File No. CA 004-94

L. Kamerman) Thursday, the 6th day
Mining and Lands Commissioner) of April, 1995.

THE CONSERVATION AUTHORITIES ACT

IN THE MATTER OF

An appeal to the Minister under subsection 28(5) of the **Conservation Authorities Act** against the refusal to grant permission for the construction of an addition to a single family dwelling on Lot 8, Plan 630, 2597 Oliver Road, City of Thunder Bay, in the District of Thunder Bay.

B E T W E E N :

GLEN STREY and NANCY STREY

Appellants

- and -

LAKEHEAD REGION CONSERVATION AUTHORITY

Respondent

ORDER

WHEREAS an appeal to the Minister of Natural Resources was received by the tribunal on the 29th day of June, 1994, having been assigned to the Mining and Lands Commissioner (the"tribunal") by virtue of Ontario Regulation 795/90;

AND WHEREAS a hearing was held on Wednesday, the 8th day of March, 1995, in the Fireside Room, Valhalla Inn, 1 Valhalla Inn Road, in the City of Thunder Bay, in the Province of Ontario;

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UPON hearing from the parties and reading the documentation filed;

1. THIS TRIBUNAL ORDERS that the appeal from a refusal of the Lakehead Region Conservation Authority to grant permission for the construction of an addition to a single family dwelling on Lot 8, Plan 630, 2597 Oliver Road, City of Thunder Bay, in the District of Thunder Bay be dismissed.

2. THIS TRIBUNAL FURTHER ORDERS that no costs shall be payable by either party in respect of this appeal.

DATED this 6th day of April, 1995.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

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REASONS

This matter was heard in the Fireside Room, Valhalla Inn, 1 Valhalla Inn Road, in the City of Thunder Bay, in the Province of Ontario on March 8, 1995.

Appearances:

Allan D. McKitrick Counsel for the Lakehead Region Conservation Authority

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Glen Strey Appearing on behalf of Nancy Strey and himself

Preamble:

Glen and Nancy Strey (the "appellants") applied to the Lakehead Region Conservation Authority (the "LRCA") on March 1, 1994 for permission to construct an addition to the existing residential dwelling on the property located at 2597 Oliver Road, Thunder Bay. At a meeting of the LRCA held on May 11, 1994, it was resolved that the application be refused. The appellants were served with a Notice of Decision dated May 13, 1994, which sets out the following reasons for refusal:

1. The addition would increase the potential for people to be put at risk in a flood situation.

2. The threat of property damage would be increased.

3. Safe and dry pedestrian and vehicular access are not available at the site.

On June 14, 1994, the appellants wrote to the Minister of Natural Resources appealing the decision of the LRCA. An appeal pursuant to subsection 28(5) of the **Conservation Authorities Act**, R.S.O. 1990, c. C.27 is to the Minister of Natural Resources. The Mining and Lands Commissioner (the "tribunal") is appointed by virtue of subsection 6(1) of the **Ministry of Natural Resources Act**, R.S.O. 1990, c. M.31. The Minister's authorities, powers and duties are assigned to the tribunal by virtue of Ontario Regulation 795/90, pursuant to subsection 6(6) of the **Ministry of Natural Resources Act**. Part VI of the **Mining Act**, R.S.O. 1990 c. M. 14 applies to the hearing of appeals with necessary modifications.

Facts Not In Dispute:

Prior to the current application under appeal, the appellants had applied on two other occasions for permission to construct an addition. In 1987 permission was refused on an application to demolish the existing structure and replace it with a new residence.

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On August 21, 1991, the appellants applied to construct a 15 x 24 foot addition to the existing building. The LRCA gave its permission for the proposed construction on the basis that additions of up to 50 percent of existing floor space are permissible under certain circumstances.

The original building prior to any additions was approximately 528 square feet. After the 1991 addition of approximately 360 square feet, the total area became approximately 880 square feet.

The application under appeal involves proposed construction of an addition measuring 30 x 24 feet to be located at the south side of the existing structure. This would allow for an expanded living room and dining room on the main floor along with a workshop and storage area as there is no basement. The proposed construction also involves a second floor addition, which would have two bedrooms and an additional bathroom.

The proposed construction is to increase the main floor area by approximately 730 square feet and create a second storey of approximately 728 square feet. According to LRCA calculations, the cumulative total of existing and proposed additions would result in a 328 percent increase in the original floor area.

The site of the property is in a rural area of Thunder Bay on Oliver Road. The Neebing River runs perpendicular to Oliver Road and forms the western boundary of the property.

Jurisdiction over the subject property is found in Schedule 8 of the LRCA Fill, Construction and Alteration to Waterways Regulations, Ontario Regulation 152/91. The property is located on the LRCA Neebing River Flood and Fill Line Mapping, Sheet No. 203, prepared by Anderson Associates Ltd, issued on December 11, 1984, filed as part of Exhibit 19 found at Tab 12.

The regulatory flood for the subject property is the Timmins Storm.

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Issues:

1. Does the policy of the LRCA allowing additions of up to 50 percent of the existing floorspace preclude subsequent or consecutive applications which would result in excess of 50 percent of the original floorspace?

2. Does the construction of an addition to an existing structure fall within the meaning of "construction" or is "construction" as used in clause 28(1)(e) limited to initial construction?

3. Does the proposed addition increase the potential for people to be put at risk as a result of flooding caused by a regional storm event?

4. Are safe vehicular and pedestrian access and egress available at the site?

5. If the answer to No. 4 is no, is the LRCA bound by its 1991 decision to grant permission, which in its submission was made erroneously on the issue of safe access?

Evidence of Witnesses:

Glen Strey gave evidence on behalf of himself and his wife, commenting that he was unable to retain counsel. The bulk of Mr. Strey's evidence-in-chief was in the form of submissions, which are reproduced under that heading below.

