

File No. CA 011-94

K. Henry)
Deputy Mining and Lands Commissioner)

L. Kamerman)
Mining and Lands Commissioner)

J. Robb)
Deputy Mining and Lands Commissioner)

Friday, the 26th day
of April, 1996.

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 a single family dwelling on Part Lot 25, Concession IV, Town of Innisfil.

B E T W E E N :

DOUGLAS BIBLE

Appellant

- and -

LAKE SIMCOE REGION CONSERVATION AUTHORITY

Respondent

ORDER

WHEREAS an appeal to the Minister of Natural Resources was received by the tribunal on the 30th day of December, 1994, having been assigned to the Mining and Lands Commissioner (the "tribunal") by virtue of Revised Ontario Regulation 795/90;

AND WHEREAS a hearing was held on the 27th day of June, 1995, in the Court Room of the tribunal, 24th Floor, 700 Bay Street, in the City of Toronto, in the Province of Ontario;

UPON hearing from the parties and reading the documentation filed;

1. THIS TRIBUNAL ORDERS that the appeal from a refusal of the Lake Simcoe Region Conservation Authority to grant permission for the construction of a single family dwelling on Part Lot 25, Concession IV, Town of Innisfil is hereby dismissed.

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

Reasons for this Order are attached.

DATED this 26th day of April, 1996.

Original signed by K. Henry

K. Henry
DEPUTY MINING AND LANDS COMMISSIONER

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

Original signed by J. Robb

J. Robb
DEPUTY MINING AND LANDS COMMISSIONER

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REASONS

This matter was heard in the Court Room of the tribunal, 24th Floor, 700 Bay Street, in the City of Toronto, in the Province of Ontario on June 27, 1995.

Appearances:

Shan K. Jain	Counsel for Douglas H. Bible
Kenneth C. Hill	Counsel for the Lake Simcoe Region Conservation Authority

Background:

On October 31, 1994, Mr. Douglas Henry Bible (the "Appellant") submitted through Mr. Shan K. Jain, Q.C., his lawyer, an application (the "application") (Ex. 6) to the Lake Simcoe Region Conservation Authority (the "LSRCA" or, the "Authority") to construct a single family dwelling on a parcel of land (the "property") owned by the Appellant and his brother, and designated as Part Lot 25, Concession IV, in the Town of Innisfil.

On the recommendation of its staff, the Executive Committee of the LSRCA, at its regular meeting on December 16, 1994, denied the application under section 28 of the **Conservation Authorities Act** (the "Act") and Ontario Regulation 153/90 (the "Regulation") as amended by Ontario Regulation 534/91 and 623/94, stating as its reasons (Ex. 9):

Our floodplain mapping for this area indicates that the existing grade on this lot is 720 ft. above sea level, which is 0.5 ft. below the flood elevation during the Regional Storm floodwaters spilling into this area from the watercourse to the north, or the 1:100 year wave run-up from Lake Simcoe inundating this low area. The lot is also within the Little Cedar Point Swamp, which is an evaluated wetland by the Ministry of Natural Resources.

There are concerns that the construction of a single family dwelling will affect the control of flooding, pollution and conservation of lands. The loss of wetland, which is part of a floodplain and fill regulated area, will interfere with the ability of this wetland to purify and retain water prior to it draining into Lake Simcoe.

In a subsequent letter sent to Counsel for the Appellant, dated December 21, 1994 (Ex. 10), Mr. Dan Frank, Regulation Supervisor for the LSRCA, added that the Authority opined the Appellant's lot was:

. . . entirely within a fill and construction regulated area which is entirely within the "Little Cedar Point Wetland" which is an evaluated wetland by the Ministry of Natural Resources.

Our floodplain mapping also shows this lot to be in an area susceptible to flooding. Since wetland areas have the ability to both purify and retain water, the construction of a house and placement of fill required for lot grading around the house will interfere with these valuable functions that the wetland provides this area.

