ISSUE DATE:

December 24, 2012

PL101247

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

Applicant and Appellant:	Natasha Gauthier
Subject:	Consent
Property Address/Description:	12 Herbert Place
Municipality:	City of Hamilton
Municipal File No.:	B-121/10
OMB Case No.:	PL101247
OMB File No.:	PL101247

A P P E A R A N C E S :

Parties	**Counsel**
Natasha Gauthier	R. Wellenreiter
City of Hamilton	L. Magi

DECISION DELIVERED BY M. C. DENHEZ AND ORDER OF THE BOARD

INTRODUCTION

[1] This severance dispute arose after Natasha Gauthier (the applicant), of the City of Hamilton (the City), applied to split her corner lot in two, in an estate lot subdivision of the former Town of Flamborough (the former Town), in the former Region of Hamilton-Wentworth (the former Region).

[2] Her suburban lot measured 0.84 hectare (2.1 acres), over twice the size of most neighbouring lots. She first proposed to split it asymmetrically (a severed parcel of 0.29 hectare – like the lot next door – with the rest to the retained parcel). City planning staff told the Committee of Adjustment (COA) that this severed parcel would be below the minimum lot size (0.4 hectare – one acre) in the former Region's Official Plan (ROP), which was still applicable. Staff added that corroborating water studies were incomplete.

The COA turned down the application, and the applicant appealed to the Ontario Municipal Board (the Board).

[3] Before the hearing, the applicant decided instead to split the lot evenly (two L-shaped parcels of 0.42 hectare each – 1.04 acre). Ultimately, the parties did agree that under s. 53(35.1) of the *Planning Act,* this change from the original application was sufficiently minor that it did not warrant re-circulation. The Board also agreed, and amended the application accordingly.

[4] An engineering/hydrogeological study now supported the feasibility of that severance. However, the parties still did not agree on the merits of the proposal, notably for water safety (nitrates), and neighbourhood character. Both sides were ably represented by counsel, with the support of expert engineers and planners. Two participants also expressed concerns about the proposal. A two-day hearing was scheduled, but despite skill and best efforts, counsel were unable to finish; a third day was added, then a fourth, and still matters did not conclude. Finally, counsel presented written submissions.

[5] The Board has carefully considered all the evidence, as well as the submissions of counsel, and a cubic foot of related materials. The Board concludes that although the City is to be commended for its vigilance concerning water safety, its concerns – while understandable – were manageable.

[6] First, the thrust of the City's argument was that hard data from on-site findings, for soil type and water quality (which supported the project), should essentially be put aside, in favour of a theoretical calculation by its consulting engineer (which did not). However, the City's own engineering expert agreed that apprehensions could be addressed, by installing a tertiary water treatment system (as approved in the abutting subdivision); such a system was expected to cut nitrates by over 50%. However, the City then distanced itself, calling tertiary treatment unreliable – but without offering evidence of same. The Board was shown no substantive ground for that objection.

[7] Next, the City said the proposed 0.42 hectare severed lot (substantially larger than its neighbours) was still too small, because it needed room for *two* septic fields – a requirement beyond the terms of the *Ontario Building Code* (OBC). The Board was not

persuaded by that objection either, because even if that unusual requirement were upheld, the Board was not shown how the proposed parcels lack the necessary space.

[8] Finally, the City said the L-shaped lot arrangement would be out of character with the neighbourhood, particularly if accessory buildings were erected. The applicant replied by volunteering not to erect same; but this did little to mollify the City. In light of that undertaking, however, the Board found no remaining substance to the City's objection.

[9] The Board therefore finds that, subject to specific conditions, notably pertaining to water treatment and accessory structures, the application can meet the requirements of the *Planning Act* for consent to the severance. The details and reasons are set out below.

GEOGRAPHY AND HISTORY

[10] The subject property is at 12 Herbert Place. Although it is in an unserviced area called Greensville (the ROP designation is “Rural Settlement Area”), it is surrounded by houses in a 1980's subdivision (the Van Every subdivision), with another subdivision to the west, and a further subdivision approved (2007) to the east (Bayview Estates). Homes are substantial, and the environs (in all directions) could be characterized as upscale suburban.

