

ISSUE DATE:

April 30, 2012



PL100606

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: City of Hamilton
Applicant: Antonio Gumiero
Subject: Consent
Property Location: 179 Sunnyridge Road
Municipality: City of Hamilton
Municipal Number: B-02/10
OMB Case Number: PL100606
OMB File Number: PL100606

APPEARANCES:

Parties

Counsel

City of Hamilton

J. Wice

Antonio Gumiero

J. Ross

DECISION DELIVERED BY JOE G. WONG AND ORDER OF THE BOARD

Introduction

The City of Hamilton ("City") has appealed a decision of the Committee of Adjustment ("COA"), approving an Application for Consent to Sever Land (File No. AN/B-10:02) for residential purposes. The lands are known municipally as 178 Sunny Ridge Road ("Subject Property"). The Subject Property totals approximately 1.08 hectares; the proposed severance would see the property split in half with conveyed and retained parcels each 1.34 acres (0.54 hectares) or 25.1 metres x 215.5 metres each. The retained parcel contains an existing single family dwelling and detached garage. The Subject Property is owned by Antonio Gumiero ("Applicant").

Issues and evidence

Kate Mihaljevic a Junior Planner 2 with the City, was qualified as a land use planner for the purposes of this hearing. Ms. Mihaljevic testified that the proposal seeks to split the Subject Property into two separate 1.3 acres lots. The Subject Property is located in a

rural settlement area known as Jerseyville formerly in the Town of Ancaster, but now part of the City. Ms. Mihaljevic testified that Jerseyville is a rural area that relies on private servicing because there are no municipal sewer or water hook-ups available in this area. In 2008, the planning staff recommended approval and the COA approved a severance of the Subject Property; however, the Applicant failed to satisfy the conditions within one (1) year. In 2010, another severance application was resubmitted; planning staff reviewed the applicable policies and denied the applications on the basis of the inability to privately service the lots.

Ms. Mihaljevic testified that the proposed conveyed and retained lots are each 1.34 acres but they are of an insufficient size to sustain the required private services for potable water and septic system. According to Ms. Mihaljevic, the proposed severance meets the lot creation planning policy requirements but is unsuitable because the proposed lots cannot sustain the required private servicing. She explained that she is relying on the evidence of Mr. William Banks, the City's hydrogeologist, that the proposed size of the lots is insufficient. Ms. Mihaljevic's objections to the application are based on the evidence of Mr. Banks. The Applicant did not provide a hydrogeological report to refute Mr. Bank's findings. She indicated that Mr. Banks would provide the hydrogeological evidence later in this hearing.

According to Ms. Mihaljevic, the issue here is the servicing of the lots. She refers to policy 8.2.1 of the Region of Hamilton-Wentworth Official Plan ("OP") that directs staff to consider a hydrogeological study in a consent application. Ms. Mihaljevic testified that subsection 51(24) of the *Planning Act* ("Act"), requires lands being severed to conform to the OP and that there are adequate municipal services. She notes that there was also no hydrogeological report provided with an earlier 2008 application.

William Banks is a professional engineer specializing in hydrogeology retained by the City. In his opinion, the proposed 1.34 acre lots are of an insufficient size for private servicing and especially in conjunction with a septic system. According to Mr. Banks, the Jerseyville soils (where the Subject Property is located) are not optimal for septic systems and in the event of overflow, it could contaminate the drinking water wells. Mr. Banks calculates the nitrate concentration at the boundary of the proposed lots at 12.4 mg/l and this exceeds the Ministry of the Environment ("MOE") Guidelines of 10.0 mg/l.

Therefore, if the severance was permitted, the nitrate in the local groundwater could exceed the maximum allowable and pose an unacceptable health risk to residents.

Mr. Banks testified that the "Settlement Capacity Study for the Jerseyville Area, February 2008," recommended 2 acre lots while the proposed retained and severed lots are each only 1.34 acres. Under cross-examination, Mr. Banks testified that he did not collect soil samples and his hydrogeological assessment was based on the information provided from a prior study that he utilized a 2009 report that specified the soil type for the Subject Property. According to Mr. Banks, a 2 acre (as opposed to a 1.34 acre) site provides for greater dilution of the nitrate concentration.