One of the reasons for the appeal is that Mr. Strey believes that the determination by the LRCA that additions will be limited to less than 50 percent of the original floor area are not mandated by statute or regulation. He referred to the letter of Allan G. McKitrick which is a legal opinion to the LRCA addressed to Rick Potter, Chairman, on September 17, 1990 (One of the documents included in Exhibit 8) and in particular, paragraphs (i) through (l). Mr. McKitrick clarified that he was not the author, having a different middle initial. Mr. Strey believes that this letter is evidence of the fact that the LRCA disagrees with the decision in **Rideau Valley Conservation Authority v. Stacey**, No. 678/89, July 19, 1989 (District Court, Ontario), and forms the basis for the informal policy limiting additions to 50 percent.

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Mr. Strey stated that he hired a surveyor, W.E. Parsons of Parsons, Wilson, Milton & Bode Ltd. who used elevation benchmarks obtained from the City of Thunder Bay engineering department, while the LRCA used topographic mapping. Based upon the differences between these two benchmarks, actual elevations of the site and surrounding areas, which include the top of the culvert running under Oliver Road, the crest of Oliver Road, the main floor elevation and typical grade of the property, in all cases is 1 1/2 feet higher than found by the LRCA. According to this survey, the geometric datum floor level is only 10 centimetres below the regional storm elevation. He indicated that he was willing to raise the floor to the regional storm elevation.

Under cross-examination, Mr. Strey agreed that he currently resides at another location. Mr. Strey clarified that he was informed that there was a problem with flooding at this location, but his 1987 application, which involved another site on the property, was turned down because the proposed construction was on hazard lands to the south.

Mr. McKitrick asked a number of questions based on elevations of the subject property as contained in the document entitled "Report: Application to Construct a Dwelling Fill, Construction and Alteration to Waterways Regulations" dated July 28, 1987 (forming documentation included in Ex. 6), referring to the table entitled "Calculation of Flood Depths". He also referred to pages two and three of the document, under the headings of "Risk to Life" and "Vehicular Access". It was suggested that the depths in all these cases exceeded safety standards.

Mr. McKitrick asked whether it was fair to say that he had been warned of the flood potential and associated risks. Mr. Strey stated that to an extent he had been warned, but that the current application involved a different location and he could not say whether the concerns are the same at the location involved in the current appeal. He was relying on the LRCA in this regard.

Mr. McKitrick read paragraph 4 of Mr. Strey's Summary of Facts Alleged (Ex. 20) into the record:

> 4. The City of Thunder Bay Zoning By-Law #177-1983 states in part "However, this shall not restrict or prevent the construction of any alteration or extension to a building lawfully existing on the effective date of

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> this By-law, or any works necessary thereto for strengthening, repair, or otherwise maintaining such building in a proper structural state." The LRCA acknowledges that the house is legally non-conforming, therefore they should not deny an application for an addition.

The quoted section of the By-law falls within paragraph 5.24.1. Mr. McKitrick pointed out that Mr. Strey referred to this paragraph in both the hearing before the LRCA and in his letter of appeal to the Minister (Ex. 16). He asked why paragraph 5.24.2 was not mentioned on any of these occasions. It states:

> 5.24.2 The requirement of this Section are in addition to any applicable requirements of the Lakehead Region Conservation Authority (which may also require features and works to secure structural integrity under storm conditions, among other matters) or any other body having similar jurisdiction over such land.

Mr. Strey explained that he felt that the second full sentence in paragraph 5.24.1, which starts with the word, "However" meant that it would be an exception. He did not think that paragraph 5.24.2 applied as it was a separate paragraph, and he believed his situation was caught in the exception created by paragraph 5.24.1. Mr. McKitrick suggested that it was clear that paragraph 5.24.2 applied and Mr. Strey maintained that he was exempt.

Mr. McKitrick referred to the letter of September 24, 1987 from M.B. Inglis of the Building Services Division of the City of Thunder Bay (one of the documents included in Ex. 6) which states:

> The province has given jurisdiction over control of construction on your property to both the City and the Lakehead Region Conservation Authority. The City Zoning By-law (177-1983) does not allow new construction for human dwellings but does permit additions and alterations. I understand the LRCA will not permit new construction

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> including additions. Since the City by-law requires the requirements of the LRCA to be followed (Sections 5.24.2 and 5.24.3) and the Building Code Act does not allow the issuance of a permit if an applicable law is contravened (Clause 6(1)(a)), this office will be unable to issue a permit for a new dwelling or an addition until the LRCA gives clearance.

Mr. Strey indicated that he misunderstood the letter.

Mr. Strey stated that he was familiar with the Flood Plain Planning Policy Statement (one of the documents filed with Ex. 8)(the "Policy Statement") made pursuant to section 3 of the **Planning Act** and agreed that his property was in the floodway. While he had stated that "construction" is not defined in the **Conservation Authorities Act**, and the decision in **Stacey** should apply, he agreed that "development" in the Policy is defined as:

> the construction, erection or placing of a building or structure of any kind or the making of an addition or alteration to a building or structure that has the effect of increasing the size or usability thereof, and includes such related activities as site grading and the placing or dumping of fill.

Mr. McKitrick referred to the objectives of the policy, set out at page 5 and to principles 1 and 4, set out on page 6. Mr. Strey reiterated that he did not consider his application as involving new development, notwithstanding that it involves a 328 percent increase over the original size of the building. In the event his current appeal is allowed, Mr. Strey was unsure whether he could return with yet another application for an addition.

Mr. Strey agreed that it was his position that, by allowing his application in 1991, whether right or wrong, it was exempt in dealing with his property on the current appeal.

Mr. Strey agreed that there was no evidence of flood proofing in his application, stating that he was never approached by the LRCA that he needed to do extensive flood proofing.

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Referring to the Neebing River Flood and Fill Line Mapping Technical Report (Ex. 21, Tab 4) and map, Mr. McKitrick pointed out that the flood level elevation of 250.3 metres does not conflict with Parson's calculations.

