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The Subdivision Control amendments to the Ontario *Planning Act* are now law

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On January 1, 2022, numerous important amendments to Section 50 of the Ontario *Planning Act* became law; amendments that reflect significant enhancements, simplifications and practical adjustments that have been designed to modernize the legislation and improve the ways in which Ontarians interact with it.

Section 50 of the Ontario *Planning Act*, which controls the subdivision of land in the province, has always been a bear trap of unintended consequences for real estate lawyers, owners, developers, farmers, lenders, real estate agents and title insurers. It is technical and the language has been ambiguous, confusing and inconsistent among many of its more than 30 subsections. Section 50 applies to virtually every transaction involving land in Ontario, and its provisions have seen no major legislative review or reconsideration over the past 35-plus years. With the best of intentions to control how land is divided, its penalty provision voids a transfer or other transaction involving land that contravenes its prohibitions. While it may prevent the division of land, its provisions have historically nullified transactions that involve no planning issue whatsoever, but arise through inadvertence, misunderstanding of the technicalities, or even fate.

Despite being a planning statute, Section 50's penalty provision also makes it a title statute. The real estate title issues and the traps have been well known in the real estate legal community for more than 50 years, but largely ignored by the Province until recently. After more than 22 years of persistent effort to remedy some of the traps in the Act, these important amendments will eliminate some of the traps without in any way interfering with the purpose of the legislation.

The Act is technical, but in simple terms, no person can deal with land if they own land abutting the land being dealt with or unless the land is the subject of a municipal consent (a "consent") to the transaction. Even historically separate properties, once they are owned by the same person are considered merged as a single property and a consent is required to deal with the previously separate parts. Land that is the subject of a consent has life long separate identity; however, land abutting that consented parcel required a consent even though its neighbour was considered a separate parcel. Logic was defied by the strict language of the Act and the fear of annulment if the Act were contravened.

Like the Act itself, the amendments are technical but they do eliminate most of the common traps that have plagued property owners and their advisers, and title and errors and omissions insurers, for years. The amendments include the following:

1. Abutting properties no longer merge on the death of a joint tenant. Frequently, families would own abutting properties, such as cottages or farms, one in the name of one spouse and the other in the name of both spouses as joint tenants, all for the purpose of keeping the two properties separately conveyable and not merged under the *Planning Act.* The death of a joint tenant, however, would result in the survivor owning two abutting—and now merged—properties. Death of a joint tenant is no longer a merger, allowing families to avoid a legal and unintended consequence of a merger, and better plan their land holdings and estates.

2. Land abutting land that was the subject of consent is now considered a separate property. Until the amendments, the consented parcel was considered separately conveyable regardless of the ownership of abutting land. The unconsented "retained" parcel had no such separate identity if owned by the same person who owned the consented parcel. It required work arounds as to the manner of holding title, and was often the basis for a void transaction. "Once a consent, always a consent" was the logical refrain for both parcels of land, but that was not the law. Only the consented parcel had that benefit; the retained parcel was still subject to compliance with the Act, even if the abutting parcel could be separately dealt with. Now, land abutting land previously conveyed with consent is itself considered a separate parcel of land. The "retained" land has its own separate status.

3. There is an exception in the Act for dealings with parts of buildings or structures. Long term leases in multi-tenanted buildings are not subject to the prohibitions. However, often, tenants have outdoor rights appurtenant to the lease of part of a building for, say, outdoor selling areas, restaurant patios or storage. These additional premises were not part of the building or structure, and the question arose whether a consent was required for the lease in respect of the outdoor areas, given the statutory limitation to parts of the building or structure only. The Act now permits rights in outdoor spaces if ancillary to the lease (for example) of part of a building or structure.

4. Life leases involving parts of a building or structure are exempt.

5. Where land has been conveyed with a consent, it has a separate identity forever. At times, that a parcel of land has been subject of a consent may be an obstacle to an owner seeking an addition to its land holding or a development of land where a part of the land was the subject of a consent. Now, an owner whose land or a part thereof that is the subject of a consent can apply for a consent cancellation certificate, the effect of which will cancel that certificate from and after the date it is issued. The obstacle has been eliminated.

6. At times, a transaction has been completed that contravened the technical prohibitions of the Act. Such contraventions were usually innocent and did not involve a planning issue. As a simple example, an owner owns one house, buys the house next door, and registers a mortgage on the new house to finance the purchase. While the owner has good title to both houses—now considered merged as a single property—the mortgage is void since the owner mortgaged part of its land while it owned the abutting parcel. Where a prior transaction contravenes the technical prohibitions of the Act, there is a procedure to validate the transaction after the fact; essentially retroactively cure the contravention. However, the procedure involved statutory conditions that might prevent the application of the validation procedure or impose substantial costs to satisfy the conditions. Those conditions have now been eliminated and the validation criteria are now no different from those involved in a consent application.

7. Until the amendments, the ownership of all units on a condominium plan and an abutting property by one party, created a technical breach if the abutting property were being dealt with separately. Now, the land abutting the condominium plan is considered separately conveyable regardless of the ownership of the units in the condominium. Essentially, the condominium plan has the same status as a registered plan of subdivision. Developers and lenders of phased condominiums will be assisted by this new provision.

8. Housekeeping amendments have also eliminated archaic provisions, such as approvals for mortgage enforcement, and eliminated ambiguous and inconsistent language among the many subsections of Section 50. Technical amendments now permit purchasers and lenders—and not just owners—to apply for

consent, consent applications can be amended at any time up to a decision being rendered, and the time for satisfying conditions is now two years instead of one.

Sidney Troister is the author of *The Law of Subdivision Control in Ontario,* its 4th edition soon to be published to reflect the most recent amendments to the Act. He is a leader in the Ontario real estate bar and consulted with the Ministry of Municipal Affairs and Housing on the amendments, none of which would have been enacted without the initiative of now Attorney General Doug Downey.

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