Mr. Jain filed an appeal on behalf of the Appellant with the Office of the Mining and Lands Commissioner on December 30, 1994. 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 pursuant to subsection 6(1) of the **Ministry of Natural Resources Act**, R.S.O. 1990, c. M.31. By virtue of subsection 6(4) of this **Act**, where two or more deputy commissioners are appointed, the Commissioner and two of the deputy commissioners may hear an appeal to the Commissioner as a tribunal of three, and a hearing by the tribunal is deemed to be a hearing before the Commissioner and the decision of the majority is the decision of the tribunal.

Policy and Regulatory Framework:

(1) The Planning Act

By virtue of subsection 3(1) of the **Planning Act, 1983**, the Minister of Municipal Affairs, either solely or together with any other Minister, was authorized to issue policy statements that had been approved by the Lieutenant Governor in Council on matters relating to municipal planning that in the opinion of the Minister were of provincial interest. In exercising any authority that affected any planning matter, the council of a municipality, every local board and every provincial government agency "shall have regard to" such policy statements (subsection 3(5)).

(2) The Provincial Flood Plain Planning Policy Statement

The Minister of Natural Resources and the Minister of Municipal Affairs, together issued a Policy Statement on Flood Plain Planning under section 3 of the **Planning Act, 1983**. The Policy Statement had been approved by the Lieutenant Governor in Council as Order in Council No. 1946/88 on August 11, 1988. This Policy Statement contained sections dealing with the purpose of the Policy Statement, its interpretation, the background, definitions, the basis of the policy, the policies and a section on implementation. The policies contained several sections

including general provisions, the regulatory flood standard used to define flood plain limits, and the policy of the government relative to Official Plans.

(3) The Conservation Land Tax Reduction Program

The **Conservation Land Tax Reduction Program 1987 to 1993** was approved by the Minister of Natural Resources pursuant to section 2 of the **Conservation Land Act, 1988**. This Program Statement was approved by Order in Council on May 29, 1992. The stated goal of the Program is to recognize, encourage and support the stewardship of specific classes of conservation lands that contribute to the achievement of provincial conservation and natural heritage programs in the years from 1987 to 1993, by means of grants for the payment of taxes.

(4) The **Conservation Authorities Act**

By virtue of subsection 28(1) of the **Conservation Authorities Act R.S.O. 1990 C.27**, a Conservation Authority is empowered, subject to approval by the Lieutenant Governor in Council, to make regulations applicable in the area under its jurisdiction:

...

- (e) prohibiting or regulating or requiring the permission of the authority for the construction of any building or structure in or on a pond or swamp or in any area susceptible to flooding during a regional storm, and defining regional storms for the purposes of the regulations;
- (f) prohibiting or regulating or requiring the permission of the authority for the placing and dumping of fill of any kind in any defined part of the area over which the authority has jurisdiction in which in the opinion of the authority the control of flooding or pollution or the conservation of land may be affected by the placing or dumping of fill.

Subsection 28(3) requires an authority to hold a hearing before refusing permission required under clause (1)(e) or (f), while subsection 28(4) requires that an authority give written reasons for its refusal to the applicant. Subsection 28(5), referred to earlier in this decision, provides for the right of appeal to the Minister of Natural Resources by an applicant who has been refused permission.

(5) Regulation 179

The LSRCA enacted Regulation 179 (Ex. 2) which states in part, in sections 3 and 4:

3. Subject to section 4, no person shall,
 - (a) construct any building or structure or permit any building or structure to be constructed in or on a pond or swamp or in any area susceptible to flooding during a regional storm;
 - (b) place or dump fill or permit fill to be placed or dumped in the areas described in the Schedules whether such fill is already located in or upon such area, or brought to or on such area from some other place or places;

...

4. Subject to the *Ontario Water Resources Act* or to any private interest, the Authority may permit in writing the construction of any building or structure or the placing or dumping of fill . . . if, in the opinion of the Authority, the site of the building or structure . . . will not affect the control of flooding or pollution or the conservation of the land.

