



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

G.H. Ferguson, Q.C. ) Monday, the 28th day  
Mining and Lands Commissioner ) of August, 1989.

AND IN THE MATTER OF

Appeals against the refusal to issue permission to place fill and construct a commercial mall on part of Lot 13 in Concession III, the premises municipally known as 1207 Adelaide Street North, in the City of London in the County of Middlesex.

B E T W E E N :

PEARL LING and TEMVAK HOLDINGS LIMITED

Appellants

- and -

UPPER THAMES RIVER CONSERVATION  
AUTHORITY

Respondent

A.R. Patton, for the appellants.  
S.R. MacKay, for the respondent.

The appellants appealed to the Minister of Natural Resources from the refusal of the respondent to issue permission to place fill and construct a commercial mall on part of Lot 13 in Concession III, in the former Township of London, in the City of London known as 1207 Adelaide Street North. The appeals dealt with two proposals that had been presented to the respondent and had been refused.

By Ontario Regulation 364/82 the power and duty of hearing and determining such appeals were assigned to the Mining and Lands Commissioner. The appeals were heard in London on May 2 and 3, 1989.

The subject lands are composed of a parcel of land having a frontage of approximately 188 feet on the west side of Adelaide Street and a depth of approximately 175 feet. A one and a half storey brick and frame house is situated in the southeast quadrant of the property. A frame shed is situated on the north

boundary approximately 25 feet from the northwest corner of the subject lands and may overlap the lands to the north.

Mrs. Ling and her husband, who died in 1971, acquired the subject lands in 1941. They raised their family on the subject lands. At the time of purchase it was considered to be a farm in the country. No fill was placed on the lands after the purchase and the buildings are in similar condition to the condition at the time of acquisition in 1941.

Mrs. Ling's evidence was that the house was built on a hill and the land sloped to the west and the north from the site of the house. The house has a basement, containing a furnace. Her evidence was that the only water damage that had been sustained was damage that came from a drain and seeped through the basement. She stated that there had never been any problems of access from the property or flooding of the shed or the house. She was unfamiliar with the flood of 1937 and any effects it might have had on the subject lands. Although Adelaide Street had been flooded further north, she had never seen any flooding at Kipps Lane, a street running to the east from Adelaide Street near the subject lands.

There are berms along the west side of Adelaide Street to the north and to the south of the subject property. No history of the time of installation or purpose of these berms was available. The berms appeared to be fairly stable as there was evidence of trucks being parked on the berms. It was not clear from the evidence whether the higher portion of the subject lands was a result of similar filling.

Mrs. Ling has entered into a conditional agreement of sale to the corporate appellant. The corporate appellant submitted two proposals to the respondent for the development of a small mall on the subject lands.

The first proposal was the creation of a parking lot on the higher ground immediately west of Adelaide Street and the construction of the mall on a concrete slab supported by pillars along the westerly side of the property. This proposal included

the excavation of part of the westerly bank of the higher ground if such were desired. In this proposal the level of the first floor of the mall would be equivalent to the level of the higher ground along the easterly side of the subject lands. This proposal was illustrated on Exhibit 12.

The second proposal involved the construction of the mall on the higher ground along the easterly part of the subject land and the creation of a parking lot at the rear or westerly side of the subject lands. This proposal was illustrated by Exhibit 7. In order to level the parking lot at the building site, this proposal involved the removal of 25,000 cubic feet of fill and the placement of 17,000 cubic feet of fill. 12,000 cubic feet of the fill would be placed under the building and 5,000 cubic feet would be placed in the parking lot. There would be a net decrease in the obstruction of the floodway of 8,000 cubic feet. Exhibit 8 shows the elevations of the subject lands as determined by Holstead & Redmond Limited, Ontario Land Surveyors. The elevation of Adelaide Street is approximately 796 feet and this measurement is the average elevation of the land lying to the west of Adelaide Street and surrounding the existing house. At the westerly side of the subject lands the elevations vary from 789.4 feet to 790.7 feet which indicates that there is a drop in elevation of approximately six feet over a distance of 40 or more feet. The elevations of Adelaide Street are shown on Exhibit 3 as being 242.2 metres near the subject lands and rising to 243.3 metres at the river and the bridge over the river has an elevation of 243.7 metres. The lands lying to the east of Adelaide Street and the subject lands have general elevations of 241.2 or 240.9 metres. These lands vary in elevation from four to five feet below the elevation of Adelaide Street at the subject lands.

