

File No. CA 008-95

J. Robb)
Deputy Mining and Lands Commissioner)

Monday, the 1st 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 Lot 32, Plan M-16, Town of Innisfil.

B E T W E E N :

JOHN VALCHEFF

Appellant

- and -

LAKE SIMCOE REGION CONSERVATION AUTHORITY

Respondent

ORDER

WHEREAS an appeal to the Minister of Natural Resources was received by this tribunal on the 8th day of August, 1995, having been assigned to the Mining and Lands Commissioner (the "tribunal") by virtue of Ontario Regulation 795/90;

AND WHEREAS a hearing was held on Monday, the 29th day of January, 1996, in the Courtroom of this tribunal, 700 Bay Street, 24th Floor, 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 Lot 32, Plan M-16, Town of Innisfil be dismissed.

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

DATED this 1st day of April, 1996.

Original signed by J. Robb

J. Robb
DEPUTY MINING AND LANDS COMMISSIONER

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REASONS

The hearing of this matter was held on January 29, 1996, in the Courtroom of this tribunal, 700 Bay Street, 24th Floor, Toronto, in the Province of Ontario.

Appearances:

Joseph Valcheff Appearing on behalf of the Appellant

Kenneth C. Hill Counsel for the Lake Simcoe Region Conservation Authority

Background:

Mr. John Valcheff proposed to construct a single family dwelling on a vacant lot in the Lefroy area of the Town of Innisfil. The subject lot is located north of Carson's Creek on the west side of Ferrier Avenue, municipally known as 988 Ferrier Avenue, several hundred metres inland from Killarney Beach, Lake Simcoe. A May 30, 1995 development application (Exhibit 2, Tab 1) was submitted to the Lake Simcoe Region Conservation Authority under the permit system for fill, construction, or alteration to waterways.

Mr. Valcheff's application was considered and refused by the Executive Committee of the Lake Simcoe Region Conservation Authority on June 23, 1995. According to a January 1984 Flood Plain Management Study (Exhibit 2, Tab 2), the subject lot is entirely within the regional storm (Hurricane Hazel) flood plain and floodway of Carson's Creek. Measurements place the lot grade at 0.7 metres below the regional storm flood elevation of 223.9 metres above sea level (ASL). In its reasons for refusal (Exhibit 2, Tab 5), the Conservation Authority said that the proposed house would create an obstruction to the passage of water during regional storm flood conditions. The obstruction of the floodway would reduce the available area for flood water storage and thereby increase the risk of flooding on surrounding properties.

Mr. Valcheff appealed the Conservation Authority's decision within the prescribed thirty day period. Under the **Conservation Authorities Act**, the Mining and Lands Commissioner has the authority to hold a hearing and decide the outcome of the appeal.

Evidence:

The appellant's son, **Joseph Valcheff**, provided evidence and submissions on his father's behalf. In the mid 1970s, the appellant's neighbour was given a building permit to construct a single family dwelling on vacant lot 32. However, the neighbour mistakenly erected the building on lot 31, the original Valcheff property. In 1979, when the neighbour went to sell the property, the deed search established the mistake. A property exchange was legally filed to correct the mistake and Mr. Valcheff relinquished ownership of Lot 31 and took ownership of Lot 32. The Valcheffs filed exhibits to support and summarize this evidence (Exhibits 1 to 6 and 14).

Since a building permit was issued for Lot 32 in the 1970s, the Valcheffs assumed that one day they would be able to build a dwelling on the property. They installed culverts and a driveway, maintained the property, and waited for servicing of the area by Town water and sanitary sewers. Mr. Valcheff continued to pay taxes on the property under the category "residential" (Exhibits 7 and 8) and a driveway and updated survey were completed in 1987 (Exhibit 9). The appellant's son said that his father's intention was to build a small home (1100 - 1400 ft²) on the property for retirement purposes.

In December of 1994, the Town's consultants contacted local property owners, including the Valcheffs, about the planned extension of municipal sanitary sewers within the Lefroy area. The notification letter (Exhibit 11) indicates that a sanitary sewer connection will be provided to the property line of each registered lot within the contract area. The potential sewer hook-up was greeted as good news by the Valcheffs. However, in May of 1995, the consultants wrote another letter to local property owners (Exhibit 13). The May letter announces a revision to the sanitary service policy based on discussions between the Conservation Authority and the Town. The revised policy would not provide sanitary sewer hook-ups within the Carson Creek floodway. The revision addresses the inability to obtain permits for new homes within the encroachment limit of Carson's Creek flood plain.

According to the Valcheffs, the May 1995 letter was the first time they had been notified of the flood plain restrictions on the development of their property. The Valcheffs questioned the fairness of introducing flood plain restrictions without notification of affected property owners. After paying residential taxes on the subject property for decades, Mr. Valcheff found it unfair to prevent the construction of a residence on the property.

Mr. Valcheff's son indicated a willingness to design the proposed dwelling to address the flooding concerns of the Conservation Authority. He said the structure could be built on concrete pillars above the regional flood level to minimize obstruction to flood waters and to avoid flood damage. If the house proposal is rejected, the appellant's son said the only alternatives would be to build a small shed or place a trailer on the property. The Valcheffs preferred to build a well-designed flood-proofed house.

A Conservation Authority engineer, **Thomas Hogenbirk**, addressed the fill and flood plain restrictions and mapping for Carson's Creek (Exhibit 18 and 19). Encroachment limits were established after the 1984 Floodplain Management Study by Cummings-Cockburn and Associates (Exhibit 2, Tab 2). Near Ferrier Road, the encroachment limits require a set back of approximately 150 metres (500 feet) to the north and south of the Creek. The Valcheff property is approximately 36 to 55 metres (120 - 180 feet) north of Carson's Creek. Mr. Hogenbirk said the Valcheff lot is entirely within the fill regulation area designated in Schedule 9 of Ontario Regulation 153/90 and shown on Map 14 of the watercourse mapping for the Town of Innisfil. He also testified that the construction of a small shed or the placement of a trailer is covered by Ontario Regulation 153/90.