(6) Ontario Regulation 346/79

Ontario Regulation 346/79 (Ex. 2) was enacted on February 16, 1979 to replace Schedule 1 of Ontario Regulation 782/74. Regulation 346/79 states in section 9 that Lot 25, Concession IV, Township of (now the Town of) Innisfil is designated under Schedule 1 of Regulation 179.

Issues:

At the commencement of the hearing in this matter, Mr. Jain told the tribunal that the Appellant's family had owned the subject property since 1920. The property had been inherited by the Appellant and his brother from their grandmother in 1937. While the surrounding area is "built-up", the Appellant's property is vacant. The Appellant has applied for a building permit to erect a dwelling on the property. His application has been refused because the LSRCA has refused to grant its permission for the building permit.

Mr. Jain challenged the LSRCA's reasons (Ex. 9). He summarized the issues as:

- 1) The LSRCA designates the area as a wetland and the LSRCA believes the property must be preserved as is to assist in the control of flooding and pollution in the area.
- 2) The LSRCA's action by refusing to allow a building permit is tantamount to expropriation of the property without compensation and the Appellant's property should be purchased by the LSRCA at fair market value.
- 3) A municipal sanitary sewer line runs across the front property line. The property is taxed as a residential lot with municipal sewage services.
- 4) Whether the property has a dwelling or is vacant will not make any difference to flood and pollution control in the area.
- 5) The Appellant is being treated unfairly by the LSRCA and the municipality.

Mr. Hill, Counsel for the LSRCA, summarized for the tribunal the Authority's concerns. The LSRCA felt the development of the property would:

- 1) Interfere with the natural ability of a wetland area to contain water in times of flooding and thus possibly subject other lands to increased flooding,
- 2) Interfere with the natural ability of a wetland area to reduce pollution in surface water.

In summary, Mr. Hill told the tribunal that the onus is on the Appellant to convince the tribunal that the development of the property is not likely to result in additional flooding, pollution and be contrary to the provincial policy to conserve wetlands.

Evidence:

At the time of the hearing, **Daniel Clemens Frank** was the Regulation Supervisor at the LSRCA. He had been employed by the LSRCA since 1982. Since 1988 he was responsible for the supervision of three LSRCA staff members.

He explained to the tribunal that his responsibilities included evaluating the applications received by the LSRCA and considering how the regulations apply to each application.

Mr. Frank, in referring to the shoreline map of the area prepared by Marshall Macklin Monaghan Limited in 1978 (Ex. 1) and the Watershed map prepared by the LSRCA, dated January 1995 (Ex. 11), showed the tribunal the location of the Appellant's property. It is located on the southeast side of Ewart Street, about 500 feet from the shoreline of Lake Simcoe.

The shoreline map shows a watercourse on the northwest side of Ewart Street opposite the property. This watercourse drains into Lake Simcoe. This map delineates, with a heavy solid line, the floodline limit – the area that would be expected to be inundated in a Regional Storm as defined in the **Act** and its regulations. The dotted solid line delineates the limit of the fill and the construction limits in the area. The gray area on the map shows the extent of the hazard area.

Mr. Frank had not experienced a Regional Storm during the past eight years in supervising the area. However, during two less-severe storms in that time period he witnessed flooding in the area of the Appellant's property. Neither storm had the intensity of Hurricane Hazel.

He described a late summer storm that occurred in the late 1980s. This storm caused extensive flooding near Maple Avenue and Ewart Street. The flooding extended several hundred feet along Ewart Street. A portion of the Fifth Line was washed out near its intersection with Maple Avenue.

Mr. Frank told the tribunal that he visited the property on two separate occasions. The front of the property nearest Ewart Street is covered with bulrushes and deciduous shrubs. He found it difficult to walk across the property due to the dense vegetation. On each occasion he observed standing water on the property. He estimated that the surface of the property was approximately one foot above the level of Lake Simcoe.

