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Ontario

The Mining and Lands Commissioner

In the matter of The CONSERVATION AUTHORITIES Act

G.H. Ferguson, Q.C.) Thursday, the 15th day of
Mining and Lands Commissioner) September, 1988.

AND IN THE MATTER OF

An appeal against the refusal to issue permission to construct an addition to an existing dwelling on part of Lot 31 in Concession B, municipally known as 89 Bankfield Drive in the City of Etobicoke in the Municipality of Metropolitan Toronto.

B E T W E E N :

JOHN ANGA

Appellant

- and -

THE METROPOLITAN TORONTO AND REGION CONSERVATION AUTHORITY

Respondent

C.G. Ashton, for the appellant.
J.H. Wigley, for the respondent.

The appellant appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission to construct an addition to an existing dwelling on part of Lot 31 in Concession B, municipally known as 89 Bankfield Drive, in the City of Etobicoke, in the Municipality of Metropolitan Toronto. By 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 July 18, 1988.

Exhibit 3 contains a number of agreed facts for the purpose of the hearing, which agreement is without prejudice to any subsequent application in which the elevations of the subject property are re-established by engineering methods. The subject property was acquired by the appellant in 1983 and comprises 1.53 hectares (3.739 acres) on the east side of Bankfield Drive. A one and one-half storey dwelling, a detached garage, the foundations for two greenhouses and a storage shed are situate on the property. The residence is approximately 120 square metres in size. The facts also agree that the elevation of the land

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adjacent to the dwelling is 126.2 metres and that the regional storm elevation is approximately 130 metres resulting in a depth of flooding of 3.8 metres or 12.464 feet in the event of a regional flood. The elevation of Bankfield Road at the location is 126.5 feet and would be flooded to a depth of 3.5 metres in a regional flood, making the subject lands inaccessible by road in that event. The land also is subject to flooding in a one in one hundred year storm to a depth of 0.8 metres or 2.6 feet.

The evidence indicates that the dwelling on the subject lands is at least forty or fifty years of age and is of frame construction with two by four studs. It is now covered with aluminum siding. Its condition is substandard in accordance with modern requirements in respect of plumbing, electrical wiring and insulation. There is only one bedroom on the main floor and the half storey is used by the appellant's mother-in-law who is in excess of seventy years of age and who finds the high temperatures during summer to be unbearable. In addition to the appellant, his wife and mother-in-law the building provides housing for the son of the appellant and his family. The result is that nine or ten persons are resident in the building.

The proposal of the appellant is to remove the porch at the front of the dwelling which measures approximately 152 square feet in area. The removal would provide an additional flood storage capacity to the watershed of 1,894.528 cubic feet. The proposal also involved the utilization of rectangular areas at the northeast corner and the southeast corner of the existing dwelling measuring 72 square feet which would create a loss of storage capacity of 897.408 cubic feet. In addition, it is proposed to erect along the southerly side of the existing building an enlargement of the existing rooms in the dwelling measuring 244 square feet. It is proposed to raise this addition on pilings to a height of two feet and calculating the loss of storage capacity at a depth of flooding of 10.464 feet this portion of the proposal would create a loss of storage capacity of 2,550.216 cubic feet. The total loss of storage capacity is 3,450.624 cubic feet. Deducting the gain of storage capacity

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from the removal of the porch there is a net loss of storage capacity of 1,556.096 cubic feet or 173 cubic yards.

The proposal of the appellant included the raising of the existing house and the additions, other than the part to be placed on the pilings, and the construction of new basement walls under the old building and the two parts along the east side of the building. Although a plan by G. di Marco International Inc. was placed before the executive committee of the respondent at the hearing or two days before the hearing and was filed at the hearing before this tribunal as Exhibit 4, the position of the engineer for the respondent was that the plan did not establish the ability of the proposed building as amended to withstand the flows of a regional storm.