Concerning access and egress, Mr. McKitrick pointed out that the river travels north to south with three culverts and ditches on either side of Oliver Road are 9 feet deep. Asked how he would get out if flooding occurred, Mr. Strey stated that the water would have to breach the highway, having an elevation of 205.3 metres.

Stephen Suke, Director of Technical Operations of the LRCA, took two photographs on April 28, 1994 (Ex. 24). The Neebing River flows under Oliver Road, past the subject residence and into Lake Superior. The residence is within the floodway of the Neebing River watershed, within the meaning of the Policy Statement. All of the Strey property is within both the floodway and flood plain. The road elevation is higher than the surrounding land by two feet. Ditches on both sides of the road vary in depth, but immediately adjacent range from 6 to 8 feet. The estimated distance from the dwelling to the river bed under non-flood conditions is 60 to 66 feet.

Referring to the Neebing River Flood and Fill Line Mapping Technical Report (Ex. 21, Tab 4), Mr. Suke characterized it as a study to undertake flood risk assessment and mapping of the watershed within the Thunder Bay area, in keeping with the mandate of the LRCA to determine lands vulnerable to flooding.

The study establishes flood susceptibility through hydrologic and hydraulic modelling. Hydrology is the assessment of rainfall and runoff, in this case from a known storm event, the Timmins Storm. Hydraulics assesses the affect that the rain will have on a given watercourse.

At the page of the Study entitled "Bridge Data", which corresponds to map sheet 203, the photograph depicts three culverts, with the river flowing away from the viewer and the subject property in the left corner. Technical information is shown in relation to the culvert structures and their capacity for passing flows. The Stage Discharge Curve, which depicts the height of water for varying amounts of water (metres cubed per second). This information shows that the culvert capacity is less than that of the regional storm, so that the water level at the bridge during a regional storm would be 250.5 metres. Under flood conditions, the land behind the culverts becomes buoyant. With increased hydrostatic pressures, piping may occur, which could lead to culverts being pushed out and the road collapsing.

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Referring to Map 203, which is a contour base map prepared by the City of Thunder Bay, Mr. Suke stated that the solid lines are calculated flood plain lines from the study. If a regional storm occurred, flooding would occur in a wide flat plane of water with a slight slope. The water would be turbid and full of floating debris. The expanse of water would be 700 feet wide and extend 538 feet to the east and 203 feet from the west at a depth of 8 inches. Oliver Road would lose its structure and definition, owing to the turbid water full of debris. In this situation, where the surface of the road is not apparent, coupled with deep ditches on either side which are equally not apparent, an extremely hazardous condition for vehicular traffic would be created.

Reference was made to the parameters set in the Flood Plain Planning Policy Statement Implementation Guidelines (Ex. 21, tab 5) (the "Implementation Guidelines"). Criteria for assessing flood proofing commence at page 36, including depths of one metre and velocity of 1.8 metres/second posing a threat to life. In stagnant backwater areas (zero velocity) where depths in excess of about 1.4 m (4.5 ft) are sufficient to float young children, and depths above 1.4 m (4.5 ft) are sufficient to float teenage children and many adults. Ingress and egress by most typical automobiles will be halted by flood depths above 0.3-0.5 m (1-1.5 ft). A depth in the range of 0.9-1.2 (3-4 ft) is the approximate maximum depth for rapid access of large emergency vehicles.

Mr. Suke stated that water would flow around the dwelling located on the Strey property and if flooding were to occur at night, the situation would be even more difficult. Mr. Suke explained that floods do not occur with adequate warning. Impacts are not felt until 16 to 18 hours after the rain occurs, with some variance. In his opinion, the depth of flooding on the subject property would pose a risk to life, which increases with a larger home. With the depths of the ditches, safe access could not be achieved by either private or emergency vehicles.

In W.E. Parson's report of elevations (Ex. 16), the floor is below the regulatory flood level. The figures given are not inconsistent with those of the LRCA, and the suggestion that the benchmark is a problem is not accurate. Depending on the benchmark used, all figures would have to be transposed so that there would be no variation in the absolute differences between ground and flood elevations.

Mr. Suke stated that the 1991 determination that access and egress were available was in error, for which he accepts responsibility. According to his estimates of elevations, safe access is not available.

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Mr. Suke stated the LRCA was an entity which must have regard to the Policy Statement to bring order and equity to the use of flood plain lands and prevent the implications of unwise choices, where friends, family, emergency and utility workers may be put at risk. There are also up and downstream implications of development, such as more serious flooding. The amount of flood water will increase due to incremental encroachment. The character of the watershed would be changed due to increased impermeability of driveways and buildings, which affect the flood attenuation characteristics of the land. Also, existing buildings and infrastructure would be subjected to increased damages.

Page three of the Policy Statement sets out that the preferred approach to flood plain management is one of prevention. This can be best accomplished by ensuring that additional people are not placed at risk.

Mr. Suke referred to the definition of "development" in the Policy Statement, which includes additions and alterations to existing buildings. The current appeal involves a One Zone Concept, as discussed on page nine and further described in Figure 2. From this, it is clear that the LRCA has authority to prohibit construction within the floodway. Included in the objectives is minimization of property damage. Any increase in size of a home implies that more people will be put at risk, either now or in the future, as well as increased potential for property damage.

The fourth principle on page 6 of the Policy Statement refers to new development, which is further described at page 34 of the Implementation Guidelines where additions in excess of 50 percent of original floor space are characterized as major, thus constituting new development and new construction. While the Policy Statement and Implementation Guidelines are meant to be flexible, standards must also be maintained. The rationale behind the 50 percent rule was that the size of such an addition was unlikely to allow more people to live in the residence. The 1991 addition was smaller than a garage, and fit within the Implementation Guidelines.

The current appeal is not considered as an addition but as a new structure and therefore, as new development. Even if not allowed to demolish the existing structure, the size proposed would give 800 more square feet each to both the ground and the second floors. Mr. Suke stated that perpetual additions are not consistent with the Policy Statement or flood plain planning principles.