The LSRCA classifies the area, in which the property is situated, as a swamp and part of the wetland area which provides a valuable function in retaining water, purifying it through contact with the vegetation and slowing down the discharge of water to Lake Simcoe. He explained that any infilling of this wetland/floodplain area could impact on the severity of any flooding and flood damage in the area. As the ability of the wetland to hold or retain water would be decreased there would be a decrease in the delay time for water to reach Lake Simcoe.

He testified that the elevation of the property is 720 feet above sea level ("ASL"). The LSRCA has established that a Regional Flood would result in water reaching an elevation of 722 feet ASL. This would put the Appellant's property under 1 1/2 to 2 feet of floodwaters.

Mr. Frank admitted that when the Application was first received in November, 1994, he considered the property only as a swamp pursuant to section 3(a) of the Regulation. The LSRCA did not evaluate the Appellant's property as being situated in a wetland as the LSRCA's wetland policy was not adopted until December, 1994.

The property is well inside both the Regional Flood limits and the designated wetlands area and, in the opinion of the LSRCA, any construction or filling of property may not be done without prior approval by the LSRCA.

Mr. Frank testified that during the time he has been with the LSRCA, applications for building on lots within the floodplain have been refused. Prior to 1991, some construction had been allowed between the fill and flood lines. He admitted that one house had been built in the floodplain not far from the Appellant's property. This was a result of the municipality issuing a permit in error and without requesting approval by the LSRCA.

Under cross-examination, Mr. Frank explained that hazard land is the definition given to lands that are comprised of poorly-drained muck soil.

Responding to Mr. Jain's inquiry if the LSRCA would compensate the Appellant for the value of the property since the LSRCA deems the property not suitable for development, Mr. Frank explained that the Manager of Policy and Planning is responsible for making any recommendations regarding compensation.

Mr. Frank feels the maintenance of this wetland area is important for maintaining the present shoreline of Lake Simcoe as well as allowing the slow release of water into Lake Simcoe. Mr. Frank told the tribunal that the area has been designated recently by the LSRCA as an evaluated wetland by the LSRCA.

He stated that the recent installation of municipal sewers does not affect the LSRCA's evaluation of the area. The LSRCA is pleased that sewers are being installed as this will reduce the contamination caused by nutrient loading in the soil and the ground water and thereby reduce the amount of nutrients entering and contaminating Lake Simcoe. However, the property is a part of a ten-square mile area of wetland that is important as a retention filtration area for cleansing and slowing the passage of storm water.

Douglas H. Bible has been retired from the banking industry for the past 18 years. He testified that he is now age 77. He and his brother inherited the property from their grandmother in 1937.

In 1992 he applied to the LSRCA for permission to build on the property. At that time, he was denied permission. He claims he appealed the decision but nothing was done about his appeal and he did not see any sense in pursuing the matter any further at that time.

He showed the tribunal two photographs (Ex. 19A and 19B). Exhibit 19B shows a building under construction on what appears to be the lot next to his property. The building appears to have three floors above grade. Mr. Bible questioned why such a large structure could be built on a lot adjoining his property when the LSRCA would not grant him permission for a structure of any size.

Mr. Bible told the tribunal that he was not aware of standing water on his property. However, he admitted it was possible that surface water could be present on the property.

He failed to see how any build-up of his property would make any difference to flooding in the area as any excess water would merely run down the ditch alongside the road.

He asked that the tribunal grant him permission to place fill on the land so that a house could be built on the property. He told the tribunal that once he is granted permission he can then sell the property to avoid his children facing the problem of disposing of the property upon his death.

Under cross-examination he admitted that he had never used the property for any purpose and had visited the property only on four different occasions since 1937 and has never walked to the rear property line since 1937. His grandparents never used the property as they stayed in a cottage they owned on the lakefront.

He testified that he was unable to estimate the amount of fill that would be required to raise the property to a sufficient level to allow construction of a house.

