ISSUE DATE:

Jan. 20, 2011

PL100269

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:	George Bahdi
Applicant:	Gino Forte Construction Inc.
Subject:	Consent
Property Address/Description:	North Limit of Graham Street
Municipality:	City of Niagara Falls
Municipal File Nos.:	B-2009-038, B-2009-039, B-2009-040
OMB Case No.:	PL100269
OMB File Nos.:	PL100269, PL100270, PL100271

APPEARANCES:

Parties	**Counsel**
Gino Forte Construction Inc.	J. Crossingham
City of Niagara Falls	K. Beaman
George Bahdi	

DECISION DELIVERED BY J. V. ZUIDEMA AND ORDER OF THE BOARD

Gino Forte Construction Inc. ("the Applicant") and George Bahdi ("the Appellant") have a long history together, which is worth summarizing. Mr. Bahdi purchased a parcel of land commonly referred to at the hearing as "the Fortier" lands. For some unexplainable reason, the City of Niagara Falls ("the City") granted a severance of the Fortier lands which preceded the sale of this property. The Fortier lands are located at the northerly end of a subdivision, which Mr. Bahdi developed a number of years ago, referenced at the hearing as the "Graham Street subdivision". The severance of the Fortier lands resulted in lands north of the Fortier lands becoming land-locked. The land-locked lands to the north now posed a serious challenge to the Applicant who owned them. In order to remedy this situation, the Applicant purchased most of the Fortier lands from the Appellant, save and except for two smaller triangular parcels at the extreme east and west of the Fortier lands. The Appellant had purchased the

Fortier lands for $55,000.00. He sold to the Applicant for the same amount such that the smaller triangles, which he retained, resulted in no net cost to him. He required these smaller parcels in order to rectify having constructed buildings which were situated beyond property lines. Each triangular parcel, when consolidated with the existing lot to the south, resulted in the location of the buildings no longer being problematic.

The background facts of the planning application are summarized as follows: the Applicant made applications to the City's Committee of Adjustment ("C of A") to create four lots proposed to be located at the north end of Graham Street in the City. The C of A granted the severances on a few conditions, including the Applicant entering into a Development Agreement with the City to address all servicing requirements for the lands in question including drainage, grading and provision of street trees. In addition, the Applicant had to dedicate a 0.3 m reserve along Graham Street as a public highway. The decisions of the C of A required that the four lots be finalized concurrently.

The Appellant appealed these decisions because he sought an additional condition to be included, namely that the Applicant enter into a cost-sharing agreement so that the Appellant could recover costs for municipal services, which he installed during the development of the Graham Street subdivision. The odd twist to the history of the applications is that over a span of a few years, the Applicant made a number of consent applications for the same parcels; each time the approvals lapsed as the conditions were not satisfied. On previous occasions, the C of A included a condition for cost-sharing. No such condition was included in the last set of applications, currently under appeal. The theme of the Appellant's arguments was that out of fairness, he should be entitled to recover for costs he incurred in locating services through his own development project along Graham Street and as those services were situated adjacent to the Fortier lands to which the Applicant enjoyed as a benefit.

The Board heard from Doug Darbyson, who was qualified and accepted as an expert in land use planning. Mr. Darbyson is the former Director of Planning for the City. He set out the history of how the Appellant developed the lots along Graham Street and at the time, stated that the City tried to assist the Appellant to pay for the development as a way to encourage infill development. The thrust of Mr. Darbyson's evidence was that the City routinely required cost sharing and on prior occasions when

the C of A granted the severances, they did include such a condition on the City's planning staff's recommendation. On the last set of applications, the planning staff as signed off by the current Director of Planning, did not recommend the cost-sharing condition. Mr. Darbyson testified that he believed this is why the C of A changed its position, and he said he disagreed with the approach. He recommended such a condition indicating that including same was standard practice for the City. Mr. Darbyson's opinion was that the services in question are local services and as such, imposing a requirement for cost recovery was a reasonable condition. In coming to his conclusions, he cited other examples of when the City included such a condition. He explained that the amount sought for the subject lots would amount to $10,133.00 for each of the three new lots, the fourth being the remnant parcel. It is important to note that Mr. Darbyson is no longer employed with the City and his comments on the City's practices are reflective of a time when he was working with the City.

Counsel for the City and Counsel for the Applicant argued that the Board should not venture into including such a condition as matters of charges for services were already included in the Development Charges legislation. During his cross-examination of Mr. Darbyson, Mr. Crossingham identified a previous development, namely the Bambi subdivision as it was referred to during the hearing. That development resulted in services being located along Delta Drive and it was to those services which the Appellant received a benefit. While the Bambi development was finalized some time ago, Mr. Darbyson could not confirm whether or not the Appellant had paid to connect to those services. The Appellant did not testify in order to address this issue.

