

ISSUE DATE:

Feb. 26, 2009



PL081255

Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 53(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	Serge Imbrogno
Applicant:	Mark Vuksan and/or Nicole Perin
Subject:	Consent
Property Address/Description:	104 Pine Drive (Stoney Creek)
Municipality:	City of Hamilton
OMB Case No.:	PL081255
OMB File No.:	PL081255
Municipal No.:	B-166/07

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APPEARANCES:

Parties

Mark Vuksan and Nicole Perin

Serge Imbrogno

Counsel

M. Rudolph

DECISION DELIVERED BY M. G. SOMERS AND ORDER OF THE BOARD

Context

Mark Vuksan and Nicole Perin (“the Applicants”) want to sever an existing residential lot at 104 Pine Drive (“the Subject Property”) and create two residential lots. At the time the Severance Applications were submitted, an additional vacant, single,

detached dwelling existed on the easterly side of the Subject Property. The dwelling has since been demolished and a new single, detached, dwelling has been built using permits obtained from the City of Hamilton.

The proposed lots will have the following dimensions, as noted in the sketch map at Exhibit 4, Tab 1, at p. 15:

- West Parcel has a frontage of 33.95 metres, a depth of 91.44 metres and a lot area of 3,375 square metres.
- East Parcel has a frontage of 18.71 metres, a depth of 91.44 metres and a lot area of 2,338 square metres.

On September 4, 2008 the Committee of Adjustment (“the Committee”) approved the Consent Applications subject to a number of conditions (Exhibit 4, Tab 11, at p. 96). However Serge Imbrogno (“the Appellant”), an area resident, appealed the Committee’s decision pursuant to subsection 53(19) of the *Planning Act*.

Present at the hearing were the Appellant, and Mr. Rudolph, Counsel for the Applicants. The Appellant advised the Board that he would be representing himself. The Applicants retained Stephen Fraser, a qualified land use planner, and Kenneth Uisic, a qualified ecologist, and both provided evidence in support of the Applications. Also present was a planner from the City of Hamilton, who was subpoenaed by the Applicants, but who did not testify.

The City did not attend the hearing.

Subject Property and Surrounding Lands

It was Mr. Fraser’s evidence that the Subject Property was located generally in the lower portion of the former City of Stoney Creek, now in the City of Hamilton. It is situated at the base of the Niagara Escarpment. The rear two-thirds of the property are associated with the steeper escarpment slope. The front third of the property is relatively level. There are no watercourses or ponds associated with the Subject Property. There is a constructed swale and catch basin situated in the southwest corner of the site that intercepts storm runoff and flows naturally towards residences on DeMarchi Court.

In terms of neighbourhood context, the Subject Property is bounded by the Niagara Escarpment facing the south, Highway 8 to the north, Green Road to the west and Millen Road to the east. The Subject Property is located along Pine Drive and is just over an acre in size, which is considerably larger than the lots within the surrounding area. The Subject Property has a frontage of 49.19 metres along Pine Drive and a depth of 91.44 metres.

History of the Applications

It was the evidence of Mr. Fraser that the Applicants received comment regarding the severances from the City Staff and other governmental agencies including the Niagara Escarpment Commission (“the NEC”) and the Hamilton Conservation Authority (“the HCA”), as well as area residents. The NEC and HCA comments confirmed an Environmental Impact Statement (“EIS”) was required and accordingly a Condition of Consent Approval was imposed on the Applications (Exhibit 4, Tab 15, at p. 135). The City of Hamilton Development Engineering Section requested also a Servicing Analysis (Exhibit 4, Tab 8, at p. 83) be prepared and the City’s Forestry Section requested a Tree Preservation Plan be prepared (Exhibit 4, Tab 9, at p. 88).

Mr. Fraser noted that the City Staff supports the Severance Applications subject to a number of conditions (Exhibit 4, Tab 4, at p. 25).