He agreed with the position of the LSRCA that there is a potential for up to two feet of water over his property and the surrounding road if a regional storm was to hit the area.

He emphasized to the tribunal that he felt it was most unfair that he had been assessed the residential tax rate when he could not obtain permission to build a residence on the property. He told the tribunal he filed an appeal of his tax assessment in 1993.

Argument:

For the Appellant

Mr. Jain submitted that the Appellant has a long history of ownership of the property and feels a sentimental attachment to it.

He stated that the Executive Committee of the LSRCA, in deciding to refuse Mr. Bible's application, relied upon the advice of Mr. Frank, when it expressed its concern

. . . that the construction of a single family dwelling will affect the control of flooding, pollution and conservation of lands. The loss of wetland, which is part of a floodplain and fill regulated area, will interfere with the ability of this wetland to purify and retain water prior to it draining into Lake Simcoe.

Mr. Jain submitted that the evidence showed that Mr. Frank has no special qualifications to predict whether floods may occur that would inundate the property.

Mr. Jain told the tribunal that Mr. Frank does not need special training to state that the property is part of a land area that will contain water. That is a statement any person can make and a statement to which the tribunal should not give much weight.

He reminded the tribunal that Mr. Bible's evidence corroborated Mr. Frank's evidence that the property is in a built up area. He questioned whether Mr. Frank's concerns regarding the potential of water accumulating on the property was because when the road was improved and the ditch was installed, the ditch was not properly designed to carry away the water that would flow from the built up areas and the watercourse onto the lower-lying Bible property. He submitted that a visual inspection showed the property was at a higher elevation than the watercourse and as soon as the Appellant is allowed to build up his land, the water flow would stabilize and would not prefer to flow across the property.

Mr. Jain argued that the municipality and the Region obviously felt the area was ripe for development otherwise it would not have expended the funds to install a municipal sanitary sewer line. Thus, it is apparent that the restriction is imposed by the LSRCA not by the Region or the Town. Obviously, the Town and the Region question the usefulness of the wetland to the surrounding area, otherwise they would not have installed the sanitary sewers. Furthermore, the sewer was not installed to merely service the seasonal cottages but obviously to service future additional uses.

Mr. Jain emphasized that the only restriction the LSRCA was actually imposing was to refuse to allow the Appellant to place fill on the property. Once the necessary amount of fill was in place, there would not be any future problems with water on the property.

He insisted that nothing in the wetland policy prohibits the LSRCA, if it desired, to grant permission for the filling of a property in a wetland area. Otherwise, there would be no room for an appeal of the LSRCA's actions. Similarly, the tribunal, standing in the place of the LSRCA, has the authority to grant permission.

Mr. Jain urged the tribunal to exercise its authority and over-rule the Executive Committee and grant permission for the Appellant to fill the land on the basis that this action will not adversely affect the conservation or retention of water.

For the LSRCA

Mr. Hill submitted that the tribunal should deny the appeal and uphold the decision of the LSRCA. He referred the tribunal to the testimony and evidence which clearly showed that the Appellant had no interest in the property beyond its real estate value as he had visited the

property only four times in almost sixty years. As well, the Appellant had admitted that it is his intention to sell the property as soon as he receives a fill permit from the LSRCA.

Mr. Hill argued that Mr. Frank's experience was of significant value and the tribunal should rely on this evidence for, on the other hand, Mr. Bible possessed no experience in conservation matters and relied on his common sense only to assert that adding fill to his property would not affect the flooding in the area.

Mr. Frank has visited the area many times; has actually visited the subject property on two different occasions over the past four years and has witnessed the flooding caused by storms, less severe than a Regional Flood, that covered the road in the immediate area of the property.

The LSRCA is concerned that the wetland must be conserved to protect its ability to retain and purify stormwater and surface water prior to its release into Lake Simcoe. He agreed that the wetlands policy is not binding on the Authority or the tribunal. He argued that the tribunal should consider this policy and its intent carefully.

