



The Mining and Lands Commissioner  
In the matter of The CONSERVATION AUTHORITIES Act

IN THE MATTER OF

An appeal against the refusal to issue permission to construct an addition to an existing residence at 167 Birkett Lane, in the City of Brantford in the County of Brant.

B E T W E E N :

BRIAN TAYLOR

Appellant

- and -

GRAND RIVER CONSERVATION AUTHORITY

Respondent

R. L. Verity for the appellant.  
J. M. Harris and P. Mann for the respondent.

REASONS FOR JUDGMENT

The appellant appealed from the refusal of the respondent to grant permission under Ontario Regulation 356/74 to construct an addition to the appellant's residence at 167 Birkett Lane in the City of Brantford. By Ontario Regulation 133/76 the power and duty of hearing the appeal was assigned to the Mining and Lands Commissioner. The appeal was heard in Kitchener on March 2, 1976.

In May, 1971 the appellant and his wife, Patricia Taylor, as joint tenants acquired the subject property which is situate on the north side of Birkett Lane and is composed of part of Lot 10 in the Eagles Nest Tract. It contains 19,811 square feet and measures 120 feet along the northerly limit of Birkett Lane. The width at the rear is 90.5 feet. The easterly limit is 207.5 feet and the westerly limit is 200 feet.

At the time of acquisition of the property there was

situate thereon a frame house built in 1946 approximately. The outer walls are covered with Johns-Manville siding. There is a basement approximately 7 feet deep. The existing house is 32 feet 6 inches in length and approximately 30 feet in width. It contains three bedrooms, a kitchen, a living room and one bathroom.

The Taylor's have a fourteen year old son and three daughters aged sixteen, twelve and five. The third daughter was born on the day they moved into this house. A fifth child is expected in September. The existing accomodation was said to be insufficient for the existing family and the situation will worsen in September. The property is subject to a first mortgage in the amount of \$9,000.00 and a second mortgage in the amount of \$6,000.00 with payments of \$95.00 and \$60.00 monthly respectively. The balance of the purchase price of \$17,500.00 was borrowed from a bank and the loan has been paid. Mr. Taylor is a truck driver who is employed with a local trucking firm.

The application for a permit described the nature of the work as "house addition." The plan attached to the application and the evidence before me indicates that the proposal is much more extensive than those two words would imply. It is proposed to raise the foundation under the existing building by two blocks and fill the basement if required. The existing area would be completely remodeled to create a dining room, a living room, a den or guest bedroom and a laundry and sewing room as well as continuing the existing bathroom. It is proposed to erect at the west end of the existing building an addition having a length of 37 feet 4 inches and approximately the same width as the existing structure. No basement is proposed for this addition but it is proposed that the foundation be raised two feet above the 18 inch raise of the existing area with the result that the proposed first floor level of the addition will

be approximately 3 1/2 feet higher than the floor of the existing building. The first floor of the proposed area would be composed of a family room adjacent to the existing area, a two-car garage and an area at the rear of the garage for storage, furnace, and other services. It is proposed to put three bedrooms and a bathroom over the garage portion of the addition but there would be no living quarters over the family room portion of the addition. The estimated cost of the addition is \$24,000. It is not expected that any fill would be required except for the purpose of filling the existing basement or raising the septic tank bed if this is required.

Birkett Lane is laid out in a generally easterly and westerly direction between Erie Avenue and Mohawk Road, which streets run in a more or less, northerly and southerly direction and are approximately one mile apart. The appellant's property is approximately 2,000 feet by scale easterly of Erie Avenue. The Grand River at this location runs in a general easterly direction and the subject property is in a part of the flood plain of the river which may be affected not only by waters flowing perpendicularly out of the river but also from waters coming toward the property from the west as the direction of the river is in a northerly direction approximately a mile to the west. There is a very large flood plain in this area. The subject property is only 400 feet from the river. It is approximately 1,300 feet from the maximum observed flood line which is the flood line that has been established following the flood in May, 1974. It is approximately 2,500 feet below the regional flood line that has been established by the consulting engineers for the respondent.