[11] There was no dispute that the project would be categorized as an intensification, under the profusion of applicable planning documents for this area, namely the Provincial Policy Statement (PPS), the Growth Plan for the Greater Golden Horseshoe (Growth Plan), the Niagara Escarpment Plan (NEP), the Provincial Policy Statement (PPS), the ROP, the Rural Hamilton Official Plan (RHOP – still pending), the former Town's Official Plan (TOP), the Greensville Secondary Plan (Secondary Plan), and the Zoning By-law (By-law). The underpinnings to the neighbourhood's planning, however, were in yet other documents dating from 1985. At that time, a consultant's report, entitled *Greensville Servicing Study* (Gartner Lee report), estimated that:

- in the southern part of the subdivision (about three quarters of the subdivision), soils were composed of till,

- whereas further north (about one quarter of the subdivision), they were composed of glacial/fluvial deposits.

[12] Those soils have different infiltration capacity, affecting septic fields and wells. In the till soils to the south, the Gartner Lee report recommended a lot minimum of 0.4 hectare (1 acre) because of those soil characteristics, whereas in the glacial/fluvial deposits to the north, it recommended 0.8 hectare (2 acres).

[13] This categorization, however, was not reflected in any Official Plan (OP), or in the By-law. On the contrary, the relevant OP standard was uniformly the lower figure of 0.4 hectare; and the By-law specified a minimum lot size even lower than the OP, namely 0.2 hectare. Nonetheless, the subdivision was laid out in accordance with the Gartner Lee report, with a few 0.8 hectare lots to the north, and many 0.4 hectare lots (or smaller) to the south. Neighbours said their lots tended to measure ¾ acre (about 0.3 hectare), i.e. a quarter less than the OP minimum. The Board was told that the abutting lot to the southeast, belonging to the participant Mr. Bird, measured 0.29 hectare.

[14] The report's mapping also estimated that the boundary between the two soil types *crossed* the subject property. The Board was not told of any corroborative soil testing at the time; instead, it was said that the boundary was probably inferred, based on topography and aerial photography. The subject property was accordingly laid out as if it were glacial/fluvial, at 0.84 hectare, whereas the two abutting properties to the south (Mr. Birds's to the southeast, and one to the southwest) were less than half that size. In other words, the subject property was over twice the OP-required size, and over four times the size required by the By-law. Strictly parenthetically, instead of providing municipal addresses in sequence (12 Herbert Place, 14 Herbert, 16 Herbert etc.), a municipal address was skipped here (number 14), as if dealing with a double lot.

[15] Starting in 1988, further work was done by Mr. Kerr, a hydrogeological engineer (ultimately hired by the applicant). He reviewed the physical layout, during the course of testing wells – 34 times. He concluded that the estimate for the boundary between soil types had been incorrect: a well to the north of that supposed boundary, in soil expected to be glacial/ fluvial, was actually in till, similar to soils of neighbours further south. By that reasoning, the subject property *should* have been in the category of the 0.4 hectare lots. Indeed, at 0.42 hectare, the lots proposed by the applicant would actually be larger,

and would still have wider frontage than those of neighbours. For example, the severed parcel would be over a third larger than Mr. Bird’s lot, and have almost 10% more frontage.

[16] More importantly, in Mr. Kerr's opinion, the measured data from the 34 tests corroborated the feasibility of the severance, in terms of water safety. Whereas the standard of the Ministry of Environment (MOE) was a nitrate load of 10 milligrams per litre (10 mg/L), 27 of the 34 tests were at under 2 mg/L; the others were under 5 mg/L, i.e. less than half the MOE standard of 10 mg/L.

[17] Mr. Kerr conducted five more tests in August, 2012. They indicated nitrate levels ranging from 2.86 mg/L to a high of 7.62 mg/L, directly in the plume of the septic field.

[18] For good measure, Mr. Kerr also produced theoretical calculations, under a model called Predictive Assessment, pursuant to MOE’s *Procedure D-5-4* (D-5-4). They hypothesized a potential nitrate load of 9.9 mg/L – still within MOE standards, though barely.

[19] The applicant used Mr. Kerr's information to argue that, from a water safety perspective, the proposed severance was feasible. Under her revised scenario, the new lot would be L-shaped: its frontage (almost 35 metres) would equal or exceed that of neighbours further south; but its rear yard would be much wider, giving it this L-shape. In terms of appearance, the applicant added that any new house would fit into the streetscape: she promised that it would "line up" with other houses, have similar architectural inspiration, and retain most of the trees now on the property.

