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Proposed Amendments to the Subdivision Control Provisions of the *Planning Act* Introduced in Ontario's New Red Tape Bill - Finally

By Sidney H. Troister, LSM

Real estate lawyers across Ontario and the public will be pleased that, on April 15, 2021, the Ontario Government introduced in its new Red Tape Bill much sought after amendments to Section 50 of the *Planning Act*, which controls the subdivision of land in the province.

The conveyancing traps and unintended consequences of the section have been well known and documented as far back as the mid 1970's when the Ontario Court of Appeal tried to clarify its application but only scratched the surface. The Ontario Bar Association compendium of the *Planning Act* "Bear Trap" cases led to 3 editions of *The Law of Subdivision Control in Ontario* that continued to highlight the conveyancing and title complexities of Section 50 of *the Planning Act*. A draft proposed set of amendments to fix some of the anomalies in the *Act* gathered dust since 2000. They have now come to life in the proposed amendments to Section 50.

The *Act* prohibits dealing with a part of one's land while retaining the balance of that land which would effectively result in the division of land unless certain specified exceptions applied. The exceptions were limited and often led to illogical and unintended results. The proposed amendments add further logical exceptions to the prohibitions and make the provisions of the *Act* more consumer and user friendly. Consenting authorities will also have more discretion in their review of applications so that they can concentrate on planning issues without being hampered by procedural limitations.

Here are some of the key proposed amendments:

1. Section 50(12) provides that once land has been conveyed with an unstipulated consent, that land can be dealt with in the future without obtaining a further consent. This provision is commonly referred to as "once a consent, always a consent." While that benefit is bestowed on the consented land, the abutting land (which is the other half of the approved land division) gets no such benefit. While the consented

parcel can be dealt with freely, a further consent is required for the abutting retained land, at least until the consented parcel is transferred. Where owners sought to keep and deal with both parcels or to deal with the retained land first, that led to work arounds and inadvertent contraventions of the *Planning Act* as confirmed in the *Acchione* case. The amendment will now permit land that abuts a parcel of land conveyed with consent (the “retained land") to be dealt with without a further consent. *Acchione* is gone and so is a key trap and unintended consequence of Section 50.

2. Applying for consent to divide land required designating one parcel the “severed parcel” and the other parcel the “retained parcel”. Once consent was granted, the consenting authority would issue a certificate that would prove that consent was given and would be attached to a transfer that then confirmed the application of “once a consent, always a consent.” Even though two (or more) separate parcels were being created by the consent application, many consenting authorities would typically only grant a consent certificate for the land designated as the severed parcel. Some owners however wanted the benefits of Section 50(12) to apply to both of the parcels considered in the land division application. It also created issues and work arounds if the owner wanted to deal with the retained parcel first. Owners will now be able to obtain a consent certificate for both parcels of land referred to in an application for consent. They only have to ask and provide a registrable legal description for each.

3. Long term tenants often rented premises in large shopping centers that included the right to use adjacent outdoor space for restaurant patios, exclusive parking areas or outdoor selling areas. While the lease of a part of a building or structure is exempt under the *Act*, not so, technically, for long term leases for the adjacent areas that are not part of the building or structure. For certainty, tenants often applied for a consent to the lease that included the outdoor space. No consent will be required for the long-term lease of outdoor areas that are ancillary to the main lease of part of a building or structure. Landlords and tenants will be spared the expense of obtaining such consents to ensure the validity of their rights.

4. Families at times purchased two adjacent properties for investment or recreational purposes and to ensure that the two properties were and stayed separately conveyable, title was taken in the name of one person (for example, Mr.) for one property and in the names of two people (Mr. and Mrs.) as joint tenants for the other property. If Mrs. died, the two properties would be merged under common ownership and could only be separated with a consent. If Mr. died, there would be no merger. The *Act* will now provide that there is no merger if it results as a result of the death of a joint tenant.

5. The requirements and criteria for lender mortgagees now requiring a severance consent will be the same as for owners. There are no special and more onerous requirements for lenders. The same planning rules will apply to lenders enforcing their mortgages as to owners seeking to divide land.

6. An owner will be able to have an unstipulated consent that is preventing a lot addition application or other transaction cancelled as of a fixed go forward date. “Once a consent always a consent” is forever and sometimes, that consent is an obstacle to one’s intentions to develop or add to a property. The work around as set out in *Re Furlong* required an owner to transfer a part of its consented land to a municipality and thereby change the configuration of its property so that it is no longer identical to the land previously conveyed with consent. That work around will no longer be necessary. While the need for such a cancellation does not arise often, it will be an available procedure to avoid the work around and make the application of the *Act* consumer friendly. There will be no conditions to be applied to an application for cancellation of a consent. Ask and the owner is entitled to it.

7. Validation of title applications cure prior title contraventions of the *Planning Act*. Typically, a parcel of land may for all practical purposes be separate and recognized as such by municipalities, but the title may be deemed invalid in the current registered owner because of an historical contravention of the *Planning Act.* For example, a mortgage on a home may be invalid because the owner owned the abutting property when the mortgage was given. The mortgage requires validation. One of the obstacles to such applications is that the *Planning Act* currently require the property to be validated to comply with the municipality’s official plan and zoning bylaws, an expensive and time consuming exercise even though, but for the discovery of an historical technical contravention of the *Act*, there is no true planning issue involved in the property. The mandatory compliance with official plan and zoning will be eliminated. Instead, an application for validation will be governed by the same criteria as apply to consents, namely that the authority has “regard” to zoning and official plan but that compliance with official plan and zoning will not be mandatory.

8. Consenting authorities across the province apply the procedural requirements of the *Act* differently. Some for example do not permit amendments to applications once submitted and require applicants to start over if an amendment to the application is sought. The amendments to the *Act* will now permit amendments to an application right up to decision making. Depending on the nature of the amendment, consenting authorities will have the discretion to waive or require further consultation in regard to the amendment sought.

9. The *Planning Act* provides that conditions can be imposed by a consenting authority in granting a provisional consent. The *Act* clearly provides that the provisional consent lapses if the conditions are not met within one year of decision. There is no discretion under the *Act* to permit extensions of time, even if the request is reasonable or can be satisfied shortly after the one year period. Owners frequently have difficulty meeting the one year test for example because they need the cooperation of others that is not forthcoming or bad weather and other delays prevent the necessary survey from being obtained. Owners may now seek a one year extension of the time to satisfy conditions on such terms as the consenting authority permits. Fairness and not arbitrariness should be a benefit to the consuming public.

10. Often, purchasers of property are given the right to apply for a consent under an agreement of purchase and sale. The *Act* however only permits owners and mortgagees to apply so that the application must be made by the seller owner and not the purchaser. The proposed amendment will now permit a purchaser to apply in their own name if given that authority in the agreement of purchase and sale. The agreement of purchase and sale need only provide that authority and the application can be dealt with.

The public, real estate lawyers, planners and municipalities should all benefit from these practical and logical amendments to the *Planning Act.* Municipalities will be able to focus on planning and not be hampered by procedural issues in the consent and validation applications they receive. The complexities of legal title will be simplified, and the public will have a more user friendly and discretionary consent process to work with.

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