Notwithstanding the proposals the living quarters of the building as reconstructed would be subject to in excess of ten feet of flooding in a regional storm. It was argued that the raising of the floor of the second storey above the elevation of the regional storm constituted flood-proofing. However such a principle of flood-proofing has never come to the attention of this tribunal and the tribunal concurs with the argument of counsel for the respondent that all that would be created would be an insular trap from which the occupants could not escape in a regional storm or to which rescue and other services could not be provided in that event.

The present policy of the respondent was thoroughly reviewed by J.C. Mather, P.Eng., the Director of the Water Resources Division of the respondent who is a qualified engineer in respect of water related matters. Following a policy suggestion of the Ministry of Natural Resources, the respondent has reviewed its policy respecting lands in flood plains and, in the interest of creating flexibility and particularly having regard to the appellant's case and one or two similar cases, the respondent has established a more lenient policy than the policy related to the two zone concept in respect of lands in floodways. In summary the new policy provides for minor additions in "Flood Vulnerable Areas". Although a minor addition is defined as being

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one which costs no more than fifty per cent of the cost to build the existing structure, the respondent was prepared to have regard to the proposal as a minor addition. However, the policy requires flood protection to a minimum of the 350 year flood level and there is an absolute prohibition where the depth of flooding in the regional storm exceeds 1.8 metres or where the velocity exceeds 1.5 metres per second. In addition the policy requires that there be access to and from the subject lands in the event of a regional storm. Accordingly the application does not fall within the recently revised policy of the respondent as the quality of flood-proofing does not meet the standard and as the depth of flooding in the regional storm is 3.8 metres, a significant depth beyond the 1.8 metres permitted by the policy and further there would be no access in the event of a regional storm either to or from the building.

There was evidence that considerable amounts of filling had taken place in the flood plain in the area of the subject lands. The only conclusion that can be made is that such filling was done without the permission of the respondent or where permission had issued it was done pursuant to a policy respecting parking lots which has no relation to the safety of occupants of a building that is the subject matter of the application. The tribunal cannot find that there was any precedent for the granting of the application from these examples of the placing of fill in the flood plain.

The argument of counsel for the appellant was that regardless of the outcome of the appeal, the existing building would continue to be used as a residence and that the raising of the building and the construction of part of the addition on pillars fell within the policy of the Conservation Authorities Act as it constituted an improvement of the property which would increase the ability of the house to withstand floods, particularly floods of lesser flows than a regional flood. In response to this argument, counsel for the respondent submitted that the standard and the policy of the Conservation Authorities Act is the control of flooding within the concept of the regional flood

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and that any exception should be based with reference to the regional flood and should not be made in relation to minor floods. The tribunal is satisfied that the argument of counsel for the respondent should prevail. The legislative jurisdiction of a conservation authority in respect of flooding is found in clause 28(1)(e) which reads,

> 28.--(1) Subject to the approval of the Lieutenant Governor in Council, an authority may make regulations applicable in the area under its jurisdiction,
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> .....
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> (e) prohibiting or regulating or requiring the permission of the authority for the construction of any building or structure in or on a pond or swamp or in any area susceptible to flooding during a regional storm, and defining regional storms for the purposes of such regulations;
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> .....

The key words in the clause are "during a regional storm" and "defining regional storms for the purposes of such regulations". It is clear to the tribunal that the standard of the regulations to be made and the legislative jurisdiction of a conservation authority is the standard of the regional storm created by such regulations and while there may be improvement in some circumstances the standard required by the Legislature relates to regional storms.

Counsel for the respondent referred to a number of principles usually considered on appeals, with particular emphasis on the loss of storage capacity, the risk to persons living in the dwelling even though it is improved and the lack of access to and from the buildings. The tribunal concurs with these arguments. It was further submitted by counsel for the respondent that on the evidence the appellant has been dealt with in accordance with the policy of the respondent and that he has not been denied permission in circumstances in which other land owners have been granted permission. On the evidence the tribunal finds that such is the case and for the various reasons

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submitted by counsel for the respondent the appeal will be dismissed.

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

2. THIS TRIBUNAL ORDERS that no costs shall be payable by either party to the tribunal.

SIGNED this 15th day of September, 1988.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.