



The Mining and Lands Commissioner

In the matter of The CONSERVATION AUTHORITIES Act

G.H. Ferguson, Q.C.) Thursday, the 12th day of
Mining and Lands Commissioner) November, 1987

AND IN THE MATTER OF

An appeal against the refusal to issue permission to erect an addition on an existing structure on the property municipally known as 3725 King Street East, in the City of Kitchener in the Regional Municipality of Waterloo.

B E T W E E N :

JOHN S. FETHERSTON

Appellant

- and -

GRAND RIVER CONSERVATION
AUTHORITY

Respondent

The appellant, in person
J.M. Harris, Q.C., for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission to erect an addition to an existing structure on the property municipally known as 3725 King Street East, in the City of Kitchener in the Regional Municipality of Waterloo. 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 29, 1987.

The subject lands comprise part of Lot 14 in the Broken Front Concession, Richard Beasley's Lower Block, containing .434 acres. They lie in the valley of the Grand River downstream from the City of Waterloo and approximately six or eight miles upstream from the City of Cambridge. King Street, which was formerly Highway No. 8, lies some six or seven hundred feet to the east of the subject lands. At a somewhat greater distance to the west, the river is crossed by Freeport Drive and the bridge

known as Freeport Bridge. The subject lands lie to the south of a short section of the river that flows in an westerly direction.

Between the subject lands and the Grand River there is an abandoned but open road known as the Old Preston-Berlin Road. This road is owned by the City of Kitchener and the portion between the subject lands and King Street is used by the appellant as access to the subject lands. The subject lands have a frontage on the southerly side of this road of approximately 117.67 feet and run southerly a distance of approximately 166.79 feet except in the south westerly corner where there is an overlap of two deeds for a small triangular piece of land. There is presently situate on the subject lands approximately 25 feet southerly of the road a frame house having a frontage of 25 feet and a depth of 21 feet.

The appellant and his wife have owned the subject lands since 1974. Previous to that date the appellant's father rented the subject lands and the appellant has lived in the house for some 23 years. The house is a one and one-half storey building and was said to contain 960 square feet of floor space, notwithstanding that its ground floor measures 525 square feet. In 1978 the appellant removed a garage at the southwesterly corner of the house that had been used as a play room for children. Both buildings had been of frame construction. The house has a stone foundation.

The appellant gave evidence that in the flood of the spring of 1974 the property was flooded. He stated that the basement filled to approximately two feet from the ceiling of the basement but there was no damage to the building itself or the contents in the building. However, since that time he has installed a furnace and the electrical panel remains in the basement.

The proposal was to add a one-storey addition measuring 16 feet in an easterly direction and 27 feet in a southerly direction. A concrete slab presently exist at the southerly end

of the existing building and the proposal was to extend the addition six feet beyond the existing building in order that the slab could serve as a new entrance for the entire building with the back entrance being through the addition. The proposal was to erect a similar building with a sloping roof rather than a flat roof and to instal footings, rather than a basement, without windows other than vents for the passage of air. It was intended to construct the floor level of the addition at the ground floor level of the existing house. The purpose of the addition was to provide a living room, laundry and mud room.

The house is situate approximately 50 or 60 feet according to the evidence of the appellant from the river's bank. This distance may be greater as the evidence did not disclose the width of the Old Preston-Berlin Road.

During the 1974 flood, the municipality took emergency steps to prevent the escape of flood waters in the area and placed a considerable amount of rubble and other material along the southerly bank of the Grand River. After the flood waters receded this fill was leveled off at the elevation of approximately the regional flood line. However, the fill was placed as an emergency measure and its instalation did not follow principles of dyke construction or flood proofing. The berm does not prevent the regional flood from reaching its designed elevation because the berm is not completed and the flood waters could move in behind the subject lands when they rise to the level of the regional flood.

The relevant elevations in the area are shown in Exhibits 13 which reads,

Flood Levels

	Flow (cfs)	Level (feet above GSC datum)
Regulatory Flood (based on Regional Storm)	70,500	941.7
100-year Flood	61,200	940.7
Maximum Observed Flood (May 1984)	50,000	939.6

Flood Depths

	Level	Depth of flooding (feet) relative to:		
		Regulatory Flood	100-year Flood	Max. Obs. Flood
Floor	941.2	0.5	+	+
Driveway and yard at house	939.6	2.1	1.1	-
Back and side yard	937.0	4.7	3.7	2.6

The above elevations were obtained from spot elevations taken on the site by the engineer of the respondent, Mrs. L.L. Minshall, or her staff. The significance of the above figures is that in a regional flood the property generally is subject to 4.7 feet of flooding and the raised areas are subject to 2.1 feet of flooding and in the event of a one in one hundred year flood, the elevation are approximately one foot lower. It was also given in evidence that the 1974 flood was in the nature of a one in fifty year flood.

With reference to the implications in respect of the management of flood plains, Minshall also give evidence that, provided the berm contained the flows which were admitted by the appellant to have occurred in the 1974 flooding, there would be a backwater condition of a ponding nature on the subject lands and lands adjacent thereto resulting from the backing up of flood water from a location downstream of the subject lands at which the berm ended without dyking the entire southeasterly side of the flood plain. However, the engineer did not express any views on the stability of the berm other than to infer that from its method of creation it was not constructed according to the standards of a planned remedial work. Minshall also give evidence that with regard to the matter of loss of storage capacity the addition was insignificant having regard to the size of the flood plain. Accordingly, subject to the qualification, the proposed addition,

apart from its precedential implications, did not contain increased impediments to the control of flooding.