Although the regulation of the respondent adopts the Hurricane Hazel standard as the regional storm, for administrative purposes, the respondent uses the equivalent of a 1937 storm as its regulatory floodline. According to W.J. Diver,

the relevant elevations at the subject lands are 243.6 metres for the regional storm, 243.3 metres for the regulatory storm and 243 metres for the 100 year storm. He pointed out that with the adoption of the regulatory floodline in February, 1989 the difference in elevation between the regulatory floodline and the 100 year floodline becomes minimal and consequently the respondent, having reduced the regional floodline to a regulatory floodline does not apply a two-zone policy in the main part of the Thames River and applies a one-zone policy in this area. As the elevation of the highest part of the subject lands was lower than the 100 year floodline the respondent considered that the application should be refused on the grounds that the subject lands are below the 100 year floodline, the regulatory floodline and the regional floodline and in accordance with the policies of the respondent and the Province of Ontario the application should be refused.

The position of the appellants was that the tribunal should view the matter on the basis of a two-zone policy and much evidence was produced to attempt to establish that the elevations of the higher portions of the subject lands were above the 100 year floodline. Expert evidence was introduced of the application of cross sections other than those used by the respondent in its calculation of the relevant elevations to a HEC 2 program. This expert evidence did indicate with a selection of cross sections the 100 year floodline could be said to be below the elevation of the higher parts of the subject lands.

Evidence was produced of the extent of flooding in the 1977 flood event. Exhibit 5 is a photograph taken at a time subsequent to the peak of the flood. It shows flooding of Adelaide Street to the north of the river and to the south of the river at a location north of the subject lands. It shows extensive flooding behind the subject lands and to the southwest of the subject lands reaching the edge of the building on the subject lands. There is evidence of wetness if not flooding on

the lands lying to the east of the subject lands. The evidence of R.M Goldt, the Water Management Supervisor of the respondent, was that the 1977 flood was less than a 100 year flood.

Considering the evidence of the expert witnesses, the tribunal is only prepared to find that the subject lands may or may not be below the elevation of the 100 year flood.

There was considerable evidence regarding other projects approved by the respondent. Reference was made specifically to the lands lying between the subject lands and the Thames River that had been developed for a playground with the installation of parking lots and backstops which might catch debris or be destroyed in a regional flood. Reference was also made to a public utilities commission building. The evidence seemed to indicate that there was some confusion as to the elevations in respect of that building. The tribunal is satisfied that these alleged precedents do not establish a policy of the respondent of permitting the new construction of commercial buildings in the floodway as contrasted with the fringe.

It is an interesting question as to whether, with the change of policy of the respondent in February, 1989, the case should be viewed on the basis of a two-zone policy or the one-zone policy. In the view of the tribunal the theory that is often applicable to applications of applying principles in effect at the time the application is made, is not necessarily applicable in the case of the construction of buildings in flood plains. The authority has created an element of flexibility in its policy and adopted a regulatory flood level that is less than the regional flood elevation. It is understandable that such a degree of flexibility would require a stricter application of flood plain management principles and the tribunal is satisfied that the appropriate approach is to apply the one-zone concept which is now the policy of the respondent.

Assuming that the approach should have regard to the previous policy of the respondent, counsel for the respondent argued that the evidence clearly showed that the building site on



the subject lands would be an island in a regional or regulatory storm without access and probably would be such an island in a 100 year flood. The tribunal adopts this argument of counsel for the respondent.

It is apparent to the tribunal that one aspect of flood plain management was not addressed by the parties who seemed to concentrate on the issue of the elevation of the 100 year flood. The subject lands are situate on the downstream side of an embankment which is the equivalent of a dam in flood conditions. It is clear that the head pond in a regional or regulatory storm would extend to the lands lying to the east. As indicated above there would be a depth of four to five feet of flooding before the road bed of Adelaide Street would be overtopped. It is also noted that the elevation of Adelaide Street rises toward the river and the site in question would be the first location at which the waters would overtop and cascade onto the subject lands which have a significant slope. In the opinion of this tribunal this aspect of the subject lands is one which should not be overlooked. The tribunal is not aware of any principles of establishing the likelihood of embankments withstanding the pressures of head ponds in regional floods and the failure or washing out of railway embankments and street embankments does occur in such floods.

The tribunal is satisfied that the decision of the respondent was made in accordance with its policies and that the appellants have not been denied the benefit of any exceptions which the respondent applies in its policy either express or implied.

1. THIS TRIBUNAL ORDERS that the appeals are dismissed.
2. THIS TRIBUNAL ORDERS that no costs shall be payable by any of the parties to the matters.

SIGNED this 28th day of August, 1989.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.