Mr. Banks was asked about new tertiary treatment systems and he testified that the septic system is the only one listed in the building codes. He acknowledged that new technologies are under development to help reduce nitrates but tertiary systems are not currently part of the Building Code.

Sean Shrive is a Senior Project Manager with the City's Public Works Department who appeared under summons. He testified that the only septic system permitted in the Building Code was a Class 4 System. He agreed that new tertiary system can reduce nitrates but they are not recognized in the Building Code as doing so. Mr. Shrive acknowledges that there may have been a calculation error in the data provided by City staff but he still finds Mr. Banks' conclusions to be reasonable. According to Mr. Shrive, what is needed (to settle any disagreement) is a hydrogeological report to characterize the area and to protect public health.

Nancy Frieday is a qualified land use planner retained by the Applicant. She testified that the proposed severance is consistent with all the applicable planning policy documents, nothing has changed from the 2008 approval, and the Greenbelt Plan permits infill. The Provincial Policy Statement (PPS) directs development to settlement areas but does require adequate servicing. In her opinion, the proposed lots meet the minimum lot area requirements and they fit with the Jerseyville lot fabric where the majority of lots are one (1) acre. According to Ms. Frieday, the increase of one additional lot would not put any undue pressure on municipal services. Ms. Frieday agrees that the issue here is water quality and that a hydrological study is needed to help determine the adequacy of the lot size. In Ms. Frieday's opinion, one alternative is for the City to require a tertiary nitrogen reducing system to be installed.

Disposition and Order

The planning evidence and opinions of both planners, Ms. Mihaljevic (for the City) and Ms. Frieday (for the Applicant), are that the proposed severance/consent meets all of the policy requirements and differ only in terms of the ability of the subject lots to provide for private servicing as the proposed and retained lots do not have access to municipal water or sewer.

The Board is satisfied from the planning evidence that the proposed lots meet the general intent of all the applicable planning policy documents including the PPS, OP and Zoning By-law and are consistent with subsection 51(24) of the Act except in terms of servicing and the ability of the proposed lots to provide for private servicing.

The evidence of Mr. Banks and his hydrogeological analysis is that proposed lots at 1.3 acres each are too small to sustain private servicing because his calculations indicate that the nitrate levels here would exceed the MOE standards. What is required in this instance is a larger lot (for example a 2 acre lot) to help dissipate/disperse the nitrates.

However, the Board also finds based on the evidence and testimony of Mr. Banks and Mr. Shrive, that there is a potential for calculation errors in the nitrate level calculations because of the possibility that incorrect assumptions were utilized to calculate the base data by a former City employee (no longer available). The base data was utilized by Mr. Banks and it could have resulted in inaccurate calculations.

Therefore, the Board finds that what is required is an independent hydrogeological report/study to determine the ability of the subject lots to sustain private servicing. The requirement for a hydrogeological report/study is a typical requirement for the severance of a rural lot and this is found in Policy 8.2.1 of the Hamilton-Wentworth OP:

8.2.1 Establish a minimum lot size in Rural Area of .4 hectares (approximately 1 acre). A larger lot size may be required by the Regional Public Health Department depending upon soil and site conditions or the findings of a hydrogeological study. A potable water supply must be available for the intended use.

That depending on the results of the hydrogeological study, a larger than the minimum (1 acre) sized lot may be required. In this case, the proposed lots exceed the minimum

lot size and so the requirement here is the ability of the proposed lots to sustain the required services for sewer and water.

Ms. Mihaljevic presented a list of conditions (Exhibit 5) in the event of approval by the Board. All of her recommended conditions are standard conditions and they mirror the COA's approval except for the added requirement for a satisfactory "Hydrogeological Study" (Condition 2) which the Planning Department had also recommended at the time of COA approval. The Applicant did not provide a hydrogeological study/report with either its 2008 or 2010 application.

The only expert hydrogeological evidence the Board heard was from Mr. Banks (and his professional qualifications were not challenged). He maintains that his calculations and conclusions are correct but agrees that any disagreement with his conclusions could be readily settled with an independent hydrogeological study. There was no independent expert evidence to sustain the submission by the Applicant's counsel that Mr. Banks' calculations and conclusions that the nitrate levels exceeded the MOE limit of 10 mg/l, were due solely to data and calculation errors.