With reference to the issue of precedence the evidence indicated that there are some six or seven hundred feet along the Old Preston-Berlin Road which could be developed as sites for additional residences if this present application were permitted, each of which would be subject to approximately five feet of flooding in the event of a regional storm.

With reference to the policy of the respondent, the appellant put in evidence regarding three properties in the general area on which construction or filling had taken place. Firstly, reference was made to a Wilson property on which an addition was made in 1977 approximately. The evidence for the respondent was that it had no record of having issued permission in respect of this property.

Secondly, reference was made to a property referred to as the Grand Valley Garden Centre where additional greenhouses were permitted as well as a relocation of a stream flowing into the Grand River. The evidence of the respondent was that this property being within the category of commercial property fell within an exception to its policy and accordingly permission was granted.

Thirdly, reference was made to tennis courts which were built downstream and on the opposite side of the river. The evidence of the respondent in this regard was that the matter had been dealt with by the respondent and although the enforcement officer of the respondent was unsure whether permission had issued or was not required the position of the respondent was that the placing of the fill for the tennis courts did not interfere with the flows of the river or the stability of the banks. Apparently the residence itself was not involved and probably was above the flood line.

The evidence of the respondent regarding its policy is found in a publication dated July 24, 1981 which outlines the law and policy approach of the respondent. The respondent has not

adopted a two zone policy and accordingly, the entire flood plain is treated as a floodway and additions to existing buildings in the floodway are dealt with in item 3.4.1 which reads,

3.4.1 Floodway

Facilities which are provided by the Government of Ontario, the Government of Canada or any board or commission that is performing its function on their behalf shall be encouraged to incorporate proper hydrological designs. These facilities shall include, but not necessarily be limited to railroads, streets, bridges and public services for the distribution of water, gas, oil and electricity.

Uses not appreciably damaged by flood waters shall be permitted in this zone save and except permanent or mobile structures for human occupation.

The following uses are permitted:

- a) Construction of enclosed buildings for flood protection works or municipal utilities.
- b) Fences, walls or other appurtenances which will not constitute an obstruction or debris-catching obstacle to the passage of floodwaters.
- c) Material and equipment storage provided:
 - i) they are properly anchored to prevent moving.
 - ii) they can be removed within the limited time available after a flood warning.
 - iii) they are not subject to major damage by flooding.
 - iv) explosive, pollutant, buoyant, corrosive or flammable liquid or gaseous materials are not stored for warehousing purposes.
- d) Commercial excavating of materials from pits, strips or pools providing the stockpiling of materials, products or overburden will not create pollution or a restriction to the passage of floodwaters. Excavation and stockpiling shall be carried out in such a manner as to ensure the stability of all slopes in conditions of flood, dryness or any combination thereof, in accordance with accepted engineering, resource management, and safety standards.
- e) Improvement and normal maintenance of stream channel alignment and capacity providing the hydrological characteristics are not adversely affected.
- f) Improvement not specifically addressed in a) - e) above, provided they are designed to have a minimum

effect upon the flow of floodwater and anti-flotation measures are incorporated in the construction.

It is not necessary to find that the policy of the respondent does not include the two zone approach because even if such a policy had been adopted the subject lands fall within the floodway as contrasted with the flood fringe. The policy statement permits certain buildings which have an element of public necessity to be constructed in a floodway and expressly excludes permanent or mobile structures for human occupation.

On the evidence before this tribunal it can only be concluded that the permission requested by the appellant is contrary to the express and the implied policy of the respondent. The evidence did not support the inference by this tribunal of a policy of permitting additions to residential buildings in the floodway. It is the responsibility of the respondent to set and administer the policy for the areas under its jurisdiction and unless there is some serious matter of federal, provincial or municipal overriding concern, the responsibility of the respondent should be carried out. There was no evidence of any such overriding concerns and there was no evidence that the applicant has been deprived of any policy, implied or express, under which the permission sought is normally given by the respondent and for these reasons the appeal should be dismissed.

In addition, it may be noted that the tribunal is not aware of any provincial policy that permits the construction of residential buildings in areas that are subject to four and one-half feet of flooding in a regional storm. Even where exceptions are permitted, it is usually a condition of the permission that ingress to the property be provided above the elevation of the regional flood and secondly that the building be floodproofed to elevations above the regional flood elevation. The application of the appellant in this case met neither of the two requirements.

The evidence of the respondent emphasized the isolated effect of the subject lands and the risks to life both to the

occupants and to rescuers in attempting to deal with emergency situations or even normal egress and ingress in the event of a regional flood. The tribunal is not un-mindful of such concerns.

The thrust of the submissions of the appellant was that he was prepared to accept the risks of the expenditure of capital and his request was small compared with the exceptions which are permitted for properties in downtown and other areas. This argument fails to take into consideration the fact that such areas are designated as special policy areas and are so designated only on approval of the local municipalities and where remedial steps have been taken to reduce the risks from flooding. These considerations are not applicable to the subject lands and a comparison cannot be made between the two situations.

For the foregoing reason, the appeal is dismissed.

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.

Signed this 12th day of November, 1987.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.