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The restrictions on development in the floodway are also implied by reference in paragraph 5.24.2 of By-law 177/83 to the requirements of the LRCA being in addition to those of the City of Thunder Bay.

If the Policy were ignored, Mr. Suke stated that he would be concerned that the LRCA is breaking the law. Also, there would be increased risk of flooding which defeats the purpose of the Policy Statement and flood plain management generally. If the culverts were breached, it would cause a surge of water downstream. Also, Maplewood Road, which crosses Oliver Road to the east of the subject property, has culverts which cross the Neebing River upstream from the subject property. Under regional storm conditions, Maplewood Road would be overtopped as well, so that those culverts are also at risk. The intersection of the two roads is approximately 700 feet from the river, and yet will be inundated.

Mr. Suke concluded his evidence-in-chief by stating that there was no technical evidence to indicate that the current refusal under appeal was wrong.

Under cross-examination, Mr. Suke stated that he could not recall having inspected the subject site at the time of the 1991 application, but that he has visited on many subsequent occasions. Although he had previously indicated that access and egress were available, he now believes it was an error. The extent of the concern raised on the current appeal is a dramatic departure from the 1991 application, and Mr. Suke could offer no explanation for the error.

Asked whether the elevations in 1991 were referred back to the benchmark for accuracy, Mr. Suke indicated that it does not form part of the procedures to check elevations. Only in situations where there might have been alterations to the elevations would the LRCA take elevations. Otherwise it relies on the maps.

In response to a question of the tribunal, Mr. Suke characterized the area as rural, undeveloped and flat. The Neebing River is characterized at page 1-1 of the Study (Ex. 21, Tab 4) as:

> ... fairly short and wide ... The watershed contains little storage in the form of lakes but there is considerable storage in swampy, marsh areas and behind beaver dams.

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Submissions:

Mr. Strey submitted that the reasons given by the LRCA for its refusal to grant permission are not valid, stating that it failed to consider all of the facts. Referring to the comments on the last page of the 1991 approval (Ex. 20, application documents), he quoted the following:

> ... In view of a recent ruling by the Courts in a case involving Stacey and the Upper Thames Conservation Area, in which the Judge ruled that renovations or additions did not constitute construction and ruled in favour of Stacey.

While it has been the position of the staff of the LRCA that 50 percent additions are reasonable, this is not found in either the **Act** or the regulation. He reiterated that, in his submission, the LRCA received legal advice and created an unwritten policy which does not constitute statute or regulation. The LRCA's mandate is to hold a hearing for permit approval, which must be based on the powers conferred to it in the **Act** by the province.

Mr. Strey referred to the decision of the District Court in **Stacey** at page 111 where Cosgrove D.C.J. quotes the headnote from the decision of **Murray v. District of West Vancouver** (1937), W.W.R. 269:

> Since the cardinal principle of both the British and Canadian constitutions is the supremacy of Parliament or of a Legislature acting within the ambit of its powers, therefore where a statute admits of but one interpretation effect must be given to whatever its consequences.

Mr. Strey submitted that the **Act** does not define "construction" and continued with the **Stacey** decision at page 115 where Cosgrove states:

> The court is also satisfied that the plain meaning of the word "construction" within s. 28.1.e and Regulation 175 under the Conservation Authorities Act means just what it says,

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> namely, initial construction, construction at the outset, the first building of a building, but not "reconstruction".

He submitted that the jurisdiction of the LRCA is limited to cases which involve the first building or initial construction and does not extend to cases of additions or reconstruction.

With regard to this issue of increased potential to put people at risk as a result of the proposed construction, Mr. Strey referred to the **Stacey** decision at page 122 where Cosgrove states:

> As regards the stated objectives and the impact of the decision on the stated objectives of the Authority on the other hand in the Thames[1] decision, because more units were being added (both commercial and residential) more people were being invited to live and shop in the building to be renovated, it seems to me there would be a greater risk of harm to a greater number of people and hence a potentially greater difficulty to the Authority than in the present case.

Mr. Strey pointed out that the proposed addition would be located at the south end of the existing building would be further from the river and allow for flood proofing measures. He suggested that the statement of the LRCA that errors were made on the last application concerning flood elevations and safe access and egress are distressing. Based on the earlier decision, Mr. Strey stated that he assumed his home was safe and he was not informed of the LRCA's concerns until he applied for another addition.

Mr. Strey submitted that the elevations taken by his surveyor should be relied upon by the tribunal in making its findings, reiterating that there was a difference of 1 1/2 feet, with that of the surveyor being the higher of the two. He was willing to raise his floor level above the regional storm, to the extent that it would be necessary using figures obtained from Mr. Parsons.

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1. Re Upper Thames River Conservation Authority v. The City of London et al., 67 O.R. (2d) 784 (Ont. Dist. Ct.)

Mr. Strey stated that he does not wish to make a precedent out of this case, but wishes to have a house in which his family can live.

Mr. Strey concluded by inviting the tribunal to consider the facts. The largest portion of his case is that the LRCA made an error in 1991 which led him to believe not only that he was in compliance with the regulation, but that his property was not at risk. As a member of the public he relied on the expertise of the LRCA. He is not aware of anything in this appeal which would cause greater risk to life and property damage. The tribunal should find that a mistake of this kind is not acceptable. Mr. Strey stated that he has invested 13 years in the property.

Mr. McKitrick submitted that the technical report and evidence presented by the LRCA was not contradicted. The figures provided by Mr. Strey's surveyor are consistent with the LRCA's position. Using either set of numbers, the subject property is clearly susceptible to flooding.

The Policy Statement does not, in its reference to development, use the word "new". Such development is not allowed in circumstances which as are found in this case. Therefore, development is clearly prohibited and the tribunal should find accordingly.

With respect to new development, the LRCA followed the Implementation Guidelines and did so consistently, in accordance with section 3 of the **Planning Act**.

To allow this new development would make a mockery out of what could occur. The purpose of the Policy Statement is to protect lives. To allow the appeal would subject those with no say in the matter, such as young children and emergency personnel to unacceptable risk.