At the Committee’s public hearing held on January 31, 2008, the Applicants tabled indefinitely the Applications until the EIS, Tree Preservation Plan and the Servicing Analysis were completed and submitted to the Committee and relevant departments and government agencies for review.

On June 6, 2008, the Tree Preservation and Removal Plan was submitted to Scott Plante of the City’s Forestry Section to review whether the municipal trees were considered assets and whether their removal would be approved as a result of a development application. On June 16, 2008, Mr. Plante approved the Tree Preservation and Removal Plan covering municipal tree removals. Rich Canfor, an Arborist with the City of Hamilton, was responsible for reviewing tree removals on private lands. Mr. Canfor approved the Applicants’ plan (Exhibit 4, Tab 4 (vi) at p. 36 and Tab 4 (vii) at p. 42 respectively).

On August 1, 2008, the EIS and Drainage Report were submitted to the Committee, with a request to reschedule a public hearing.

Mr. Fraser advised the Board that the Subject Property had an Environmentally Significant Area ("the ESA") known as "ESA 54" traversing through it. As such, Policy C-1.2.2 b) of the Hamilton-Wentworth Official Plan states that proposed changes to the ESA limits would be referred for review to the Environmentally Significant Areas Impact Evaluation Group ("the ESAIEG"). In addition, Policies C-1.2.2 c) and h) require the proponent to complete and submit an EIS to the ESAIEG so that the boundaries of the ESA applicable buffer requirements and any other recommendations would be provided by the ESAIEG.

Mr. Fraser noted that the ESAIEG is an Advisory Committee made up of volunteers from the Hamilton Community who review and assess the potential impacts of developments that would be proposed adjacent to or within an ESA or a Provincially Significant: Wetland ("PSW"). Mr. Fraser maintained that the recommendations of the ESAIEG would then be brought forward to the Planning and Development Department for consideration during the review of a planning application.

On September 17, 2008, there was a meeting of the ESAIEG. At this meeting the members supported the Severance Applications. There were recommendations that proper tree protection fencing should be installed during construction and that a permanent demarcation of the ESA boundary be installed (Exhibit 4, Tab 4, at p. 31).

Appellant's Evidence

It was the Appellant's evidence that the woodlands in and around the Subject Property are a "Significant Woodland" as defined in the PPS. Mr. Rudolph concurred with the Appellant that the woodlands in and around the Subject Property were a Significant Woodland Area.

The Appellant testified that pursuant to sections 2.1.1, 2.1.2 and 2.1.4 of the PPS, the natural features and long-term ecological functions in the subject area should be maintained and protected. He argued that the PPS stated that development and site alteration should not be permitted in Significant Woodlands south and east of the Canadian Shield², unless it could be demonstrated that there would be no negative

impact on its natural or ecological features and functions. The Appellant stated that the City of Hamilton's Draft Urban Official Plan Policies for Natural Heritage (November 3, 2008) is similar to that of the PPS.

Nevertheless, the Appellant testified that the subject Applications would lead to the removal of 34 trees with diameters of at least 10 centimetres from the Subject Property. It was the Appellant's view that this was contrary to the abovementioned policies of the PPS. Furthermore, the Appellant stated that there was a mature oak tree that was approximately 240 years old in close proximity to his property line. He was concerned that any construction activity would have an adverse impact on the health of this and other trees.

The Appellant argued that policies, such as the PPS Policy 2.1.4, set out limitations and prohibitions such as "development and site alteration shall not be permitted" that must be strictly adhered to and do not provide any discretion to do otherwise.

However, Mr. Fraser notes that the whole of the PPS must be looked at to determine if a proposed development is consistent with it. Mr. Fraser maintained the PPS is a document that balances development in urban areas with the preservation of natural heritage. Mr. Fraser disagreed with the Appellant's approach of focusing only on the Natural Heritage policies and not looking at other policies such as the policies in the Building Strong Communities section of the PPS. The Board agrees with Mr. Fraser that all of the policies in the PPS must be reviewed to see if a proposal is consistent with the PPS.