Findings:

The tribunal finds that the evidence presented by the LSRCA was reasonable.

While some slight boundary inconsistencies exist between Exhibit 1, the map prepared by the engineering firm Marshall Macklin Monaghan Limited, and Exhibit 3, the handdrawn map, these are not of great enough significance to cast severe doubt that, based on a balance of probabilities, the Appellant's land is wholly contained within an evaluated wetland area and is subject to flooding during a regional storm because it is below the 1 in 100 year flood elevation. Consequently, by virtue of subsection 28(1) of the **Conservation Authorities Act** and subsection 3(b) of Ontario Regulation 179, the prior approval of the LSRCA must be obtained for the placement of fill.

Further, the tribunal finds that the property is described in Schedule 1 of Ontario Regulation 179 as an area in which the LSRCA has determined the control of flooding or the retention of stormwater or the treatment of surface water may be affected by the placing of fill. Again, the prior approval of the LSRCA must be obtained for the placement of fill.

The tribunal is persuaded by the evidence given at the hearing of this appeal that at least two feet of fill would be required to bring the subject property above the regional flood elevation, and that this fill would have to cover a significant area of the Appellant's property. Only when "the control of flooding or pollution or the conservation of land" will not be adversely affected may permission be granted for the addition of fill. The tribunal finds that such infilling would affect both floodwater movement and the retention capacity of the wetland and such an action would interfere with the valuable recharge/discharge functions the wetland provides in this area.

This tribunal has determined on prior appeals (for example **Sprague v. Moira River Conservation Authority** (unreported) August 22, 1995, or **Bye v. Otonabee Region Conservation Authority et al.** (unreported) November 19, 1993) that conservation authorities are not bound by the **Planning Act** or section 3 of provincial policy statements, in making their determination under section 28 of the **Conservation Authorities Act**, since these applications are not "planning matters". The tribunal has also found that conservation authorities are not resource planning bodies for purposes of section 28 applications, nor is the Mining and Lands Commissioner a resource planning body for the purposes of considering appeals from decisions of authorities. The tribunal has decided in these cases, however, that it will apply the technical provisions of provincial policy statements in consideration of technical issues. The tribunal will follow the same approach in considering this appeal.

The LSRCA has passed a wetland policy that regulates fill and construction on wetlands. The policy applies to the land containing the Appellant's property since it is an evaluated wetland within the Little Cedar Point Wetland. There was no evidence before the tribunal that the LSRCA has been inconsistent in applying this policy. While it is apparent that a large structure is under construction on the land adjoining the property, the evidence at the hearing in this matter was that this construction commenced without approval from the LSRCA. The commencement of the construction of this building, without the required permits from the LSRCA raises the legitimate public concerns about the equitable application of the Conservation Act Policies or Regulations.

The tribunal finds that the property is within an area designated by the LSRCA as "Hazard". The LSRCA's evidence on the significance of this designation was tenuous at best. The tribunal remains puzzled about the difference, if any, between hazard land and a swamp. Nevertheless, the tribunal's decision does not rest on this designation. Also, this designation does not prohibit the Appellant using the property for other outdoor uses that do not include the building of a residence or structure.

The tribunal accepts the submissions on behalf of the LSRCA that this wetland area makes a significant contribution to the water quality in Lake Simcoe. While the tribunal's decision means economic loss to the Appellant, this must be weighed against the benefit good quality water in Lake Simcoe provides to countless others.

The tribunal explained to the Appellant at the hearing that it has no authority to award them any compensation by the LSRCA. If the Appellant is unable to develop his land for residential purposes they may wish to consider applying for a rebate under the Ontario Conservation Land Tax Reduction Program.

In view of its foregoing findings, the tribunal dismisses this appeal.

The tribunal recognizes that this will be a disappointment to the Appellant, in whose family the ownership of this property has been for over seventy years and whose late grandmother maintained that the ownership of land was always a good investment.