Mr. McKitrick submitted that the Policy Statement is clear and uncontradicted. No development should occur. It is a fact that the subject property is in the floodway. For the tribunal to sanction perpetual development would be inconsistent with provincial law. It would affect those downstream. Similar applications would have to be allowed. The quality and quantity of runoff would be affected. The effect of allowing this appeal would be compounded.

The tribunal is reminded that the subject property is located in a semi-rural area, which has the potential to become very developed. Flexibility is provided in the form of a one-time compromise. The province did not intend to go any further.

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There is no evidence before the tribunal to demonstrate that the LRCA has not made its decision in accordance with municipal, provincial or federal law. Throughout, the LRCA has acted in accordance with the law and the Policy Statement constitute law, having been made under Order in Council.

Mr. McKitrick submitted that the tribunal can make its findings based upon the facts of this case. However, he did provide one recent case of the Ontario Municipal Board in the matter of **Jowa Investments Inc. and the City of Guelph**, No. V 930054, August 15, 1994, which interprets the Policy at page 7:

> Moreover, the definition of development contained in the Provincial Flood Plain Policy, while not encompassing a use change per se, does include the making of alterations to a building to increase its usability. ... Although there was evidence that no tenants would be living in the basement, the Board heard no evidence from the representatives of Jowa to the effect that floodproofing measures of the building or access from it to higher ground had been explored. Further, the evidence of Ms Davy, although she is not an engineer, was not successfully challenged as to the importance of safe access in the event that flood waters rose to the potential level anticipated during a regional storm or that a safe access would require to be subject to not more than .8 metres of flooding or that this site cannot achieve such safe access.

With respect to Mr. Strey's submission regarding the **Stacey** decision, Mr. McKitrick stated that he did not disagree with the legal opinion of the other Mr. McKitrick, as was provided in the documentation filed. He submitted that the equities from that case to the current appeal are quite different. **Stacey** involved reconstruction after the building was destroyed by fire, and one of the determining factors in the decision was that the insurance proceeds would be less if the replacement building was constructed at another location.

Mr. McKitrick pointed out that the tribunal is not bound by the **Stacey** decision, as it is not that of Divisional Court or the Court of Appeal. It is also clearly distinguishable on the facts.

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Mr. McKitrick submitted that the **Thames** decision can be similarly distinguished, as it did not involve an addition, but was limited to an internal renovation. The tribunal is reminded that in **Thames** the court recognized that the tribunal can rely on its own expertise in matters of flood plain management. The tribunal did actually hear an appeal from a refusal in this case in **Soufan v. Upper Thames Conservation Authority**, File 2028DO, June 1, 1989, where it did find that risk to loss of life was a valid concern, upholding the refusal of the authority.

Mr. McKitrick submitted that the LRCA must protect property owners and others from unwise choices. To allow the proposed construction would increase the risk of harm, owing to its increased habitability and potential for more occupants. The property would be under water in a regional flood event. With the additional risks posed by the deep ditches and potential highway breaches, it is clear that prevention is the appropriate means of addressing this fact situation, which is the primary role of the Policy Statement. There is no principle of sound flood plain management to justify a reversal of the LRCA decision.

Concerning the situation in 1991, Mr. McKitrick submitted that Mr. Strey was aware of the problems which were raised in his earlier application which was refused in 1987. In 1991, the LRCA attempted to interpret the **Stacey** decision. It admits that it made an error with respect to access and egress. However, if an error is made in the interpretation of law, a party is not estopped from correctly applying the law at a future date. Mr. Suke admitted his error, which speaks to his credibility as a witness. To accept Mr. Strey's position with respect to the error would allow perpetual construction in the floodway. The past error should have no bearing on the current appeal. The Policy Statement must be applied to this and similar cases. There does not exist in the LRCA the right to disregard it.

Mr. McKitrick reiterated that Mr. Strey did not address the flood proofing issue in his appeal, but chose to rely on the LRCA. He does have the right to retain his own experts, which is not the responsibility of the LRCA, although it does have discretion to offer assistance. An applicant should come prepared to make its case on the issues raised by an application and should not be entitled to rely on a conservation authority in this regard.

In response, Mr. Strey questioned whether the LRCA can look outside its statute.

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Findings:

Elevations

According to the Neebing River Flood and Fill Line Mapping Study, (Ex. 21, Tab 4), the flood line elevation at cross-section 16.899 for the regional storm is 250.47 metres. This cross-section corresponds with the upstream side of Oliver Road. On the downstream side, immediately north and south of the subject property, are cross-sections 16.876 and 16.834, having flood line elevations of 250.30 and 250.29 metres respectively.

According to the LRCA figures, the top of Oliver Road where the Neebing River flows through the culverts is 250.3 metres and the subject property is at 249.71 metres.

The figures obtained by W.E. Parsons, the surveyor hired by Mr. Strey, differ to a greater degree that was described by Mr. Suke in his evidence. Parsons' figures are as follows: grade a Oliver Road 250.7 metres; grade of the subject property 250.15. The differences in the LRCA's figures when compared with those of Parsons', taking into account that several other elevations were included, vary between 0.4 metres and 0.46 metres lower. This is a difference of between 1 foot 4 inches and 1 foot 6 inches.

As discussed at the hearing, the tribunal is only able to put limited weight on the evidence provided by Mr. Parsons as he did not attend the hearing to give the LRCA the opportunity to cross-examine him. This fact notwithstanding, Mr. Strey asked the tribunal to consider that the LRCA used a different benchmark in its elevations, and that those of Mr. Parsons should be preferred.

The problem with comparing the LRCA elevations using a different benchmark in isolation is that the flood line elevation calculations are done using internally consistent elevations. Essentially, these calculations are done for the profile of a watercourse and plotted on the elevations of the watercourse and surrounding terrain. Using a different benchmark for elevations of the subject property will only be meaningful if the flood line elevation calculations are transposed onto the profile of the landscape which reflects the different benchmark. In other words, the flood line elevations and grade elevations must be internally consistent, using the same benchmark in each. Otherwise, the differences found in elevations by Mr. Parsons are rendered meaningless. To succeed in this approach, Mr. Strey would have to hire an engineer to

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redo the calculations and plotting to the benchmark used by Mr. Parsons. However, it is most likely that the differences in elevations and flood plain plotting will remain unchanged.