Both Mr. and Mrs. Taylor were raised in the area and are familiar with floods that have existed in recent years. Their recollections of Hurricane Hazel, which was not a regional storm by

any means, at this location are indistinct because they were quite young at that time. They appeared to be reconciled to existing flooding conditions and hence are proposing the raising of the buildings to a height which would be above the floods that they have experienced. However, I am not convinced that they appreciate the possibility or the significance of a regional storm.

Mr. Taylor was not present during the flood of May, 1974. While Mrs. Taylor was on the premises during the evening of the night of the flood she was not there when the water peaked and did not return until noon the next day at which time the water was receding fairly quickly. However, when she did return the basement was still full of water and water remained in one of the corners of the ground floor of the house.

Charles Ball, the immediate neighbour to the east, whose foundation is approximately a foot higher than the Taylor's foundation, gave evidence that he had remained on the property throughout the night and had not been evacuated. The Taylor family was not staying in the house because of the absence of Mr. Taylor and was visiting friends. In the general area of the Taylor property the river flows in a northward arc bringing the channel to within 400 feet of the Taylor property. There are no buildings between the Taylor property and the river and in the vicinity of the Taylor property the only buildings lying south of Birkett Lane is a greenhouse property, the buildings of which include a residence. There are three or four residences to the east of the Taylor property on the north side of Birkett Lane and a few residences near Erie Avenue and approximately 1,000 to 2,000 feet to the west of the appellant's property.

The contractor for the appellant also gave evidence. He lives on Erie Avenue and has constructed a house in the particular

area and other buildings in the general area. He did work on the foundation and the brick work for the Board of Education building on Erie Avenue. In his view, he did not anticipate any construction problems with the proposed alterations to the existing building and the erection of the addition thereto.

Counsel for the appellant indicated that if the tribunal was of the opinion that a change in the overall approach to the reconstruction of the building by placing a second story over the existing building would be acceptable, the appellant was prepared to consider this possibility. He correctly pointed out that such a change would warrant a review before the executive committee of the respondent prior to the tribunal examining such proposal.

The grade elevation of the appellant's property is 645 feet above sea level. The existing grade of the first floor is 646.6 feet. The May 17, 1974 flood line was 648 feet and the regional storm flood elevation in this area is 655.8 feet. Applying these elevations to the proposed building it appears that the base of the windows on the first floor and the door are below the May, 1974 flood line and that the regional storm flood elevation is above the eaves of the existing building as raised and may even be above the floor level of the second story of the proposed addition.

The elevations are further supported by the evidence in the report of His Honour Judge Leach that indicates that there was a substantial flooded area above the appellant's property during the May, 1974 flood. If this flooded area were increased, as it would be during a regional flood, in size and in depth the risks of damage and the concern for personal safety related to the subject property are significant and substantial.

Evidence regarding the official plan and the zoning

by-laws of the municipality were produced. The existing use of the property as a residence is not in accord with the legal requirements for new buildings. Counsel for the appellant assured me that he has been in touch with the appropriate municipal officials and has been assured that the doctrine of pre-existing use and extension of pre-existing use are both being applied by the municipal officials and that there would be no difficulty in this regard.

The evidence disclosed that the general policy of the respondent was to prohibit all new buildings and filling below the regional storm line. There was an exception in respect of properties lying between the maximum observed flood line and the regional storm line whereby some properties which fall within established concepts which may be granted permission. These principles are not outlined here because of their irrelevance to this particular case as the property in question is well below the maximum observed flood line. The policy of the respondent has been further extended to permit isolated instances of exceptions in areas that are in the vicinity of the maximum flood line. In all of these cases the Authority has required the appellant to raise the basements to the level of the regional storm line. The first floor of the buildings and any openings have to be raised to an elevation of 655.8 feet. While there may be some variation of this policy due to error in the establishment of the regional flood line, as was the case in respect of Our Lady of Fatima Catholic Church, there was no indication that the policy of the respondent had gone further than to permit a very minor change in property in the vicinity of the maximum observed flood line such as the erection of a very small addition or an excavation for a furnace area.