In response to questions by the appellant's son, Mr. Hogenbirk acknowledged that many existing dwellings are located within the central flood plain of Carson's Creek (i.e. between the encroachment limit lines). Mr. Hogenbirk agreed that some additions and improvements are permitted for existing dwellings within the central flood plain. He said that once dwellings are established, it is difficult to monitor and restrict incremental improvements (e.g. sheds, garages). However, Mr. Hogenbirk said no approvals have been granted for the construction of new dwellings within the central flood plain since the encroachment limits were established. New development in the central flood plain would tend to reduce flood plain storage capacity, restrict flood water passage, increase surrounding flood water velocities and levels, and thereby aggravate the risk to existing development. Mr. Hogenbirk agreed that elevating the proposed house on concrete pillars could reduce the potential for property damage and flood water obstruction. He said, however, that such a proposal would require detailed design and review. Mr. Hogenbirk also referred to restrictions on the deposition of fill within the property and potential problems with road access and safety during flood conditions.

Provincial Flood Plain Policy:

Under section 3 of the **Planning Act**, the province issued a 1988 policy statement for flood plain planning. This policy states:

... the need to manage flood plains was emphasized in 1954 when

Hurricane Hazel struck the Metropolitan Toronto area resulting in the loss of 81 lives and approximately \$71 million in property and other damages.

Despite additional precautions, Ontario experienced record flooding in 1985. The provincial flood plain policy refers to the direct and indirect costs of flood damage across the province and summarizes the role of government as follows:

- to provide order and equity in the use/non-use of flood plain lands; and
- to protect society, including all levels of government, from being forced to bear unreasonable social and economic burdens of unwise individual choices.

In the Carson's Creek area, a central floodway zone and a flood fringe zone were designated after a January 1984 Flood Plain Management Study by Cummings-Cockburn and Associates Limited. A similar two zone concept is outlined in the provincial flood plain policy. The provincial policy states:

- 5.2 New development in the floodway is to be prohibited or restricted.

Final Submissions:

In his final submissions, Mr. Hill said that the uncontested facts demonstrate that the Valcheff lot is located within the central flood plain and floodway of Carson's Creek, an area designated for "no encroachment". He referred to other tribunal decisions which had upheld Conservation Authority decisions to refuse new development in the Carson's Creek central flood plain (e.g. **Ditta v. LSRCA** (unreported) October 28, 1988 and **Graham v. LSRCA** (unreported) October 3, 1989).

The appellant's son noted differences between the referenced cases and the current case. The **Ditta** case involved the placement of fill and the construction of a septic system within the flood plain. The **Graham** case involved a house with a basement and windows below flood level. In contrast, the Valcheffs expressed a willingness to avoid fill; to raise the house above the flood level and to utilize the extension to the Town sanitary sewers rather than a septic system. The appellant's son submitted that an elevated two storey house with no basement or fill could accommodate the flooding concerns of the conservation authority.

Mr. Hill said the proposal to elevate the dwelling above the flood level was not part of the application to the Conservation Authority. In the absence of an engineering and feasibility study, Mr. Hill said that it was impossible to make an informed decision on this new proposal. In terms of the fairness and notice issues raised by the Valcheffs, Mr. Hill said the Conservation Authority's actions were reasonable. Although the **Conservation Authorities Act** and Regulation 153/90 do not require formal notice, proposed fill lines and flood plain mapping are advertised and an open house is held before development restrictions are registered. If residential development is not possible, Mr. Hill said the Valcheffs could appeal to the appropriate authorities for a reduction to their property taxes.

Mr. Hill noted that existing development has been recognized and some new development is permitted on the fringe of the flood plain where flooding impacts should be less problematic. In Mr. Hill's submission, the surrounding development increases the importance of prohibiting new development in the central flood plain (floodway). By obstructing flood water during a regional storm, new development in the flood plain could increase the risk of flood damage to both existing and fringe development.

Findings:

The facts of this case present an unfortunate situation for the Valcheffs. The appellant exchanged properties to accommodate a neighbour's mistake and paid residential property taxes for many years with the hope of eventually building a house. In this context, it is understandable that the Valcheffs question the restrictions on the residential development of their property. However, the evidence places the subject lot clearly and entirely within the

floodway for Carson's Creek. Allowing the proposed development would be contrary to the applicable regulations and policies for wise flood plain management. The tribunal accepts the Conservation Authority's evidence that new development within the floodway could adversely affect floodwater storage and passage and floodwater levels and velocities. Although incremental in its impact, the proposed development would tend to increase the risk of flood damage and the social and economic burdens noted in the provincial flood plain policy.

The appellant referred to the possibility of elevating the proposed dwelling above the regional flood level, however, the application contained insufficient information to assess this proposal adequately. Although the Conservation Authority raised concerns about any new buildings within the central flood plain (floodway), the Authority's engineering witness said an elevated building may be feasible. Before pursuing any remaining options, the appellant should consult with the local Conservation Authority. If residential development of the property is foreclosed, the Valcheffs have the right to appeal to the appropriate authorities for a reduction in property taxes.

Conclusions:

The tribunal has considered the evidence and all of the exhibits including the flood plain mapping, the fill regulation and the provincial flood plain policy. In the context of wise flood plain management and clause 28(1)(e) and (f) of the **Conservation Authorities Act**, refusal of the Valcheff application is justified. Therefore, this appeal must be dismissed.