Based on the foregoing, the tribunal finds that it is willing to accept the flood line elevations and grade elevations used by the LRCA. Based upon the LRCA figures, the subject property is wholly within the flood plain. However, very little evidence was presented at the hearing or in the documentation concerning grades on the subject property.

Mr. Parsons' hand written elevations purport to include those of the LRCA. With the level of flooding on the subject property occurring at 250.3 metres, the level of flooding on what has been termed the typical grade of the subject property, described as 249.71 metres using the LRCA benchmark, is found to be 1.94 feet or 0.59 metres.

Mr. Suke's evidence is limited to reference to figures from the 1987 application. However, in the Respondent's Position and Statement of Facts (Ex. 21, Tab 1), at paragraph 39, the depth of water on the existing driveway is described as approximately 3 feet, while flood depths at the rear of the house are estimated to be 1.3 metres or 4 feet, 8 inches. This same information is found in the Minutes of the April 20, 1994 meeting of the LRCA. (part of documentation in Ex. 12) This is contrasted with the evidence of the LRCA that the existing driveway would be inundated by approximately 3 feet of flooding and that the rear of the home would be subjected to 1.3 metres or 4 feet 8 inches of flooding.

The top of Oliver Road, where it crosses the Neebing River, is 250.3 metres. The flood line elevation for the top of the road is 250.5 metres. Therefore, Oliver Road, at the Neebing River, will be overtopped by 0.2 metres or 0.66 feet, approximately 8 inches. To the east, the top of Oliver Road drops somewhat, so that the flood level will be 0.3 metres or 0.98 feet, being just under one foot. To the east, the road rapidly exists the flood plain and fill line, where the top of the road is above the flood line by 1.24 metres or 4.06 feet. The situation created by the flood line is somewhat misleading, as the quickest route to dry land along Oliver Road necessitates crossing over the Neebing River, where there is the very real likelihood of a breach of the road. The route to the east is longer, but moves away from the source of the flooding. This flood plain is 700 feet wide and relatively flat, so that the terrain is quite misleading in non-flood conditions.

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Policy in Relation to Statute

Clauses 28(1)(b), (e) and (f) of the **Conservation Authorities Act** generally and clause 28(1)(e) specifically in relation to this appeal, provide that a conservation authority may make regulations to be approved by the Lieutenant Governor in Council, "prohibiting or regulating or requiring the permission of the [conservation] authority ...". Pursuant to these clauses, the LRCA has made Ontario Regulation 152/91.

As evidenced by section 3 of Ontario Regulation 152/91, the LRCA has created an absolute prohibition to construct a building in areas susceptible to flooding during a regional storm, to dump fill in a scheduled area or to alter a watercourse. Section 4 of the regulation provides that any of the foregoing may be permitted by the LRCA,

> ... if, in the opinion of the Authority, the site of the building or structure or the placing or dumping and the method of construction or placing or dumping or the straightening, changing, diverting or interfering with the existing channel will not affect the control of flooding or pollution or the conservation of land.

The reference to "requiring the permission of the [conservation] authority" in clauses 28(1)(b), (e) and (f) represents the granting of the right to regulate the giving of their permission by the provincial government to conservation authorities. Section 4 of the regulation sets out the test which the LRCA has determined it will apply in considering whether or not to grant its permission. The regulation has been both sanctioned by the **Act** and received the endorsement of Cabinet, having been passed by the Lieutenant Governor in Council.

Conservation authorities design and apply their own policies or they may elect to apply the provincial policies made pursuant to section 3 of the **Planning Act**, as is the case with the LRCA. Indeed, many conservation authorities in the province have policies which are more rigorous than the provincial policies. The Supreme Court of Canada has considered the validity of a decision based upon a policy statement and not upon statute or regulation in **Capital Cities Communications Inc. v. Canada (Canadian Radio-television & Telecommunications Commission** [1978] 2 S.C.R. 141, where the late

Chief Justice Laskin stating at page 171:

> In my opinion, having regard to the embracive objects committed to the Commission under s. 15 of the Act, objects which extend to the supervision of "all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of the Act", it was eminently proper that it lay down guidelines from time to time as it did in respect of cable television. The guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions. An overall policy is demanded in the interests of prospective licensees and of the public under such a regulatory regime as is set up by the **Broadcasting Act**. Although one could mature as a result of a succession of applications, there is merit in having it known in advance.

Essentially, having policies outlining the manner in which a conservation authority will exercise its discretion provides a prospective applicant, in advance of the hearing, vital information for the preparation of his or her case. Not only is this in keeping with the rules of fairness, but it will also ensure that an authority will exercise its discretion in a consistent manner.

The issue of whether this tribunal will apply policy was discussed in **MacGregor v. Director of Mine Rehabilitation** (unreported) December 23, 1994, File No. MA 033-93, when it considered and applied the reasoning of the Divisional Court. Commencing at page 22 of the **MacGregor** decision, the tribunal stated:

> Although the incumbent legislation is different, the principle of the following case describes the requirements of a tribunal reviewing a decision made through the statutory exercise of discretion. The Court in **Segal v. The General Manager, The Ontario Health Insurance Plan** (Gen. Div., Div. Ct.) unreported, 347/94, November 24, 1994, Hartt, Saunders

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and Moldaver JJ., considered an appeal from a decision of the Health Services Appeal Board set out at page 3:

