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Ontario

The Mining and Lands Commissioner

In the matter of The CONSERVATION AUTHORITIES Act

G.H. Ferguson, Q.C.)
Mining and Lands Commissioner) Tuesday, the 3rd day of October, 1989

AND IN THE MATTER OF

An appeal against the refusal to issue permission to construct a single family dwelling, install a septic system and place fill on Lots 2 and 3, Registered Plan M15 in the Township of Innisfil in the County of Simcoe.

B E T W E E N :

DAVID GRAHAM

Appellant

- and -

LAKE SIMCOE REGION CONSERVATION AUTHORITY

Respondent

J.D. Dooley, for the appellant.
K.C. Hill, for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to issue permission to construct a single family dwelling, install a septic system and place fill on a parcel of land in the community of Lefroy, most recently described as Part 1 on Reference Plan 51R-16283, which lands are situate in the Township of Innisfil in the County of Simcoe. The subject lands were previously described as all of Lot 3 and part of Lot 2 according to Plan M-15 or all of Lot 44 and part of Lot 43, Plan 983 or all of Lot 3 and part of Lot 2 on Plan BA-755. Under Ontario Regulation 364/82 the power and duty of hearing and determining such appeals were assigned to the Mining and Lands Commissioner. The appeal was heard in Toronto on September 25, 1989.

At the outset of the hearing counsel for the appellant raised a preliminary matter. He submitted that Ontario Regulation 179 of R.R.O. 1980 is a regulation made by South Lake

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Simcoe Conservation Authority and that no regulation had been made to amend Regulation 179 to change the name to Lake Simcoe Region Conservation Authority. During the hearing the tribunal was able to obtain a copy of Order-in-Council No. 1891/86 which changed the name of South Lake Simcoe Conservation Authority to Lake Simcoe Region Conservation Authority. No authorities were submitted to this tribunal to establish that a change of name would affect the legislative jurisdiction of the conservation authority. This tribunal is not aware of any authorities which so hold and the only decision which could be made if the result were otherwise would be to make a decision which is not within the jurisdiction of this tribunal namely that there was no regulation governing the subject lands by the respondent. Such a matter would be in the jurisdiction of the Provincial Court on a prosecution or in some other judicial proceeding.

It may be noted at the outset that there were a number of administrative procedures that were not followed in connection with the subject lands. Firstly, approval by the Committee of Adjustment of the Township of Innisfil was obtained at a meeting of May 12, 1987 for the severance of the subject lands from lands held by the then owner Jack Siebert. Although notice of this application was sent to the respondent the records indicate that it was received very late and was not drawn to the attention of the proper officials so that representation could be made to the Committee of Adjustment.

Secondly, the appellant gave evidence that prior to closing the purchase of the subject lands and at a time when he had a right to terminate the offer to purchase if he were unable to obtain permission and permits for the construction of a single family dwelling, he attended at the office of the respondent and met with an employee of the respondent who is no longer employed by the respondent. His evidence was that the flood plain mapping and other maps were examined and he was advised orally that there would be no difficulty with the construction of a single family dwelling on the subject lands. The evidence of the respondent in

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this regard was that the matter was first drawn to the attention of the present regulation officer in the evidence of the appellant in this hearing. If such is the case the matter was not raised before the Executive Committee and the respondent has had no opportunity to look into this aspect of the matter.

The appellant also made inquiries at the township office prior to the expiry of the condition in the offer of purchase. His evidence was that he was given assurance that there was no difficulty and accordingly he permitted the condition of the offer to purchase to expire.

This tribunal considers that all of these matters are serious but they have no relevance in determining the merits of the present application. The result of these matters is that the appellant paid $26,500 for a building lot on which he is not now permitted to erect a single family dwelling. However this tribunal does not consider that the legal implications respecting this aspect of the appellant's affairs are relevant to the decision to be made by this tribunal.

The subject lands lie on the east side of Ferrier Avenue. They have a frontage of 90 feet and a depth of approximately 200 feet. An existing building lies between the subject lands and Carson Creek. Carson Creek rises in the lands lying to the west of Highway 11 and falls sharply into Lake Simcoe.

The application to the respondent for permission contained a copy of the reference plan but it contained no specifications of the proposed dwelling other than a note that it would contain 1400 square feet. The application also indicated that fill would be placed and a septic system installed.

For the purposes of the hearing before this tribunal the appellant prepared a hand drawn sketch showing a proposed raised bungalow measuring 50 to 60 feet situate fairly centrally in the subject lands leaving approximately 15 feet at either side. His sketch and his evidence indicated that there would be a ditch along Ferrier Avenue and he believed that this ditch coupled with

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the swales which he proposed along the northerly and southerly boundaries would permit any rainfall or floodwaters to flow off the subject lands into the ditch and to Carson Creek. He proposed to excavate a rather shallow basement. Approximately four feet would be excavated and the greater part of the material would be hauled away. The only material that would be left would be material which would raise the natural grade along the edge of the building a height of six inches. The swales were to be sloped so that they would flow both towards the ditch along Ferrier Avenue and to a field at the rear of the subject lands. The appellant did not appear to be aware of any principles of floodproofing and he had taken no steps to prepare a design which would floodproof the building to any design flood. In fact it appeared that the windows in the basement would be below the elevation of the regional flood for the area.

