question. It is clear to the tribunal that regard must be given to the *PPS*. Subsection 3 (5) of the **Planning Act** appears to endorse this view. It states that:

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> "In exercising any authority that affects any planning matter, the council of every municipality, every local board, every minister of the crown and every ministry board, commission or agency of the government, including the Municipal Board and Ontario Hydro, shall have regard to policy statements issued under subsection (1)."

In addition, the tribunal also notes that Conservation Ontario entered into an agreement with the Ministry of Municipal Affairs and Housing and the Ministry of Natural Resources (parent Ministry) whereby conservation authorities were delegated the Minister's responsibility as the lead agencies in commenting on municipal planning matters specific to natural hazards as described in the *PPS*. Obviously, certain sections have more import to the authorities than others and this was acknowledged by the Minister through a Memorandum of Understanding that was signed in early 2001.

The *PPS* itself directs development away from areas of natural and human-made hazards, "where these hazards cannot be mitigated". Section IV- (2) continues with "Taking action to conserve land and resources avoids the need for costly remedial measures to correct problems and supports economic and environmental principles.

Section 3.1 of the *PPS* deals with Public Health and Safety - Natural Hazards. It is this section that speaks to the fact that an authority should be concerned and should attempt to direct development to areas outside :

> "hazardous lands adjacent to the shorelines of the Great Lakes - St. Lawrence River System and large inland lakes which are impacted by flooding hazards, erosion hazards and/or dynamic beach hazards;"

In this case, hazardous lands, means "property or lands that could be unsafe for development due to naturally occurring processes."

The policy also has provided a description of the Great Lakes flooding hazard limit as the "100 year flood level plus an allowance for wave uprush and other water related hazards." This guideline certainly is important to the GSCA as it provides the basis for the area to be regulated by the GSCA.

However, Section 3.1.3. continues, indicating that development/site alteration may be allowed in hazardous lands provided certain conditions can be achieved, as follows:

" a) the hazards can be safely addressed, and the development and site alteration is carried out in accordance with established standards and procedures;
b) new hazards are not created and existing hazards are not aggravated;
c) no adverse environmental impacts will result;
d) vehicles and people have a way of safely entering and exiting the area during times of flooding, erosion and other emergencies; "

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The appellant has maintained that all of these conditions are or can be met by the application, once the land has been filled. Despite agreeing that some of these conditions could be dealt with, the GSCA disagrees with regard to Section b) and c). Their position is that since nothing is on this land at the moment, a new hazard will be created once development takes place in the form of fill and/or a new building is constructed. As a result, they took the position (in having regard to) that the application was not in compliance with the *PPS*. (The technical issues of this application will be discussed under subsequent issues.)

The use of the word "compliance" caused some concern to Mr. Pickfield as being beyond the scope of the Authority's responsibility with regard to the *PPS*. The tribunal agrees that the Authority has to have regard only to the *PPS*. There is no need to be in compliance with this Policy document and it was noted that Ms. Wilcox agreed to this during her testimony.

The tribunal does find that the *PPS* must be and should be part of the review process of this application on the basis of the need to "have regard to" the intent and purposes of this Ontario policy document. With regard to the issue of an error being made because of the use of the word "compliance" instead of "with regard to", the tribunal does not accept this and views this as an issue of semantics. It is acknowledged that a more careful use of words by the respondent would have not then and should not then have caused a concern to the appellant.

The decision by the tribunal will not be determined by the use of this document, but it will have regard to the principles enunciated in the document. It is a part of the review in understanding the views of the Province of Ontario with regard to planning and environmental issues.

Just as a note, the tribunal found it interesting that the appellant spent so much time on this policy document in their examination of Mr. Armstrong, in view of what appeared to be their main premise that policies should play a minor part in the Authority's and the tribunal's decision in this case.

Issue 2: Did the Grey Sauble Conservation Authority follow the intent of the **Conservation Authorities Act** in developing and adopting their Regulations and Policies?

The **Conservation Authorities Act** is the central document to be reviewed and followed in any appeal process, both for a conservation authority and the tribunal. We know that this appeal was filed under subsection 28 (15). The GSCA has followed the necessary steps of the **Act** in this regard, as has the appellant.

Section 28 also deals with the making of regulations in the areas under an authority's jurisdiction, all being subject to the Minister's approval. The most relevant sections of the **Act** are:

> "Subsection 28 (1) (c) prohibiting, regulating or requiring the permission of the authority for development if, in the opinion of the authority, the control of flooding, erosion, dynamic beaches or pollution or the conservation of land may be affected by the development."