[20] As mentioned, the initial application was to sever a parcel of 0.29 hectare, the same size as Mr. Bird's lot. That application was turned down. Although the COA's Minutes mentioned disagreement over water, the decision itself referred only to one ground, namely the proposition that the severed parcel would be "substantially smaller than the minimum 0.4 hectare lot size" required in the ROP (this was before the application was amended to foresee 0.42 hectare).

[21] At the hearing, however, the City cited three objections: water safety, reserve tile beds, and lot shape. First, and most importantly, it said its own theoretical projections hypothesized nitrate levels above MOE guidelines. The City's consulting engineer, Mr.

Banks, criticized Mr. Kerr's D-5-4 methodology: his own D-5-4 calculation hypothesized a theoretical nitrate level of 13 mg/L. Mr. Kerr replied that (a) his actual hard data indicated a risk level nowhere near the MOE limit, and (b) if one used Mr. Banks' methodology, every single home in the Van Every subdivision would be *deemed* to exceed MOE guidelines. There was no engineering consensus; indeed, the thrust and parry between the experts at the hearing, concerning the methodology of these hypothetical projections, went on far longer than anyone anticipated.

[22] There was some comparison with the property across the street, at 13 Herbert Place, where a severance had been approved conditionally on two separate occasions (2003 and 2009), similarly for a parcel of 0.4 hectare. There was more comparison with the approved Bayview Estates subdivision; the latter also included some nine lots at 0.4 hectare. The City had agreed, with the developer there, on installation of a tertiary treatment system, to pre-empt water safety concerns. Tertiary water treatment systems were known to the experts; the Ministry of Municipal Affairs and Housing (MMAH) had also proposed an amendment to the OBC, to provide more specifics (Change Number S-B-08-06-06), though the latter clarifications were not expected to take effect until 2016. That raised the question of whether a similar tertiary system should be envisioned at the subject property.

[23] According to Mr. Kerr, "a tertiary treatment system was not necessary, but if there was any concern as to whether this was the case, the implementation of a tertiary treatment system that reduced the level of nitrates by 50% to 75% would resolve any such issues”. There was discussion of one example, called a Waterloo Biofilter, and the applicant volunteered to install a tertiary system, if it would resolve the issue.

[24] In response, the City’s expert Mr. Banks said that if tertiary treatment were installed, "I wouldn't be here". However, the City then suggested that it was still unconvinced.

[25] The water dispute also had a second dimension. The City said the severed parcel might not have enough room for *two* septic fields – the normally-expected one, plus a "reserve septic bed", which it said was OP-required ("in case the first one failed"). The applicant responded that there was no legal requirement for this "reserve septic

bed"; and even if there were, Mr. Kerr said that "although there was no reason to have a reserve septic bed, one could reasonably be located at the rear of the severed lands".

[26] A third City argument was that the shape of the proposed severed parcel would be out of character with the neighbourhood, particularly if fences and/or accessory structures were erected in the “toe” of the proposed boot-shaped lot. The applicant replied that she would volunteer a condition not to do so; but the City was not persuaded.

APPLICABLE CRITERIA

[27] The applicable criteria for approving consents for severances are outlined in separate sections of the *Planning Act*. The relevant provision for consents, s. 53(12), refers to the criteria in s. 51(24):

> ...Regard shall be had, among other matters, to the health, safety, convenience and welfare of the present and future inhabitants of the municipality and to,
>
> (a) The effect of development... on matters of provincial interest...;
>
> (b) Whether the (proposal) is premature or in the public interest;
>
> (c) Whether the plan conforms to the Official Plan...;
>
> (d) The suitability of the land for the purposes...;
>
> (e) (Highways)
>
> (f) The dimensions and shapes of the proposed lots;
>
> (g) The restrictions or proposed restrictions, if any, on the land proposed to be subdivided or the buildings and structures proposed to be erected on it and the restrictions, if any, on the adjoining land….
>
> (h)-(l) (Natural resources, floods, services, schools, land dedications, energy)

[28] The *Planning Act* also deals with whether the transaction should proceed instead by way of subdivision; but that suggestion was not made at the hearing. In the absence of new roads or other public facilities which might normally require the subdivision process, the Board finds no need to consider proceeding by way of subdivision.