> On an appeal to the Board from the General Manager, the Board may direct the General Manger to take such action as the Board considers he should take in accordance with the Act and regulations, and for such purposes the Board may substitute its opinion for that of the General Manager (s.21(1) of the Act). Where, as here, the General Manager had adopted a policy as the basis for exercising his discretion, the Board, in our opinion, is bound to consider that policy and not follow it if it considers it to be unreasonable. Once it has considered and adopted a general policy with respect to hospital services in general, the Board need not reconsider the policy in each subsequent case unless there are exceptional circumstances. However, we think it is still the duty of the Board in each case to consider whether the application of the policy is reasonable in the circumstances before it. The Board in a number of cases has found inapplicable some of the conditions in Appendix C in certain situations.
>
> In its reasons for dismissing her appeal, the Board stated that the appellant must meet the conditions laid down in Appendix C. In our opinion that was a misdirection so far as hospital services were concerned. In our view the Board, having found that

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> certain Appendix C conditions had not been complied with should then have gone on to consider whether the imposition of those conditions as part of the policy was reasonable in the circumstances. This is what the Board has done in other cases. In this case the Board should have considered whether it was reasonable to require a referral to a New York physician, and whether prior approval to the procedure was also required.

From **Segal** the following steps can be derived in reviewing this and any other policy applied by the Director and considered on an appeal:

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 its decision of **Bye v. Otonabee Region Conservation Authority**, unreported, November 19, 1993, CC.1357, the tribunal found at page 56 that it would

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apply the technical provisions of the provincial policy statements in consideration of technical issues. As was discussed in that decision at pages 53 and 54:

> The conservation authorities are not bound by the **Planning Act**, or section 3 provincial policy statements, in making their determinations under section 28 of the **Conservation Authorities Act**. However, the dual role of the authorities cannot be ignored; that of making representations and recommendations to planning authorities on official plans, plans of subdivision, consents, zoning by-laws, minor variances and the like and that of considering applications for permission for the diverting of a watercourse, construction in a pond, swamp or area susceptible to a regional storm or placing of fill in an area which may affect the control of flooding, pollution or the conservation of land.
>
> Nowhere in the **Conservation Authorities Act** are conservation authorities given authority to balance competing interests in reaching their determinations. However, in the Principles of the Floodplain (**sic**) Planning Policy (Ex. 10), at paragraph two of page six, those bodies which must have regard to the policy are required to consider local conditions in connection with applying the policy. This includes physical, environmental, economic and social conditions. While a planning body may weigh competing uses in order to arrive at the highest and best use of a tract of land, conservation authorities do not consider, nor do they have the power to consider, the relative merits of competing uses. Their mandate is to determine the impact of a proposal on the very limited capacity of land within their jurisdiction and based upon the degree of severity to allow or refuse permission. There is no power in conservation authorities to weigh or consider the relative merits of economic and social implications with those of susceptibility to flooding, risk to loss of property or life, pollution of surface waters or soils, and general ecosystem concerns within the watershed. The conservation authorities are specifically charged with determining

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> the merits of a proposed encroachment based on risk not only to the applicant, but to affected persons both upstream and downstream of the proposal. In other words, in considering the right of a property owner to use his or her land, a conservation authority will weigh the individual's rights against the public interest, in so far as it concerns flooding, pollution or conservation of land. Once the capacity of a watershed to cope with encroachment, pollution or the associated ecosystem health is depleted, there is nothing more for the authorities to consider.

The tribunal has found that it will apply the technical provisions of the provincial policy statements in consideration of technical issues. However, the tribunal notes that Mr. Strey did object generally to the reliance on policy, the focus of his objection is not to the application of the Policy Statement and Implementation Guidelines, but to the unwritten policy that additions in excess of 50 percent of the original floorspace will be regarded as new development and will not be allowed. Therefore, the relationship between the Policy Statement and unwritten policy requires further examination.

The fourth principle in the Policy Statement at page 6, which was referred to at the hearing states:

> (4) new development susceptible to flood damages or which will cause or increase flood related damages to existing uses and land must not be permitted to occur; however, some communities have historically located in the flood plain and as a result, special consideration may be required to provide for their continued viability;

As was elaborated by Mr. Suke and counsel for the LRCA, the characterization of additions in excess of 50 percent of the original area as new development stems from pages 33 and 34 of the Implementation Guidelines. The context of this discussion is in relation to the method of flood proofing which is suitable. The Implementation Guidelines go on to discuss dry and wet flood proofing, as well as active and passive flood proofing.

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This definition of new development is then inserted back into paragraph 4.2 of the Policy Statement at page 9, where it states:

> **(4) One Zone Concept**
>
> It is the policy of the Province of Ontario that subject to policies (5) and (6):
>
> 4.2 New development in the flood plain is to be prohibited or restricted.

Mr. McKitrick pointed that the one zone concept applies to the subject property. As set out at pages 19 and 20 of the Implementation Guidelines, the extent of development allowed for the one zone concept is extremely curtailed. For example, open space for recreation, marinas and boathouses, enumerated agricultural uses, storage yards and parking areas are included as permissible uses.

In applying the one zone concept to this portion of the watershed, the LRCA has gone beyond this very restrictive list and allowed modest additions to existing residences. The rationale used is that the size of the addition would not likely put more people at risk. While this approach in not strictly within the four corners of the Policy Statement and Implementation Guidelines, the cut off between new development and minor additions is one which is recognized as appropriate with respect to flood proofing. The tribunal finds that this is a reasonable application by the LRCA of its statutory discretion and will adopt this approach.

Therefore, based upon the fourth part of the test adopted from **Segal** in **MacGregor**, the tribunal finds that it will adopt the approach taken by the LRCA with respect to the Policy Statement as it applies to the facts of this case. Mr. Strey did not plead special circumstances, nor does the fact that the construction of the original residence predates the **Conservation Authorities Act** constitute special circumstances, so that the second part test does not apply. Similarly, the third part of the test has no application where the policy is generally accepted.

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Two Zone Concept

The quote from the Policy Statement regarding the one zone concept is subject to policies (5) and (6), which are the two zone concept and special policy area. There is no evidence that either of these has been adopted by the LRCA with respect to the subject property. The issue of new development as characterized in this appeal as in excess of 50 percent of the original floorspace, will remain a stumbling block to any new application for construction brought by Mr. Strey so long as the one zone concept remains in effect.