Subsection 28 (4) deals with the actual description of the areas to be regulated. Reference is made to maps that would be available for public review. (Ex. 14)

> Subsection 28 (5) The Minister shall not approve a regulation made under clause (1) (c) unless the regulation applies only to areas that are,
> (a) adjacent or close to the shoreline of the Great Lakes-St. Lawrence River System or to inland lakes that may be affected by flooding, erosion or dynamic beach hazards;
>
> Subsection 28 (6) The Lieutenant Governor in Council may make regulations governing the content of regulations made by authorities under subsection (1), including flood event standards and other standards that may be used, and setting out what must be included or excluded from regulations made by authorities under subsection (1). 1998, c. 18, Sched. I, s. 12.
>
> Subsection 28 (7) A regulation made by an authority under subsection (1) that does not conform with the requirements of a regulation made by the Lieutenant Governor in Council under subsection (6) is not valid. 1998, c. 18, Sched. I, s. 12

Subsection 28 (25) of the **Conservation Authorities Act** also provides the definitions for development, hazardous lands, and pollution. The tribunal notes that the Provincial Policy Statement provides a great many more definitions that are relevant to this decision. Since both are approved documents (in law), the tribunal will use the definitions from both documents throughout the decision.

The next step in the regulatory process was taken in 2004, when Regulation 97/04 was approved by the Provincial Government. This document provides the generic guidelines for all conservation authorities to develop "REGULATIONS UNDER SUBSECTION 28 (1) OF THE ACT: DEVELOPIMENT, INTERFERENCE WITH WETLANDS AND ALTERATIONS TO SHORELINES AND WATERCOURSES". (Ex. 19b – tab 2) Section 3 states:

> "**3**. Subject to section 4, a regulation shall prohibit development in or on,
>
> (a) hazardous lands;
> (b) wetlands
> (c) areas that are adjacent or close to the shoreline of the Great Lakes-St. Lawrence River System or to inland lakes that may be affected by flooding, erosion or dynamic beach hazards, including the area from the furthest offshore extent of the authority's boundary to the furthest landward extent of the aggregate of the following distances:
>
> (i) the 100 year flood level, plus an allowance in metres, determined by the authority, for wave uprush and, if necessary, an allowance in metres, determined by the authority, for other water-related hazards, including ship-generated waves, ice piling and ice jamming,
> (ii) the predicted long term stable slope projected from the existing stable toe of the slope or from the predicted location of the toe of the slope as that location may have shifted as a result of shoreline erosion over a 100-year period,

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(iii) where a dynamic beach is associated with the waterfront lands, an allowance in metres inland, determined by the authority, to accommodate dynamic beach movement, and

(iv) an allowance in metres inland, determined by the authority, not to exceed 15 metres;"

In comparing Ontario Regulation 97/04 to the Grey Sauble Conservation Authority's Ontario Regulation 151/06, the tribunal finds that the Authority has followed the instructions provided to it by the generic regulation. It outlines the areas where development and/or interference cannot/should not take place. Flexibity is provided in Subsection 3 (1) where it states"

> "The Authority may grant permission for development in or on the areas described in subsection 2(1) if, in its opinion the control of flooding, erosion, dynamic beaches, pollution or the conservation of land will not be affected by the development.

The tribunal finds that the underlined words in the above paragraph are most significant in this and any other decision. Flexibility is provided, but the decision is still left to the Authority (and this tribunal) as it 'may' give permission 'if in its opinion' approval should be granted. These documents have all been developed in accordance with proper regulatory processes. The generic conservation authority regulation (O Reg. 97/04 discussed above) sets out the parameters for the authority-specific regulations tailored to the specific needs of the local area, which in turn have been given legislative authority as provided by the Minister's regulations. The expertise for establishing regulations has been recognized by the Ontario legislature as being the responsibility of the Minister of Natural Resources in general and with the conservation authority in particular with regard to their area of jurisdiction.

However, the interpretation and the implementation of these regulations is a matter of great importance. The words of the regulation list the issues which must be dealt with, if a Conservation Authority is to grant permission for development or interference. The Permission to Develop sections of Ontario Regulation 151/06 are general in nature and provide no detail for the Authority or the tribunal to make a decision other than they 'may' allow development if they believe it is advisable (their opinion).

The logical step is to develop a set of policies that provide some consistency in decision making for every application that comes forward. Every applicant considers their application as unique and for the most part, each application is unique. This however is not a reason for allowing development to take place.

Most conservation authorities have developed policy documents to assist in reviewing development applications. In this case, *Policies for the Administration of the Development, Interference with Wetlands and Alterations to Shorelines and Watercourses Regulation - Ontario Regulation 151/06*. (Ex. 19b-tab 6) were adopted by the GSCA on May 13, 2009 and revised in January 2010. It is clear that this document is not a regulation but it was adopted to implement a regulation.

Does an authority have to right to develop a policy document? The answer is yes and for the most part, they are encouraged to do so. It can be argued that the development of a policy document could be considered a 'project' under the terms of the **Conservation Authorities Act**.

Section 1 in the **Act** defines 'project' as "a work undertaken by an authority for the furtherance of its objects". It does not specify the shape or form that a project takes. Further in the **Act**, the word 'program' is used, but no definition is provided. The tribunal finds that development of a policy document should be considered a program or project under the **Act**.

Reviewing Section 20 of the **Act**, the tribunal understands that:

> "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."

The *Policies for the Administration of the Development, Interference with Wetlands and Alterations to Shorelines and Watercourses Regulation - Ontario Regulation 151/06*. (Ex. 19b-tab 6) must be acknowledged as being part of a 'management' program for the GSCA.