In addition, it was the Appellant's evidence that the EIS was defective. He maintained that the EIS did not provide an explicit assessment of the anticipated negative impacts the proposed severances would have on the natural features and ecological functions in the Subject Property. The Appellant directed the Board to a letter dated February 6, 2009 from biologist/ecologist Jeff Kaiser. Mr. Kaiser stated in this letter that the EIS addresses primarily the effects of the proposal upon the criteria used to designate the Devil's Punch Bowl ESA (also known as ESA 54), but does not review properly the losses that would occur nor reviews the adverse impacts on the biological resources and ecological functions in the area if the proposal were to proceed.

The Board had a number of concerns regarding the letter from Mr. Kaiser. Mr. Kaiser did not attend the hearing and as such, the Applicants did not have the opportunity to examine him as to his understanding of the Applications, the context of his letter or his qualifications. Furthermore, Mr. Kaiser did not visit the site at any time.

In addition, the Board finds Mr. Kaiser's letter to be brief and vague. The Board finds that the EIS did address the impact of the proposal on vegetation, wildlife and biotic communities.

The Board finds further that neither the Appellant nor Mr. Kaiser established that the proposed severances would result in a negative impact on the natural features and/or the ecological function in the area. Pursuant to the PPS, a negative impact is defined as a "degradation that threatens the health and integrity of the natural features or ecological functions for which an area is identified..." Mr. Uisic, a qualified ecologist and author of the EIS, testified that the removal of 35 trees did not amount to a situation that would threaten the health and integrity of the natural features in the area.

It was Mr. Uisic's evidence that any potential, indirect impact on the Subject Property could be avoided or offset by implementing the mitigation measures specified in the EIS, as well as in the Tree Preservation and Removal Plan. For example, landscaping the future lots with compatible native trees could mitigate the effect of the loss of the 34 trees.

In addition, Mr. Uisic testified that the proposed lot severances would not affect adversely any of the ESA criteria for the following reasons:

- The proposal did not alter the Niagara Escarpment or the Devil's Punchbowl landform or geology in any way.
- There were no significant species known to be associated with the Subject Property based on background review and field surveys of vegetation and wildlife.
- There were no rare biotic communities associated with the Subject Property.
- There were no watercourses or riparian areas associated with the Subject Property.

- The rear two-thirds of the Subject Property contained natural features that were representative of the Escarpment. The EIS recommended that this portion of the site be treated as an ESA.

The Board has considered carefully the evidence of the Appellant regarding the impact of the Applications on the natural features and ecological functions on the Subject Property. The Board finds the expert evidence of Mr. Uisic to be credible and trustworthy and more persuasive than that of the Appellant's.

Furthermore, as will be demonstrated later on in this Decision, the proposal conforms to many levels of planning policy including: the PPS, the Growth Plan, the NEP, and the Regional and local Official Plans. Mr. Fraser testified that the revised set of severance conditions, in particular Condition 3, would ensure the protection of the natural features (Exhibit 4, Tab 5, at p. 46). As such, the Board finds the natural features and ecological function will be maintained and protected if the proposed Consents were authorized.

It was the evidence of the Appellant that the drainage had been a major problem in the past and he was concerned that any change in the configuration of the property would make matters worse. He maintained that there was a natural swell between the Subject Property and the properties along DeMarchi Court and that this swell would have to be replaced, otherwise there would be an adverse impact, if the proposal proceeded.

However, the Board notes that Condition 6 of the Severance Conditions requires the owner to enter into and register a Consent Agreement on title (Exhibit, Tab 5, at p. 46). Mr. Fraser maintained that the formulation of such an agreement with the City of Hamilton would require the owner to retain a Professional Engineer and to prepare a Grading Plan and Servicing Plan to the satisfaction of the City's Development Engineering section. In Mr. Fraser's opinion, this agreement would ensure proper and adequate drainage for the Subject Property. As such, the Board finds the uncontradicted expert evidence of Mr. Fraser to be credible and persuasive regarding the issue of drainage and finds that it has been adequately addressed.