The two zone concept provides more flexibility for development in what is known as the flood fringe. However, under the circumstances, owing to the fact that the subject property is so close to the river (66 feet) and so far from the eastern boundary of the flood plain (estimated distance 500 feet), it is questionable whether the existing dwelling would be determined to be within the flood fringe or floodway, should the LRCA and the City of Thunder Bay elect in the future to apply the two zone concept to this portion of the Neebing River flood plain.

The two zone concept is one which can not be applied unilaterally by this tribunal, but is instituted by the process and series of evaluations set out in Appendix B to the Implementation Guidelines. The reason for mentioning the two zone concept relates back to submissions by the LRCA regarding the absence of flood proofing measures in Mr. Strey's application. While this is indeed the case, in taking the one zone concept approach, it does not appear that the LRCA has retained the authority to allow major renovations where there is adequate flood proofing. This test appears to be reserved to the two zone concept approach, as is evidenced by paragraph 5.4 of the Policy Statement at page 9, which states:

(5) Two zone Concept

It is the policy of the Province of Ontario that:

5.4 New development that may be permitted in the flood fringe be protected to the level of the regulatory flood.

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Access and Egress

Flood levels on Oliver Road, which range from 8 inches to one foot, in and of themselves are less than set out for either private vehicles or emergency vehicles, being between 1 to 2 feet for the former and 3 to 4 feet for the latter, as set out in Appendix D to the Implementation Guidelines at pages 145 and 146.

However, the very real cause for concern are the very deep ditches on either side of the road, up to a depth described as extending downward a distance of 6 to 8 feet from the surface of the road. Under flood conditions, without guard rails or reflectors alongside the road, the flooded area will appear as a vast expanse, over 700 feet wide, of water. Anyone trying to drive along Oliver Road under such conditions would have to navigate the road with no markers delineating the side of the roads. It appears from Map Sheet 203 that the subject dwelling is the only development along this portion of flood plain adjacent to Oliver Road, which runs along a straight line, so that perhaps one could navigate flood waters by lining up with that portion of the road outside of the flood plain. This is assuming that one can see the road, as it may be dark or visibility may be obscured by rain. Unfortunately, as matters now exist, there is a very real possibility of a private vehicle ending up in the ditch, the depth of which would likely cause the inside of the vehicle to become submerged.

Based upon the existence of very deep ditches along Oliver Road, without adequate markers in the event of a regional storm, the tribunal finds that safe access and egress cannot be achieved.

Past Decision of the LRCA

The tribunal does not accept the argument advanced by Mr. Strey that the LRCA should be bound by its past finding that there was safe access and egress to the subject site. While he has obtained a benefit based upon this error, effectively being able to turn a cottage into a small single family dwelling, the purpose of this argument was unclear to the tribunal. On the one hand, Mr. Strey seemed to be stating that this error should be perpetuated so that he could continue to expand the existing dwelling. On the other hand, he seemed to say that the issue of safe access and egress would have impacted on his earlier decision to proceed with his 1991 construction.

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Based upon the materials filed from the 1987 application, it is clear that Mr. Strey is aware, or should be aware, that the subject property is located on lands for which flooding is a serious concern. His decision to continue to attempt to improve the property, notwithstanding that he has another home in which he resides, is in no way the fault of the LRCA.

New Development

Emphasis was placed on the issue of whether the proposed addition falls within the meaning of "construction" as was given in the **Stacey** decision. With the greatest of respect to Mr. Strey's able submissions on this point, the tribunal finds that it cannot agree. While **Stacey** was a decision of the District Court, and is not binding on this tribunal, the decision of the District Court Judge in **Soufan** was upheld by the Divisional Court and is binding. Essentially, the courts have determined that conservation authorities have no jurisdiction to refuse permission in cases involving essentially the same building, where there has been a total destruction of a building which is rebuilt, or where the interior of a building is renovated.

Notwithstanding earlier interpretations by conservation authorities of the **Stacey** decision, the current approach taken by most conservation authorities, and one which will be applied by this tribunal until directed otherwise by the Courts, is that construction, although not defined, will include any additions or renovations which extend beyond the boundaries of an existing structure, including demolition and reconstruction on a larger footprint.

Therefore, even though the proposed construction in the current appeal involves an addition, not constituting the demolition of the existing structure, for purposes of the **Conservation Authorities Act**, the tribunal finds that this type of construction falls within the jurisdiction of the LRCA and this tribunal to grant or refuse permission.

Zoning

It has been stated elsewhere and bears repeating that, notwithstanding the type of zoning given a tract of land by a municipality to allow for development, where the

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land falls within the jurisdiction of a conservation authority, nothing in the designation of the land for municipal purposes can remove it from the jurisdiction of that conservation authority, which has been given by the province. It would be beyond the competence of a municipality to attempt to do so.

Although nothing turns on it, the tribunal has made its decision based upon the jurisdiction conferred by the province. By-Law 177-1983 is irrelevant to this matter. Equally irrelevant are submissions concerning which clauses of the by-law were highlighted by Mr. Strey either to the LRCA or the Minister of Natural Resources in his letter of appeal.

Increased Risk

Although the decision of this tribunal is based upon the factors set out above, it is trite to say that a larger house will enable a larger family to live there. Similarly, there may be others, in addition to visitors and occupants, namely utility or emergency vehicle personnel, who may be at risk as a result of this home being located in the flood plain, a factor which was not considered when it was built some sixty years ago.

Although not directly stated in submissions, by the very fact that the LRCA applies the one zone concept to this portion of the watershed, it is understood that the risk to loss of life and property damage is applicable in these circumstances.

Conclusions:

The proposed construction constitutes new development which, under the scope of the one zone concept, is not permitted in the flood plain, constituting increased potential for risk to loss of life and property damage. Also, safe access and egress cannot be achieved. For these reasons, the appeal is dismissed.