The **Act** continues with a section on the Powers of authorities. Clause 21(1)(a) states:

> "For the purposes of accomplishing its objects, an authority has power,
> (a) to study and investigate the watershed and to determine a program whereby the natural resources of the watershed may be conserved, restored, developed and managed;"

and further…

> "(p) to cause research to be done."

It seems obvious to the tribunal that the development of policy is an important part of the regulatory process and this fact is acknowledged by the above noted clauses in the **Act**. The tribunal believes that is how the **Act** envisioned the process developing.

So the question is of the weight that the tribunal will apply to each of the three prongs of the regulatory process…the **Act**, the Ontario Regulation and the Policy document. The tribunal finds that the **Conservation Authorities Act** does direct that further studies and research should be carried out and developed into a program or project (policy document in this case) in order to fulfill the duties and responsibilities of the Authority. As such, the tribunal will review and use the document entitled *Policies for the Administration of the Development, Interference with Wetlands and Alterations to Shorelines and Watercourses Regulation - Ontario Regulation 151/06* in making a decision regarding the Fox application.

Issue 3: Are the Policies reasonable and appropriate in the context of the **Conservation Authorities Act** and specifically relating to the policy regarding 'feasible alternative' ?

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To begin this discussion, the tribunal believes reference should be made to a report entitled *Draft Guideline to Support Conservation Authority Administration of the "Development, Interference with Wetlands and Alterations to Shorelines and Watercourses Regulation"* (Ex. 19b – tab 11). The Ontario Government, through the Ministry of Natural Resources, and Conservation Ontario co-operatively developed this guideline as a result of a Peer Review of Section 28 of the **Act**. It is dated April 21, 2008.

The document contains suggested policy guidelines for implementing the individual conservation authority regulations. Until formally posted, the staff of the conservation authorities have been encouraged to consider the document in the administration of their regulatory programs. The goal is to provide a framework for the development of implementation policies or for the adjustment of existing policy documents.

Of relevance to the Fox application, the document's Preface states:

> "While the overall approach of this document is to encourage consistency in the interpretation and application of the Section 28 Regulations, it is recognized that each CA's policies may vary from these guidelines in recognition of the unique characteristics of its watersheds"

And further, the tribunal notes the following statement as representing one of the issues raised by the appellant:

> "Notwithstanding the above, it is the responsibility of each individual CA to ensure their policies are defensible based on the wording of the **Conservation Authorities Act** and their individual CA Regulations."

The preface encourages consistency between the different authorities but fully recognizes that each authority could have unique characteristics. In the case of the GSCA, they have a very large shoreline to deal with along the Lake Huron basin. The additional sentence does tell each authority to ensure that they are following the guidelines provided in the **Conservation Authorities Act**.

In the case of the Fox application, the appellant does not believe the GSCA followed the guidelines of the joint report in developing their Policies, particularly with regard to the policy which basically is that if there is sufficient land outside the hazard area, then no development approval will be given. The appellant maintains that there is nothing in the **Act** or the regulations that would allow such a 'test' to be implemented within a policy document. The tribunal notes, however, that there also is nothing outlined in the **Act** or the Regulations to preclude this policy being included and Clause 3.4.1 (12)(a) of the Draft Guideline, specifically states:

> "The submitted plans should demonstrate that:
> (a) there is no feasible alternative site outside of the shoreline flood hazard for the purpose of development or in the event that there is no feasible alternative site, that the proposed development is located in an area of least (and acceptable) risk;" (p. 66)

The tribunal sees this as definite encouragement to include the 'feasible alternative' policy in the individual conservation authority policy documents. The appellant's allegation that the GSCA did not follow the guidelines was not expanded in its evidence, but the above quote certainly indicates that the GSCA did pay attention to the suggested guidelines.

The question for the tribunal to answer is 'are the GSCA Policies reasonable and appropriate in the context of the **Conservation Authorities Act**?

The policy document, *Policies for the Administration of the Development, Interference with Wetland and Alterations to Shorelines and Watercourses Regulation - Ontario Regulation 151/06*" has two sections that are important to this finding. Section 7 provides the General Policies for regulated areas including "lands adjacent or close to the shoreline of Lake Huron and Georgian Bay". (Ex. 10. p. 12) Development, Interference or Alteration within a regulated area are not permitted unless "it can be demonstrated through appropriate technical studies and/or assessments, site plans and/or other plans as required by the GSCA that" twelve conditions can be met. All of the conditions outlined in Section 7, deal with the main goal and objectives of the GSCA, again stated as:

> "The objectives of the 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".

This definition is taken, almost verbatim, from Section 20 of the **Conservation Authorities Act** and the tribunal finds that the goals enunciated to fulfill the mandate follow the direction of the **Act** and the subsequent regulations. These goals are found in Exhibit 10 at page 6 and in summary, are:

- facilitate watershed planning
- enhance and protect water quantity and quality
- maintain reliable water supply
- reduce flood damages
- protect natural areas and biodiversity
- provide environmental education, and
- provide environmentally responsible outdoor recreational opportunities.