Applicants' Evidence

It was Mr. Fraser's evidence that subject Applications to sever three single, detached, residential lots within the urban boundary was good land use planning and that the proposal was consistent with the PPS and the Growth Plan for the Greater Golden Horseshoe. Furthermore, the Applications would adhere to the goals, objectives and policies of the NEP, Hamilton-Wentworth Regional Official Plan and City of Stoney Creek Official Plan and would conform to the existing Single Residential "R2" Zoning.

Subsection 51(24) of the Planning Act

Mr. Fraser provided a detailed analysis of subsection 51(24) of the *Planning Act*. In his opinion, the proposed Consents would have regard to the criteria outlined in subsection 51 (24), in particular clauses b to i. In addition, Mr. Fraser maintained the proposed Consents were not premature and that they represented good planning and would be in the public interest.

Mr. Fraser testified that appropriate research, studies and plans have been carried out regarding the Subject Property. He maintained that the proposed lot sizes, in terms of their shape, size and dimensions were suitable for the existing character of the Neighbourhood. He testified further that the configuration of the proposed lots would maintain the associated natural heritage and ecological functions on it.

In Mr. Fraser's opinion, the Severance Applications were in the public interest, as the proposed development occurred within the existing urban boundary that had public roads and municipal services.

Provincial Policy Statement, 2005 ("PPS")

It was the evidence of Mr. Fraser that the Severance Applications were consistent with the PPS. Specifically, the Consents were consistent with sections 1.1.1 to 1.1.3.8, and 2.1.1. Mr. Fraser maintained that the PPS promoted redevelopment and intensification in a compact form that accommodated and reinforced the existing building stock in the area. In his opinion, the Severance Applications did just that by allowing two new families to live in an existing, well-serviced urban area.

In addition, Mr. Fraser and Mr. Uisic testified that Policy 2.1.1 of the PPS ensures that natural features and areas would be protected for the long term. As previously mentioned, it was the evidence of Mr. Fraser and Mr. Uisic that the proposal would not cause unacceptable adverse impact on the natural features or ecological function in the Subject Property and surrounding lands. The correspondence from the NEC, the HCA, the City's Planning Staff and the EIS prepared for this matter, and the recommendations from ESAIEG, the Drainage Report and Tree Preservation Plan ensure that the appropriate development would proceed within the Settlement Area and that the long-term health of the natural heritage resources would be maintained.

Growth Plan for the Greater Golden Horseshoe ("the Growth Plan")

It was Mr. Fraser's evidence that the Growth Plan was created to establish a policy framework to manage growth within the Greater Golden Horseshoe, to the year 2031. The Subject Property is located within the Growth Plan and comparable with the PPS, the Growth Plan contains broad policies that encourage more compact urban form development and protection of green lands, natural systems and agricultural lands.

It was Mr. Fraser's opinion that the Applications were consistent with the Growth Plan as the proposal was an infill development located in a built up area. In addition, the proposal optimizes the use of the existing infrastructure, while conserving, as best as possible, the natural heritage features on the Subject Property.

The Niagara Escarpment Plan ("the NEP")

It was Mr. Fraser's evidence that the general intent of the NEP is to provide for the maintenance of the Niagara Escarpment and land in its vicinity as a continuous natural environment, and to ensure that the development permitted would be compatible with the natural environment.

From the outset it was recognized that the Subject Property is within a dual designation of the NEP; that is an Urban Area and a Natural Area. Mr. Fraser advised the Board that the boundary of the two designations is subjective and not defined on a site-specific basis, because the NEP mapping was at a scale of 1:50,000. Mr. Fraser testified that the boundary determination was critical and would decide ultimately which policies would apply.