The Board notes that Policy 8.2.1 of the Hamilton-Wentworth OP specifically refers to the need for a hydrogeological study in rural areas. Therefore, the Board agrees with and adopts the recommended conditions of Ms. Mihaljevic as contained in Exhibit 5, including the requirement for a hydrogeological study. The proposed severance/consent is conditional on a satisfactory hydrogeological study to ensure that the public health is protected.

THE BOARD ORDERS that the appeal is allowed in part and provisional consent shall be given, subject to the following conditions:

1. All of the conditions listed in "Attachment 1" (Exhibit 5) with the requirement for the fulfilment of all conditions within one year of the date of this decision.

This is the Order of the Board.

"Joe G. Wong"

JOE G. WONG
MEMBER

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EX-5

ATTACHMENT "1"
Conditions of Severance

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Should the Ontario Municipal Board grant the severance, an approval should be subject to the following conditions and notes:

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. A Hydrogeological Study shall be completed to the satisfaction of the Manager I&SWP as well as the Manager, Environmental Health, Public Health Services. The study is required by Official Plan policies to ensure that safe potable drinking water and adequate septic treatment facilities can be provided to service the proposed severed and retained lot development without undue impacts on area drinking water supplies.

The Hydrogeological Study shall follow the Draft Guidelines for Hydrogeological Studies and Technical Standards for Private Services currently available from I&SWP. The Study will consider the potential for private servicing impacts from both the retained lot as well as the proposed severed lot. The Study shall be undertaken by a qualified person or professional and include an investigation of potable water availability (quality and quantity) and any interference to current supplies that may arise from the development (as per MOE Guideline D-5-5). The Study shall include a nitrate boundary calculation (as per MOE Guideline D-5-4) and include calculations that demonstrate boundary nitrate calculations recognizing infiltration conditions, proposed lot boundary configuration, effluent plume and impervious area impacts associated with the current bylaw footing allowance as well as conditions under which any proposed variance in footing is applied.

3. The owner/applicant shall submit survey evidence from a Qualified Designer (Part 8 Sewage System), Professional Engineer or Architect that the existing septic system complies with the clearance requirements of Part 8 of the Ontario Building Code for the lands to be severed and or retained, to the satisfaction of the Planning and Economic Development Department (Building Services Division).
4. The owner shall enter into, and register on title of the lands a Consent Agreement with the City of Hamilton to the satisfaction of the Manager of Design and Construction to deal with the grading and drainage on the subject lands. The applicant/owner shall demonstrate to the Manager of Design and Construction that all drainage from the site shall be taken to a suitable outlet.

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5. The owner shall convey to the City of Hamilton by deed, 3.048m of land from the lands to be severed and retained for road allowance widening purposes to establish the property line 13.106m from the centre of the Sunnyridge Road road allowance.
6. The owner/applicant shall satisfy the requirements of the Public Works Department, Operations and Maintenance Division, Forestry & Horticulture Section.
7. The owner shall pay any outstanding realty taxes and/or all other charges owing to the City Treasurer.
8. 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.

NOTES:

1. Based on the attached plans, and on this application being approved and all conditions being met, the owner / applicant should be made aware that the lands to be conveyed (Part 1) will be assigned the municipal address of 173 Sunnyridge Road, and that the lands to be retained (Part 2) will remain as 179 Sunnyridge Road. 2.
2. The proponent shall carry out an archaeological assessment of the entire property and mitigate, through preservation or resource removal and documentation, adverse impacts to any significant archaeological resources found. No demolition, grading, construction activities, landscaping, staging, stockpiling or other soil disturbances shall take place on the subject property prior to the approval of the Director of Planning and the Ministry of Culture confirming that all archaeological resource concerns have met licensing and conservation requirements. All archaeological reports shall be submitted to the City of Hamilton for approval concurrent with their submission to the Ministry of Culture.

Should deeply buried archaeological materials be found on the property during any of the above development activities the Ontario Ministry of Culture (MCL) should be notified immediately (416.314.7143). In the event that human remains are encountered during construction, the proponent should immediately contact both MCL and the Registrar, or Deputy Registrar of the Cemeteries Regulation Unit of the Ministry of Small Business and Consumer Services (416.326.8392).