The twelve conditions presented in subsection 7.1.2. of the policy document expand upon these goals. The policy also clearly states that supplementary policies or standalone policies will apply to any permitted development. (Section 7.1.3.) These policies are specified as being in Sections 8 and 9 of the document. The tribunal finds that the words "demonstrate to the satisfaction of the GSCA" in Section 7.1.4. echo the words 'if, in its opinion" found in Section 3 of Ontario Regulation 151/06. The development must demonstrate that the conditions can be met, 'in the opinion' or to the satisfaction of the GSCA. The GSCA did not believe that the appellant met all of these tests.

Section 8 of the policy document provides more specific policies with regard to prohibiting or regulating development within the areas under the GSCA's jurisdiction. Subsection 8.6 specifically deals with the Lake Huron and Georgian Bay Shoreline.

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It is noted that the Authority's Shoreline Management Plan (May 1994 –Ex. 4a- tab 14) lays out the technical basis and recommended management plan for Shoreline Reach G-18, which includes the Fox property. The shoreline is described as 'low coastal plain, bedrock nearshore with cobble/pebble beaches', which is subject to flooding or erosion". This plan also established the elevations for the Regulatory Shoreline Limits as well as for the wave uprush elevation and the setbacks of 15 metres. Mr. Simmons used all of this information in preparing the Fox submission so there has been no dispute over this data.

The Management Concepts assigned to the Fox shoreline are that:

- new development should be setback outside the Regulatory Standard limits.
- structures to protect existing development would be maintained if necessary and feasible;
- protective measures to include sloped stone revetments and existing groynes but new groynes only with a review by engineer;
- shoreline processes such as erosion, flooding and sediment transport would exist;
- landowner would be required to monitor flood levels during severe storms, and
- flood warnings would constitute the emergency response.

Section 8.6.1. again reiterates that within the Regulated Area (within which every-one agrees that the Fox property is located) development will not be permitted except in accordance with the policies outlined in Sections 8.6.2. to 8.6.7. It was accepted that only 8.6.2. is relevant to the Fox application. It states:

> "Development within lands subject to Lake Huron and Georgian Bay Shoreline Flooding or Erosion Hazards may be permitted outside the 1:100 year flood limit in accordance with the policies in Section 7.1.2 – 7.1.3 – General Policies and where there is no feasible alternative site outside the flooding or erosion hazard,"

This section indicates that development is going to be allowed only "outside" the 1:100 year flood limit and specifically adds AND "where there is no feasible alternative site outside the flooding or erosion hazard". The first point here is confusing as it appears to prevent development but refers to "may be permitted". The tribunal reads the word "outside" to be beyond the flooding or erosion hazard.

If development is to be allowed, then certain conditions are outlined which must be met. There are six points raised that must be met. Again, the appellant believes that these conditions are met, whereas the GSCA does not. The appellant always returned to their chief issue with the policy document dealing with the words "and where there is no feasible alternative site outside the flooding or erosion hazard". (Discussion of these issues will follow in the context of Issue 4.) The appellant has submitted that the GSCA has taken a very narrow view of their policies by making a negative decision based almost solely on these words.

The appellant stated that the GSCA must deal with the issue of flood control first and foremost. In their view, the use of the 'feasible alternative' goes beyond the control of flooding and as a result, they have "moved beyond the legislative and regulatory parameters within which it can make a decision". (Ex. 20 9a) – para. 61, p. 18) They believe that is the only

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issue that the GSCA can legitimately deal with under the **Act** and/or regulations. The Authority has been accused of really not dealing with this issue, since flooding could be considered minor in nature. The GSCA hang their hat on the policy of a feasible alternative location.

The tribunal notes that the same policy statement is set out with regards to 'Replacement'. The policy submits that rather than replace a building or structure within the Regulated area, that wherever possible, it should be relocated within the lot with the goal of reducing the risks to the greatest extent possible.

The policy continually reiterates the main goal of the Authority of keeping development out of the flood or erosion hazard areas. This premise is stated at the beginning of the Ontario Regulation 151/06 in Section 2 as well. The Provincial Policy Statement suggests the same thing. The **Act** also states that the authorities may prohibit development. (Clause 28 (1)(c)). The flexibility exists in the form of conditions that must be met in order to secure permission for development, replacement and relocation, but it is obvious that the chief method of the GSCA to control flooding in their jurisdiction is to prohibit or prevent development in the regulated areas as opposed to the protective approach.

The intent of this policy has been used by the GSCA for some time. Mr. Greenfield had pointed out that the GSCA, as early as, 1994, worked with a document entitled "Hazard Land Policies and Guidelines" (Ex. 9) this policy prohibited new development within the Shore Regulatory Flood Standard. Where the lot existed, development would be allowed but it had to be located outside the 100 year lake flood limit. (Ex. 9-p.14) Different words were used, but the meaning was the same. Flexibility existed where uses had been in place and where there was no feasible alternative. This policy basis has not changed for many years. New development can occur only within a regulatory area if there is no other alternative and then it can occur only within the conditions outlined in the policy. It appears that the GSCA was willing to discuss the potential use of the flood fringe area as a possible alternative location in these cases, but apparently, this was not welcomed by the appellant.