Mr. Kilian of the NEC, in his correspondence of November 26, 2007, noted that the exact boundary between the NEC Urban and Natural Area designations is confirmed to be the 111.5 contour line, based on his site inspection (Exhibit 4, Tab 4, at pp. 23/24).

It was Mr. Fraser's evidence that the property limits of the proposed severances conform to the Natural Area policy objectives of the NEP by maintaining most of the natural Escarpment features and related significant natural areas. He maintained that the property limits also conform to the Urban Area policies of the NEP, as the proposed development does not encroach into the Escarpment Natural Area. In his opinion, the proposed lots would be in harmony with and maintain, the existing character of the Escarpment landscape.

In Mr. Fraser's opinion the Consent Applications conform to the NEP.

The Hamilton-Wentworth Regional Official Plan

It was Mr. Fraser's evidence that the Subject Property is designated Urban Area, Escarpment Urban Area and Escarpment Natural Area in the Regional Official Plan. He advised the Board that the Regional Plan is still applicable despite the fact that the Regional government has now amalgamated to form the City of Hamilton.

It was Mr. Fraser's testimony that the Applications conform to the Hamilton-Wentworth Regional Official Plan as an EIS had been completed in support of the Applications and the recommendations of the EIS have been endorsed by the ESAIEG.

The City of Stoney Creek Official Plan

It was Mr. Fraser's evidence that the Subject Property is designated "Residential" on Schedule "A" of the Stoney Creek Official Plan and is also designated "CLASS 1 – Environmentally Significant Area" on Schedule "B" of the Plan, otherwise known as Stoney Creek Open Spaces and Natural Environment System.

Subsection A.1, Policy 1.2.1 of the Stoney Creek Official Plan states that the primary uses permitted in areas designated on Schedule "A" as "Residential" shall be for dwellings. The location and type of residential densities within these areas however, shall conform to the relevant Secondary Plan provisions and other relevant policies of

this Plan. Mr. Fraser noted that the Subject Property is not part of an approved Secondary Plan, but is identified as “Low Density Residential” in the South Meadow Neighbourhood Plan, which was approved by Council and acts as a guide for development. There is no specific policy regime for Neighbourhood Plans.

However, Mr. Fraser testified that any development must have full urban services including paved roads, municipal sanitary and storm sewers, and piped water. In addition, residential intensification and infilling would be encouraged within developed neighbourhoods, providing the proposal was at scale and would not create a land use conflict with the surrounding land uses. It was Mr. Fraser’s opinion that the subject severances conform to the Stoney Creek Official Plan, as it is an infill project of two new lots/dwellings that is directed to an area that has full urban services, and would be compatible with the existing built form in the Neighbourhood.

Regarding the designated “CLASS 1 – Environmentally Significant Area” on Schedule “B”, it was Mr. Fraser’s evidence that the EIS confirms the limit of the ESA boundary and that the CLASS 1 designation would be maintained by way of implementing the ESAIEG’s recommendations.

The City of Stoney Creek Zoning By-law No. 3692-92

It was Mr. Fraser’s evidence that the Subject Property is zoned Single Residential “R2” Zone, which permits a single, detached dwelling for each lot having zone regulations of 460 square metres minimum lot area, and 15 metre minimum lot frontage for interior lots. Mr. Fraser maintained that each lot proposed in the Severance Applications would meet the minimum lot area and frontage requirements.

Mr. Fraser testified that the average proposed lot frontage for the Subject Property is consistent with the Neighbourhood. In addition, the average proposed lot area for the Subject Property exceeds the average for the Neighbourhood and is larger generally than the surrounding lands. He maintained that the proposed lot areas and frontages are similar in size, shape, density and streetscape presence as the abutting residential lands to the east. Furthermore, the proposed severances represent a logical gradation of density and would compliment the Neighbourhood in terms of land use.