The tribunal inquired as to whether a number of

recognized exceptions were applicable. It appears beyond question that the stage storage doctrine is not applicable and that there is no room for any special application of the cut and fill principle, particularly as the appellant does not have a site at which the reduced storage capacity could be replaced. Further the application of these doctrines involve the raising of the foundation and all openings therein to a height of 655.8 feet and counsel for the appellant made it quite clear that such a proposal was out of the question in this case.

The only appropriate grounds for considering the application of the appellant is whether the fact that there is an existing building on the parcel of land at present warrants the type of construction proposed by the appellant. The proposal cannot be viewed as a minor change in an existing situation. While the evidence indicates that the uses of the existing structure will change, there does not appear to be any proposed structural changes other than the raising of the foundation and the change from a space heater to a furnace. The latter point has some significance as electric installations are usually required in furnaces and would create problems in flooding conditions that exceed those experienced in recent years. With reference to the proposed addition the width is 5 feet longer than the existing structure and contains two stories as contrasted with one story in the existing building. From a one story five room house, a change is proposed to a nine room house complete with fireplace, two-car garage and utility room and two bathrooms. The end result will be so different from the existing house that it can only be considered as a complete new building. If a complete new building were permitted in this particular location the entire program of the respondent would be purposeless. The purpose of the program is to prevent, as far as

possible, the reoccurrence of situations such as those that occurred in Weston during Hurricane Hazel and in Timmins during severe flooding conditions. The property of the appellant is as close to the Grand River as any of the properties illustrated on the material placed before me and would appear to be the most hazardous site in the entire flood plain. As counsel for the appellant indicated, there is no method by which the risks from flooding can be eliminated by filling or by raising of the elevations of foundations and openings.

Counsel for the appellant asked me to withhold my decision until the decision involving the Brant County Board of Education proposed administrative building was released. That decision is released but in my opinion it is of no assistance to the appellant. The decision is based entirely on a recognized exception of public buildings and structures and as was indicated in that judgment the exception was extended beyond what I consider to be its normal bounds by reason of three aspects, none of which are relevant to the case at hand.

Counsel for the appellant brought out that the respondent has a program of land acquisition and requested me to make a strong recommendation that his client's property be given priority in this program. I am sure that counsel for the appellant can present the appellant's case far more effectively than I can to the respondent. I personally am not aware of the program of the respondent or the principles that they adopt. I am confident that officials of the respondent would discuss these matters with counsel for the appellant and the possibility of acquisition of the land by the respondent can best be dealt with on that basis.

I might be tempted to point out that I sympathize with the problems of the appellant and his family. However, it is also



apparent that at the time this property was acquired the appellant and his wife were well aware of flooding conditions in this area and at that time had four children. It might also be said that the appellant's property and the properties of his neighbours appear to be closer to the river than any other residential buildings in the immediate flood plain. However, I appreciate that this fact may not be relevant to the policies of the respondent and as the matter of acquisition is not before me, I refrain from saying anything further.

Accordingly, I can only conclude that in view of the nearness of the subject property to the river which would in granting permission create a most dangerous precedent, the risks to property and life in a regional flood and the additional burden that might be placed upon the public authorities by way of rescue and evacuation procedures in the time of a regional flood, the application should be dismissed. I have not overlooked the fact that the appellant and his wife clearly indicated their willingness to enter into a save harmless agreement. However, I have considerable doubt as to whether such an agreement would run with the land and accordingly, until such time as there is some legislative or other base of ensuring that such agreements run with the land I am not impressed with the utility of such agreements although they can play a role where a public body such as a board of education is creating a permanent public installation.

There shall be no costs payable by either of the parties.

DATED at Toronto this 18th day of March, 1976.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.