Again in the earlier document, the Authority adopted a preventative rather than a protective approach in carrying out their goal of managing flood prone areas by discouraging development in hazardous areas. Their 1994 policies were modeled after the Flood Plain Planning Policy Statement, issued by the Ontario government in 1988, which also included Implementation Guidelines which have assisted conservation authorities in developing their own policies.

The tribunal finds that, through the years and the development and/or expansion of their policy documents, the GSCA has followed the policy directions of the province, including the generic Ontario Regulation and the *Draft Guideline to Support Conservation Authority Administration of the "Development, Interference with Wetlands and Alterations to Shorelines and Watercourses Regulation"* (Ex. 19b –tab 11).

The tribunal accepts that the policies adopted by the GSCA in its document, *Policies for the Administration of the Development, Interference with Wetland and Alterations to Shorelines and Watercourses Regulation - Ontario Regulation 151/06*" have been developed in the context of the **Conservation Authorities Act** and as such, should be considered in the

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tribunal's findings. The tribunal finds that this preventative method of flood control is reasonable and appropriate in the context of the two legislated documents, and as such the policy dealing with a 'feasible alternative outside the flood regulated area ' is a valid implementation strategy.

Issue #4: If so, how do the facts of the application apply to the adopted Regulation and subsequent Policies?

The significant issue of the Fox application is that the appellant wishes to fill an area that is entirely within the 1:100 year flood lake level and the wave uprush zone that is regulated by the Grey Sauble Conservation Authority. There is a longer term goal of placing a residential unit on this filled land. The Authority's evidence has been presented from the perspective of the land being located in a flood risk zone and development is not permitted. The appellant, on the other hand, has presented its case from the perspective that once the land is filled, there will be no risk and no permit will be required to build a home.

From the commencement of the hearing the respondent has stated that the policy document of the Authority, (which they have called 'their regulation') forms the basis for the GSCA refusal of this application. Mr. Greenfield stated that "the respondent's case here really stands or falls based on its regulation". Counsel also stated that these policies stem from the guidelines stated in Ontario Regulation 151/06, the development of which was permitted under the **Act**. The tribunal has already found that the Policies of the GSCA are reasonable and appropriate in the context of the **Act**, so it is now the detail of those policies that should be referenced, including the "feasible alternative" policy.

The tribunal understands that many of the issues regarding future development can be dealt with from a straight technical engineering point of view, as submitted by Mr. Simmons. The breakwater barrier can be heightened and many of the details such as safe access can be accommodated once the land is filled. Any engineer can produce plans to allow that to happen, but the policies of the Authority say something else. The land requires further fill in order for it to be removed from the regulated area. The policies of the Authority, however, basically say it should not be filled any further than it has been.

In reviewing the conditions that would be imposed on any new development, there are some which the tribunal finds the Fox application does not meet. With regard to Section 7.1.2. of the Policy Document (Ex. 10) the Fox application is within an existing hazard area. As a result, the development is viewed as having the potential of creating new hazards. The need to increase the height of the breakwall highlights this potential. (7.1.2. b))

Section 8.6.2., which deals with Development, begins by outlining the relevant issue that development may be permitted only where there is no feasible alternative site outside the flooding or erosion hazard. Six issues are listed that must be met by an applicant in order to secure approval.

In reviewing these issues, the tribunal has found that all but one could be met in order to secure approval and this condition is extremely important as it deals with the applicant meeting the recommendations of the Shoreline Management Plan. This plan states that the Regulatory Standard Limits (RSL) requires the elevation of 177.9 m GSC plus a 15m setback in order to be beyond the 'regulatory area'. The management component states that new development

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must be setback outside the RSL limits. Existing protective structures should be maintained if necessary and feasible but construction of new ones would happen only if reviewed with an engineer. In the Fox case, the extension of the groyne or breakwall would be dealt with in this manner if the application was approved. The overriding policy here, however, is that new development will not be allowed in the regulatory area. The tribunal finds that the Fox application does not meet this condition or test.

b) flood proofing standards, protection works standards and access standards as determined by the GSCA are met:

The tribunal finds that all these conditions could be met through development conditions if the application was approved;

c) protection works are designed to create or restore aquatic habitat to the extent possible.

The tribunal again believes this test could be met through the development of proper guidelines prepared by qualified people, including a biologist.

d) vehicles and people have a way of safely entering and exciting the area during times of flooding, erosion and other emergencies;

This matter also can be dealt with if approval was granted.

e) no basement is proposed and any crawl space is non-habitable and designed to facilitate service only;

This condition is not relevant to the kind of development involved in this application but it would be required if the land were filled and a house was subsequently built.

f) a maintenance access of at least 6 metres (20 feet) is retained to and along existing shoreline protection works.

The tribunal would accept this guideline as a condition if the application is approved.