The evidence of the respondent was that the subject lands are situate within the flood plain of the regional storm on Carson Creek determined in accordance with the Hurricane Hazel standard which is contained in Regulation 179. The elevation of the Regional Flood is 733.7 feet above sea level. The elevation of the subject lands according to the flood plain mapping is 732 feet as a contour of that elevation passes through the subject lands. The property is the second property to the south of Carson Creek being approximately 100 feet to the south of the creek. The depth of flooding in the regional flood is 1.5 to 1.7 feet. The velocity of the regional flood was said to be two and one-half feet per second. The depth of flooding on Ferrier Avenue would be one foot in a regional storm.

Following the preparation of the flood plain mapping for the area the respondent caused an additional hydrological study to be made and developed what is in effect a special policy area. Lines known as "encroachment lines" were established below the elevation of the regional flood and the respondent has adopted a policy of permitting new construction above the elevation of the

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encroachment lines subject to flood proofing. The justification for this decision was that flooding would not exceed six inches in the area excluded from the regional flood plain. However the subject lands are below the elevation of the encroachment lines.

The evidence of the respondent was that a policy of strict compliance below the encroachment lines has been adopted and maintained since the establishment of the encroachment line. No evidence was placed before the tribunal which would detract from this policy. Evidence was produced to establish compliance with the policy, particularly in a case entitled Ditta v. Lake Simcoe Region Conservation Authority which was another case where the property was situate very close to Carson Creek.

It was submitted by counsel for the appellant that the respondent had merely followed its policy blindly and failed to properly assess the application of the appellant. Particular emphasis was laid on the evidence that the appellant at no time had filed a plan and specifications of his proposed house in accordance with the requirements contained in Ontario Regulation 179. While this argument might be effective before the Divisional Court, if the remedy sought by the appellant were to have the decision of the respondent quashed the appellant has elected to make an administrative appeal to the Minister of Natural Resources and such a technical legal argument does not in itself warrant the awarding of permission sought. This tribunal on behalf of the Minister can only review the evidence placed before it and review the application on the basis of the evidence that the appellant brings to the tribunal.

At the outset it may be noted that the policy of the respondent is somewhat analogous to a two-zone policy which may be adopted by a conservation authority with the approval of the Ministry of Natural Resources. The provincial policy in respect of such a policy is that any construction within the floodway which is analogous to the area between the encroachment lines is strictly limited to essential buildings and residential buildings

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are prohibited in such areas.

In reviewing appeals it has been the practice of this tribunal to have regard to the issue of whether the appellant has been deprived of the benefit of the policy, either express or implied of the respondent or whether the permission sought can be justified on some recognized principle of flood plain management. With respect to the former the evidence clearly establishes that the decision of the respondent is in accordance with its policy and that it cannot be said that the appellant has been refused permission in circumstances in which other applicants have been granted permission.

Secondly, no principle of flood plain management was drawn to the attention of the tribunal under which the permission sought by the appellant should be granted based on the application as amended by the sketch placed before this tribunal. None of the recognized exceptions to the principle of prohibiting building in flood plains were established in the evidence.

In passing it may be noted that special policy areas are exceptions to the general principle and frequently involve remedial works to reduce the risks of a regional storm in the area. In this case there was no evidence of any remedial works and it can only be concluded that the adoption of the special policy area does not decrease the risk in the special policy area and by reason of the utilization of the flood plain in that area increases the risks in the remainder of the flood plain. Where such an area is established, it becomes essential that principles of flood plain management be applied to the remainder of the flood plain and be applied strictly.

The only area of concern of the tribunal in respect of this appeal is that evidence was given by the appellant that he had taken an exhaustive number of steps to protect himself before he waived the condition of his offer of purchase. Amongst those steps was in inquiry at the office of the respondent and an assurance from the person to whom he spoke that he would be

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permitted to build on the site that he subsequently acquired at a cost of $26,500. The evidence on behalf of the respondent indicated that this was the first time this allegation had come to the attention of the witness for the respondent. The matter was obviously one of surprise and in the view of this tribunal goes not to the merits of the application but may relate to other matters. The tribunal leaves this matter for the respondent to deal with as it sees fit now that the matter has been drawn to its attention.

1. THIS TRIBUNAL ORDERS that the appeal is dismissed.

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

DATED this 3rd day of October, 1989.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.