The Board heard from Richard Wilson. He appeared under summons as, at the time of the hearing, he was a Planner with the Region of Niagara. Prior to that, he worked with the City and as such, was familiar with the matter before the Board. He was qualified and accepted as a professional land use Planner. While with the City, his responsibilities included the processing of consent and subdivision applications. He generally agreed with Mr. Darbyson's testimony but did qualify his evidence during Mr. Crossingham's cross-examination to state that had the Appellant come forward today with consent applications, a cost-sharing condition would not be recommended. The Board found Mr. Wilson to be an impartial and forthright witness. He provided the historical context of these planning applications and the treatment of other development applications (i.e. the Marinelli property) in an objective and genuine manner.

The Board also heard from Ron Webb, who is the President of the Applicant's company and nephew to Gino Forte. He explained that at the time of the transfers of property between the Appellant and the Applicant, nothing was stated concerning recovery of costs for servicing. The thrust of Mr. Webb's testimony was that if the Board were to assess what would be "fair" or "equitable" as suggested by the Appellant, than the Board needed to consider other factors in that analysis as well. In this regard, he reviewed a comparison (filed as Exhibit 15) wherein he addressed matters such as:

- the value of the lots owned by the Appellant versus those of the Applicant;
- the cost incurred by the Applicant to install a new fire hydrant as the one installed by the Appellant at lot 9 had to be removed by the City;
- the cost incurred by the Applicant to install catch-basins at lots 9 and 10 and the further cost to revise the lot grading plan as a result.

The Board heard from Rick Volpini; he works in-house with the City and is an engineering technician. He was not presented as an expert witness but rather to speak to the calculations concerning the costs in question. He testified that he had done the calculations concerning costs of sewers, watermains and roads and only those services to the Applicant's benefit were included in the calculations. He testified that the costs had changed between the years 2003 and 2006 (a reduction from $9,173.45 per lot to $7,600.00 per lot) because the number of lots proposed had changed. He outlined the circumstances surrounding the four applications and their timing in relation to the Appellant's own development. He rationally and coherently explained the reason for why the condition for cost recovery was no longer recommended by the City and it was quite simply that by 2007, the City had advised the Appellant to do class 3 works on his own development. Those were done and the securities held by the City were returned. By February 2010, the City formally assumed the subdivision and all securities owing to the Appellant had been returned to him by the Fall of 2009. In other words, the City no longer needed such a condition as the services were now fully assumed municipal services. Mr. Volpini explained that when the Appellant tapped into the municipal services of the Bambi subdivision, he did not contribute money for those connections. Mr. Volpini was clear that no formal or Council endorsed City policy existed which

required cost-sharing. He testified that there had been two occasions in the past wherein the City encouraged and assisted with cost-sharing between developers, namely the Gore and Marenelli developments, but that did not result in a City policy being put into place.

The Board found Mr. Volpini's evidence straight-forward and useful. He focused on the key issues and addressed the distinction of why the City sought a condition for cost-sharing previously but did not with the latest round of applications. It is primarily on his evidence that the Board makes its decision to dismiss the appeal and grant provisional consents on the conditions originally imposed by the C of A. My reasons are as follows: Mr. Volpini testified that there was no oversizing of services provided through the Graham Street subdivision (the Appellant's development). Had there been, that might have triggered a requirement for cost-sharing. In this instance, there was an extension of services from an existing assumed subdivision with municipal services. Just as the Appellant did not pay to access services from Delta Drive, nor should the next developer in the queue for services from Graham Street. The relief sought by the Appellant, in this instance, would be a deviation from the Board's practice as referenced in the cases presented by Mr. Crossingham (see the Book of Authorities erroneously entitled "Appellants' Book of Authorities") with particular reference to Marinucci (c.o.b. 792207 Ontario Ltd.) v. Richmond Hill (Town) [1999] O.M.B.D. No. 153 per former Member J. L. O'Brien which indicates that in the absence of oversizing of services, such compensation would not be provided. In this case, Mr. Volpini's evidence was unchallenged that no oversizing had been done.

Further through Mr. Webb's testimony and in reference to the Agreement of Purchase and Sale concerning the transfer of land between the Appellant and the Applicant, the evidence was that in selling the lands, the Appellant sold all his rights and interest in the property and at no time, indicated a further obligation for cost-recovery of services. This evidence was not undermined. No evidence was provided by the Appellant to address or reply to this contention. As such, the Board accepts it.

Finally, the Board accepts Mr. Beaman's submissions as borne through Mr. Volpini's testimony that no formal policy exists at the City concerning cost-sharing. To permit the Appellant to succeed, in this instance, would be to support the ad-hoc approach as described by Mr. Darbyson. The Appellant was not able to produce any

evidence establishing such a City policy other than the impromptu practice implemented on two occasions.

THEREFORE THE BOARD ORDERS THAT the appeals are dismissed and provisional consents are given subject to the conditions as originally imposed by the Committee of Adjustment.

This is the Board’s Order.

“J. V. Zuidema”

J. V. ZUIDEMA
VICE-CHAIR