The tribunal, however, must refer back to Section 7.1.2.l. This states that development may be permitted where it can be demonstrated that "the control of flooding, erosion, dynamic beaches, pollution or the conservation of land is not adversely affected." The tribunal believes that four of these issues have an impact on the Fox application namely flooding, erosion, pollution and the conservation of land with the final issue dealing with the 'feasible alternative' policy.

1. Flooding:

The appellant maintains that the control of flooding on the Fox lands is the main issue to be determined, and in fact, maintains that it is the only issue around which the GSCA could have legitimately made a decision in this case. The appellant submitted that their evidence

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regarding this issue was uncontested and therefore, it should be accepted by the tribunal. In summary, their evidence was that, once the fill was in place and the breakwater's height increased, the risk of flooding would no longer exist and therefore, the GSCA would have no cause for concern.

The tribunal noted that the appellant criticized the GSCA for not registering a concern about flooding in their actual decision. It appears, however, to the tribunal, that since both Regulation 151/06 and the policy document say that no development is allowed in a flood risk area regulated by the Authority, then the GSCA, by refusing the application, has shown a concern and there is no further onus on the Authority to produce any evidence regarding flood control matters beyond their policy review. The tribunal has noted that the Authority's Shoreline Management Plan (Ex. 4a –tab 14) clearly places the Fox lands in the area where no development is permitted. As such, this document provides further evidence with regard to the matter of control of flooding being a concern of the GSCA, as it is for the tribunal. There also is the added policy regarding the availability of a feasible alternative site outside the regulated area, which obviously exists in this case. As indicated, the tribunal has accepted the policy of 'prohibiting development' as the GSCA's chief strategy in dealing with the control of flooding.

2. Pollution:

Another factor that concerns the tribunal is the issue regarding the potential for pollution of Georgian Bay from ground runoff. It may not be a major issue but it is one that is having an affect along all the Great Lakes. Soil will be washed back into the bay under the natural processes, whether a dyke exists or not. It was acknowledged that wave uprush would continue to occur during storm conditions which could affect the land. In addition, with the development of 'grass' as in 'lawn' as opposed to a wetland environment adjacent to the bay, runoff of whatever might be used to enrich the growth of the grass, will end up in the bay. If the existing filled land is allowed to develop as a natural area, then this concern is reduced, this should be a concern to the GSCA and it is a concern to the tribunal, albeit a minor one.

3. Erosion:

The matter of erosion also needs to be addressed. In reading a major excerpt from the *Draft Guideline to Support Conservation Authority Administration of the "Development, Interference with Wetlands and Alterations to Shorelines and Watercourses Regulation"* document, a concern arose regarding the use of structures or groynes or as described, breakwalls, to control flooding. The GSCA policy does not support the development of such structures, again because of their emphasis on prohibition as opposed to protection. The referenced document provides some relevant statements that have given the tribunal some insight regarding the ability of the proposed breakwall to provide the necessary protection of the land that is proposed for filling. This part of the document was written for the joint task force by Tim Byrne, Flood and Erosion Control coordinator for the Essex Region Conservation Authority

> • "In terms of human use and occupation of the low-lying Great Lakes-St Lawrence River System shorelines, development decisions based on or during periods of low water levels can present the most serious problem. During lower water levels, the potential flood hazard to homes, cottages and other development often goes unrecognized." (p.55)

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• “In the absence of human intervention and/or the installation of remediation measures, once material is removed, dislodged or extracted from the shore face and near shore profile, it cannot reconstitute with the original material and is essentially lost forever.” (p.55)

• “Wave overtopping essentially occurs when the height of the natural shoreline or of the protection work, above the still water line is less than the limit of the wave uprush. As a result, wave overtopping the shoreline or protection work can cause flooding of the onshore area and can threaten the structural stability of protection works.” (p. 57)

• “Ice piling results from wind blowing over the ice, pushing the ice landward. This can produce ridging and a large build-up of ice at the shore. This shore ice can then scour sections of the beach and nearshore as well as destroy structures close to the shore. The moving ice can also remove boulders from the shallow areas, thereby reducing the level of shore protection provided by boulders.” (p. 58)

• “However, even with the installation of remedial measures (i.e. assumed to address the erosion hazard) the natural forces of erosion, storm activities/attack and other naturally occurring water and erosion related forces may prove to be such that the remedial measures may only offer a limited measure of protection and may only reduce or address the erosion hazard over a temporary period of time. Even if the shoreline is successfully armoured, the near shore lake bottom continues to erode or down cut eventually on all shorelines.” (p. 60)

As a result of this review, the tribunal has concerns about the long term stability of the breakwater that is proposed to “protect” the Fox land. The policy of the GSCA does discourage this type of structural protection because of these same concerns.

4. Conservaton of Land:

The final part of the discussion regarding the issue of how the facts apply to the adopted Regulation and the subsequent policies again brings the tribunal back to the policy document that derives its origins from the **Conservation Authorities Act** and the Ontario Regulations. The tribunal has noted that many other policy documents were developed over time by the Ontario Government that required and encouraged conservation authorities to protect and enhance as well as to alter its shorelines and river valleys for the good of the community. This goal really surrounds the concept of the conservation of land.

