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Ontario

The Mining and Lands Commissioner

In the matter of The CONSERVATION AUTHORITIES Act

G.H. Ferguson, Q.C.) Friday, the 28th day of
Mining and Lands Commissioner) October, 1988.

AND IN THE MATTER OF

An appeal against the refusal to issue permission to construct a single family dwelling, with a septic system and to place fill on Lot 69, Plan M-16 in Concession IV in the Township of Innisfil in the County of Simcoe.

B E T W E E N :

VITO DITTA

Appellant

- and -

LAKE SIMCOE REGION CONSERVATION AUTHORITY

Respondent

W. Andrews, Q.C., 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 grant permission to construct a single family dwelling with a septic system and to place fill on Lot 69, Plan M-16 in Concession IV in the Township of Innisfil in the County of Simcoe. 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 October 6, 1988.

Plan M-16 is a plan under the Boundaries Act which contains no approval of the local municipality or approval under the Planning Act. It is a plan superimposed over three registered plans and part of Lot 22 in Concession IV in the Township of Innisfil. It was registered in 1975.

A street known as Elizabeth Street forms the southerly part of Plan M-16. This street is not a street in fact but is the bed of Carson Creek which rises in the high land to the west of Highway 11 and flows easterly into Lake Simcoe through the community of Lefroy. The subject lot is the second lot on the

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east side of Corner Avenue on Plan M-16 above Elizabeth Street. It is a vacant lot purchased in 1987 by the appellant.

Flood plain mapping of Carson Creek was prepared by Dillon Consulting Engineers and Planners in 1975. According to this flood plain mapping the regional flood elevation at the relevant cross-section is 740.5 feet above sea level. The subject lands appear to have an elevation of 738 feet, resulting in the flooding of the lot to the depth of 2.5 feet in the event of a regional storm. In 1983 the respondent caused a special study to be made by the same firm and following the recommendations of that firm two lines known as the encroachment limits were established in the flood plain. These lines represent an area on which flooding in the event of a regional storm would not increase more than one-half of a foot and the respondent adopted the lines as a matter of policy and has treated lands above the encroachment limits as a special policy area. The general policy of the respondent was applied to the lands below the encroachment limits. The evidence indicates that this policy is to permit additions, renovations and garages but no new buildings are permitted on vacant lots. The respondent applies this policy strictly. The reasons for such a strict application are apparent to the tribunal in that having adopted a special policy area and created the risk of slight additional flooding of the lands in the flood plain, there is a greater than usual need of a strict application in the balance of the flood plain.

The evidence of the appellant indicated that there are a number of buildings in the flood plain and that a number of new buildings have within the last year or so been constructed. The evidence for the respondent indicates that these new buildings, with one exception, are above the encroachment limits and accordingly fall within the special policy area. The one exception was Lot 34. The evidence indicates that a building is under construction but no permission has been issued therefor. The tribunal assumes that this is probably the first time the

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matter came to the attention of the respondent and will undoubtedly be investigated.

With reference to the immediate vicinity of the subject lot, the evidence called on behalf of the appellant shows that immediately south of the subject lot there is a small house which has provided a permanent residence for many years. It is constructed without a basement and is built on the ground. The evidence also indicates that there is a cottage on the westerly side of Corner Avenue and the flood plain mapping indicates that there may be buildings immediately to the south of Elizabeth Street. Sam Renda, who owns Lot 70 which lies immediately to the north of the subject lot provided much of the evidence of the occupation in the area. He recently constructed under permission a two car garage measuring approximately twenty-four feet by twenty-four feet. The tribunal, although no evidence was filed of the location of the encroachment limit, has concluded from the evidence that there are approximately ten or eleven vacant lots lying between Elizabeth Street and the northerly encroachment limit in respect of the three streets running northerly from Elizabeth Street in the vicinity of the subject lot.

The proposal of the appellant was to construct a one storey dwelling measuring thirty-three feet, four inches by forty-seven feet, two inches and a carport with a width of thirteen feet, six inches and a depth of twenty-one feet. Counsel for the appellant assured the tribunal that the building could be constructed in accordance with the township by-laws and evidence was filed of the permission of the local health unit. Such permission required a considerable amount of fill to be placed requiring the excavation of existing vegetation, replacing the vegetation with twelve inches of granular material and the placing of an additional thirty inches of granular material plus topsoil over a fourteen hundred square foot area. There was no calculation of this amount of fill but there would be a significant reduction of storage capacity as a result of the placing of such fill for a septic tank and there would be a

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backwater effect created from the construction of the building and the placing of the fill.

The tribunal raised with the witness for the respondent the question of an infilling policy. There was no evidence to establish the elevation of Corner Avenue and the tribunal cannot conclude that satisfactory flood-proofing conditions could be designed for the subject lands keeping in mind that it is a usual condition that access in a regional storm be provided from and to such buildings, as well as the provision of other flood-proofing.

The appellant indicated a willingness to comply with any requirements of the respondent or this tribunal which would amend his proposed plan in order to permit flood-proofing of the building. However the tribunal cannot, of its own volition, determine any such conditions which would be acceptable in respect of the subject lot.

The emphasis of counsel for the appellant was that the granting of permission to construct the large garage on the lot immediately to the north indicated that the respondent was satisfied that a building of this size can be inserted in the flood plain without affecting the control of flooding, pollution or conservation of land as was said in the reasons of the respondent. The tribunal is satisfied that this conclusion does not follow from that action. That action is a usual exception used by conservation authorities and in effect relates to the more effective utilization of an existing building in a flood plain. Inherent in such an exception is the principal that such matters are affected but the exception is created to enhance or utilize the existing building.

The tribunal is satisfied in this case that the respondent was justified in adopting a strict policy in respect of the remainder of the watershed in view of the special policy adopted for the upper levels of the watershed. It may appear to create inequality among landowners in the entire watershed but the policy was undoubtedly adopted for the benefit of those landowners at the edge of the watershed and as the evidence indicated was adopted in light of the engineering evidence that

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the degree of flooding would be minimal. There was no evidence that if the vacant lots in the remainder of the flood plain were fully developed that a minimal effect would be the result and the tribunal is satisfied on the evidence produced by the respondent that there is a need for a strict application in the remainder of the watershed.

There was no evidence produced to show that the appellant has been dealt with in a manner different from other landowners in the portion of the watershed below the encroachment limits. The one exception noted above cannot be said to have been approved by the respondent and undoubtedly will be investigated. The tribunal is satisfied that the respondent has applied its policy in dealing with this application and the tribunal can find no grounds on which it should allow the appeal.

1. THIS TRIBUNAL ORDERS that the appeal in this matter is dismissed.

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

SIGNED this 28th day of October, 1988.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.