It was Mr. Fraser's opinion that the proposed development conforms to the Stoney Creek Zoning By-law.

Conclusions

The Board has considered carefully all of the *viva voce* and documentary evidence presented at the hearing. The Board finds the testimony of the Appellant to be sincere and frank. However, the Board finds the uncontradicted planning evidence of Mr. Fraser and the ecological evidence of Mr. Uisic to be more credible, persuasive and trustworthy. In addition, the Board finds Mr. Fraser and Mr. Uisic's testimonies remained consistent during cross-examination.

The Board finds the Appellant did not provide any or very little evidence regarding the following planning documents and legislation: subsection 51(24) of the *Planning Act*, Growth Plan for the Greater Golden Horseshoe, the NEP, Hamilton-Wentworth Regional Official Plan, and City of Stoney Creek Official Plan and Zoning By-law No. 3692-92.

The Board finds the Appellant did not provide any persuasive evidence to support his position. The Board notes that the City's Planning Department, Engineering Section and the Forestry Section, as well as the NEC, the HCA and the ESAIEG all concluded that the Applications would not have an unacceptable adverse impact on the natural features and ecological function of the Subject Property. All of the abovementioned agencies and departments are mandated to protect the public interest.

The Board notes that there were no residents from the area present at the hearing to oppose the Severance Applications. The Board further notes that the Committee granted the Applicants the severances subject to a number of conditions.

Having considered the uncontradicted land use planning and ecological evidence, as well as the submissions of Counsel and the Appellant, the Board finds the proposed Consents have regard to the criteria set out in subsection 51(24) of the *Planning Act*. The Board further finds the proposed Consents are not premature, and that they do not require a plan of subdivision. The Board finds the proposed Consents are consistent with the PPS and the Growth Plan for the Greater Golden Horseshoe; they adhere to the goals, objectives and policies of the NEP, Hamilton-Wentworth

Regional Official Plan and City of Stoney Creek Official Plan and are in the public interest.

THE BOARD ORDERS that the appeal is dismissed and the provisional consent is to be given subject to the following conditions:

1. The Owner shall submit a deposited Ontario Land Surveyor's Reference Plan to the Committee of Adjustment Office, unless exempted by the Land Registrar.
2. The Owner shall demolish the existing dwelling and garage to the satisfaction of the Planning and Development Department (Building Services Division). Note that this demolition is subject to the issuance of a demolition permit from this department in the regular manner.
3. That the Applicant implements the Environmental Impact Statement (EIS) reviewed by the Environmentally Significant Areas Impact Evaluation Group (ESAIEG) including their recommendations that proper tree preservation fencing be erected along the limit of the ESA during construction and that some form of permanent demarcation of the ESA boundary on the subject property be installed (signage, survey stakes) to ensure all future land owners are aware of the development limits on the property.
4. That the Owner/Applicant shall investigate the noise levels on the site and determine the noise control measures that are satisfactory to the City of Hamilton in meeting the Ministry of the Environment recommended sound level limits. An acoustical report prepared by a qualified Professional Engineer containing the recommended control measures shall be submitted to the satisfaction of the City of Hamilton, Director of Planning.
5. That the Owner enters into and registers a Consent Agreement with the City of Hamilton to the satisfaction of the Manager of Development Engineering for the purpose of, but not limited to, lot grading for both of the new residential lots to be created (Parts 1, 2 and 3).
6. The Applicant is required to pay cost for the future urbanization of Pine Drive based on the City of Hamilton new roads servicing rate. This cost will be

calculated based on the total frontage of the two (30.48 metres) new residential lots to be created at a current rate of \$469.70 per metre.

7. The Owner shall submit to the Committee of Adjustment Office an administration fee of \$15.00 payable to the City of Hamilton, to cover the cost of setting up a new tax account for the newly created lot.

The Board so Orders.

“M. G. Somers”

M. G. SOMERS
MEMBER