The tribunal accepts that the GSCA policies apply to the land as it stands today. Two of the GSCA policies state, most definitively, that no development should occur in the regulatory area of the Lake Huron shore especially where sufficient land exists outside the hazard area for new development to occur.

5. Feasible Alternative:

With regard to the issue of 'feasible alternative', the tribunal finds that this is the significant policy that must be dealt with. How it was applied by the appellant and the respondent varied considerably.

The appellant has stated that their review of the woodlands, located above the regulatory area, concluded that the area was not suitable or feasible to develop because the trees would be destroyed and development would harm the environment. That may be a reason to decide on the ultimate site but no evidence was provided to back up the statement. It just appears that a cursory review of the land was undertaken by the engineers, as Mr. Fox had already apparently indicated that he wished to build on the flood plain area. This was an understandable position to take since the real estate value would probably increase the closer to the water the house was located, despite the possible risk. There was, however, no evidence of any kind provided to indicate that there was any endangered species or any other reason why the trees could not be removed.

On the other hand, the respondent was not required to deal with any issue related to the tree removal since the woodland was outside the regulatory area and therefore, not their concern. It would have become a concern only if there had been any proof of endangered species. If this had occurred, more discussion would have been required as to the feasibility and desirability of tree removal. The respondent did not accept the conclusion by the appellant that there was no feasible alternative site.

The tribunal also does not accept this argument. The tribunal believes that more damage would be done by filling a floodplain which exists to support the natural environment than by the removal of some of the woodlot trees. Where will the greatest damage occur? In the woodlands that can be rejuvenated through new growth or on the floodplain that will be removed from the major processes of the Great Lakes systems for a long time? In many ways, the tribunal sees this issue as one relating to the conservation of land in so far as the floodplain is there to assist in the maintenance and protection of the ecosystem of the land. In this instance, the tribunal sees the appellant as being the body that is taking a narrow view by attempting to focus the decisive issue only on the control of flooding. To deny the existence of another site is unacceptable.

In the tribunal's view, it is possible to assume that the development could be refused on the Fox property not only on the basis of a flooding hazard but also with regard to erosion, pollution and the conservation of land. However, in the end, the tribunal finds that it will apply the policy document of the GSCA and its guidelines in the same manner as the guidelines of the Ontario Regulation in that both carry out the mandate of the Authority.

Issue #5: What is the impact of an approval in this matter with regards to precedent for the Grey Sauble Conservation Authority and for all Ontario's Conservation Authorities.

The issue of precedent has arisen many times in hearings before the Mining and Lands Commissioner. The appellants often state that there would not be a precedent since their application is unique. Mr. Simmons stated this on behalf of Mr. Fox. On the other hand, the conservation authority typically has a concern regarding this issue since it is they who must deal with the various applications requesting the right to develop on lands subject to hazards.

Both the appellant and the respondent discussed this issue by referring to *Russell v. Toronto and Region Conservation Authority* (tribunal file CA 003-05 -May 27, 2009). Mr. Pickfield's arguments dealt with the right of an authority to decide matters only on the basis of a policy document and that the precedent issue does not apply. Mr. Greenfield, for the respondent, argued that the issue of precedence was important to the decision and the future activity of the authority.

This particular case is unique to the tribunal in that it is located within the floodplain of a Great Lake. There have not been any appeals in these locations in the past ten or so years. However, the location does not negate the concern about precedent. For the most part, it increases this concern.

The impact of encroachment on the shoreline along the Great Lakes has been heightened over time and has resulted in many issues confronting municipalities and conservation authorities that are creating the need for extensive public funding in order to solve them. Some of these issues are:

1. erosion because of poor drainage, resulting in the slumpage of the headlands and cliffs and even the destruction and loss of residential units that have become at risk because of the erosion;
2. filling of floodplains for development as is being requested in the Fox case, and with the need of building artificial flood control structures so that a residential unit can be placed close to the water. This activity has had a huge impact on the loss of land both for a spill over area of the lake or bay and for the general use of the public along the shorelines;
3. pollution of the waters because of the type of vegetation and methods of maintenance of lawns, etc. used by landowners without regard to their impact;
4. the spread of invasive species, in particular Phragmites australis (common reed grass) has become of great concern along the Great Lakes shorelines including large areas of the Georgian Bay shoreline. Unfortunately, the public has assisted in the spread of such species. Phragmites is quite a beautiful plant that we admire in the ditches along our roadways. It has been transplanted by man and by animals. The growth structure of its roots allows the plant to take over and choke out native species that are beneficial to the shoreline habitat, both plant and animal.

All of these issues have a public cost to rectify them, even if that is possible. As a result, every application that affects these issues will have a cumulative impact and can set a precedent. In addition, an approval which has an alternative solution that will not cause these impacts certainly would be seen as a precedent.

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In *Robbins v Rideau Valley Conservation Authority* (tribunal file CA 005-00, Jan. 31/2011), the tribunal spoke to this issue of precedence.

> "The tribunal is concerned with precedent setting. It is important that a regulatory body such as the Rideau Valley Conservation Authority, reaches a decision based on the merits of each case. It is equally important that the body review and keep previous decisions in perspective with regard to consistency in applying the regulations. It is known that applicants review past decisions and use those decisions in ways that could help further their applications."

Therefore, former decisions that are determined to be consistent with water management philosophy and regulations, can place the Conservation Authorities in a position where further approvals, in effect, will follow or cause "precedence".

Mr. Pickfield, as noted previously, did not agree that precedent was an issue in this case. The tribunal has summarized his reasons as follows:

- using precedent as a reason for refusal "would be a blanket prohibition of all applications where there's no evidence of impact on flooding".
- the appellant maintained there is zero impact on flood storage and flood levels of Georgian Bay so that no precedent would occur'
- the Fox application is a unique case – small amount of fill, the fill came from the floodplain originally, that the work for this project started before the regulation was in place and that the building envelope is on the only piece of cleared land on the lot;

The tribunal acknowledges that a blanket prohibition could result but it is not because of precedence. It is because the guidelines provided by the Regulation and the subsequent policies of the GSCA prohibit development in the floodplain of Georgian Bay especially where there is sufficient land elsewhere on the property on which to develop a residential unit.

The GSCA's Shoreline Management Plan places the land in the regulatory area. There is no dispute about that. Again development is prohibited. The land will flood.

With regard to the facts in the third point, the tribunal sees no validity in them. The amount of fill is not insignificant. It does not matter that the fill came from the Bay as this application has no relevance to a cut and fill balance, nor does it matter that the land already had some fill in place. Mr. Fox has been caught in the time period when more up to date and relevant policies and procedures have been implemented in order to try to avoid many past problems regarding development that have had public impact.

It is not known how many sites emulate the conditions of the Fox application along the shoreline of Georgian Bay, but they undoubtedly still exist within the area under the jurisdiction of the GSCA. The cumulative effect cannot be judged. But that does not negate the possible future impact of setting a precedent where alternatives exist.

In 1979, Commissioner Ferguson wrote some succinct words in *Nagy v. MTRCA* (March 19, 1979) that the tribunal has always found compelling.

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> "In addition, serious emphasis was placed on the precedential effect of granting permission. The final words in section 4 of the regulation illustrate that in the granting of permission under section 4 the significant consideration is not the prevention of flooding but the broader concept of an interference with the control of flooding. It is in this broader concept that issues of precedent become significant. While the individual case may not cause significant flooding the consideration of the application must relate to the broader concept of control of flooding and whether the granting of permission would create a precedent that could not be distinguished on its merits in subsequent applications. It is proper for a conservation authority to consider the doctrine of precedent because of its relation to the "control of the prevention" of flooding as contrasted with mere prevention of flooding."

In the Fox case, the tribunal has found that the policy advocating a refusal based on the existence of a feasible alternative location applies and is consistent with the strategy used by the GSCA to deal with the control of flooding both along the shorelines of Lake Huron and Georgian Bay as well as in riverine circumstances. As such, the tribunal finds that an approval would contribute to a basis for a precedent argument for granting further approvals on other lands where an alternative location also exists.

CONCLUSIONS

The tribunal believes that each application that is submitted to a Conservation Authority has unique issues as stated in *Russell v. Toronto and Region Conservation Authority* (tribunal file CA 003-05 -May 27, 2009 - p.54).

> "This does not mean, however, that adopted policies should be adjusted to suit each application. This would create complete chaos as no consistency could exist"

In both the *Russell* case and the *Fox* case, the appellant's argument centered on the issue of the validity of a conservation authority using policy documents to make decisions regarding applications for development and alteration in flood hazard areas. The appellant maintained that there was no legal validity for this. The tribunal views this position as basically an argument to ignore policy documents.

The tribunal has not accepted this argument. It has found that both the parent **Conservation Authorities Act** and the subsequent Ontario Regulation document have provided appropriate and sufficient direction and authority to develop policy documents that provide for consistency and fairness for public decision making with regard to the jurisdiction of the Grey Sauble Conservation Authority and other conservation authorities in the province.

The tribunal has found the policy of "feasible alternative location" to be most compelling and appropriate. There is no doubt in the tribunal's mind that there is sufficient land on which to locate a building envelope outside the regulatory flood and wave uprush area of Georgian Bay. Maintaining the floodplain of Georgian Bay as floodplain is important in order to

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be able to deal with the volatile weather conditions that are besetting this area today. It is hoped that more landowners along Georgian Bay and the Great Lakes will come to understand the importance of maintaining what is left of the Great Lakes natural heritage.

Based on the review of all the discussion and the documents submitted, the tribunal finds that:

1. the policies and the strategy adopted by the Grey Sauble Conservation Authority are appropriate in order to fulfill their mandate under the **Act**, and that

2. the loss of the floodplain within the Great Lakes system by means of the placement of fill and/or site grading is not appropriate within the terms of the **Conservation Authorities Act** and Ontario Regulation 151/06.

The tribunal further finds that no costs shall be awarded to either party to this matter.