ANALYSIS

[29] The City clearly disagreed with the application. However, it said that, in the hypothetical event that the consent were granted, the latter should be subject to a series of conditions. Most were standard and non-contentious; in fact, after several iterations, counsel for both parties agreed on most of the wording, which is essentially reproduced herewith as Attachment 1. However, that changed nothing in the City's basic premise. Counsel for the City encapsulated the City's main stated concern:

> Ongoing development pressures in this rural settlement area have caused the City to take a consistently rigorous approach, by applying long-standing official plan policies, to ensure that further development does not compromise public health by requiring sufficiently large lot sizes to protect groundwater quantity and quality.

[30] Despite the expert controversy – and partly because of it – the Board understands the City's vigilance. Indeed, the Precautionary Principle cited by the City holds that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. The City's duty to the public interest, as successor to the former Region, is also addressed in the ROP:

> 8.2 … The Region will:
>
> 8.2.1 Establish a minimum lot size in the rural area of .4 hectares. 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.…

[31] That was the key question: whether these particular "soil and site conditions" constituted special hazardous circumstances, calling for a lot size larger than the ROP's 0.4 hectare – notwithstanding (a) the actual field data, which was amply within acceptable norms, and (b) the fact that the site was discovered to be comprised of till, not glacial/fluvial soil as originally thought. According to the applicant, "the criteria of the Official Plan have been satisfied *by direct measurement*".

[32] The Board finds, however, that debates about whether a conventional septic system was sufficient – on a lot of this size – are essentially moot. The experts agreed that, once equipped with a tertiary system (which the applicant volunteered to install),

water safety would become a non-issue. In accordance with the Precautionary Principle, that expert consensus would appear to dispose of the water safety question. The lot characteristics – in combination with the tertiary system – do not constitute special hazardous circumstances that would enable the City to demand more than the 0.4 hectare size foreseen in its own ROP.

[33] However, although a tertiary system appeared to resolve the matter for the City's expert, it did not do so for the City itself. The City's submissions attempted to cast doubt on that approach:

> In the absence of that degree of proof that tertiary treatment systems for the reduction of nitrates can achieve the nitrate reduction claimed by the manufacturers over the long-term, the City is not prepared or required to accept tertiary treatment systems as a reliable alternative to conventional Class 4 septic systems.

[34] The Board was not persuaded by that position. Tertiary treatment is an accepted aspect of the 0.4 hectare lots in the abutting Bayview Estates subdivision. It is also addressed by the MMAH in its proposed Change to the OBC. More importantly, it is unclear on what evidence the City based its apprehension. No actual evidence, to dispute the efficacy of tertiary treatment or cast doubt on the experts' approach, was presented at the hearing. The Board can therefore find no substantive reason to discount this solution which, in any event, the Board interprets as a measure primarily undertaken out of an abundance of caution.

[35] The next question was whether the severed parcel would be too small, because it allegedly lacked space for a second septic bed. Counsel for the applicant argued that this OP requirement went beyond the OBC, and hence ran afoul of the Board's decision in *Wilkinson v. Regional Municipality of Halton*, [1998] O.M.B. Case PL980225. That case similarly dealt with a municipal requirement for a reserve tile field – a requirement which the Board found "unenforceable":

> The Town's and Region's requirements for reserve tile fields in urban areas is unenforceable. It has only been a guideline set down by the Ministry of Environment. It was never a regulation, nor is it today. The Town must now follow the *Ontario Building Code* for septic system permits, and it does not require reserve tile fields.

[36] The Board finds it unnecessary, however, to revisit the correctness of the *Wilkinson* decision, for a more elementary reason. It was Mr. Kerr's expert opinion that

on this 0.42 hectare lot, a second location could be found for a septic bed anyway. Neither Mr. Banks nor any other City expert showed the Board how that opinion was wrong. In short, the legal debate was again essentially moot. The Board found no reason to refuse the severance on that ground.

[37] The third question was the lot shape, akin to that of a boot. The Board was not persuaded that this shape was out of character with the neighbourhood, for two reasons. First, there was no suggestion that this shape would produce any visual incongruity, in the streetscape or elsewhere. Indeed, there was no evidence that the L-shaped arrangement would even be visible to a passer-by. Second, there was nothing unprecedented about L-shaped lots in this neighbourhood: there is an L-shaped lot directly across the street north of the subject property.

[38] However, the City added the following issue, concerning this shape:

> The proposed lot configuration gives rise to other concerns with respect to building setbacks in the ability to locate accessory structures in the "toe" of the severed parcel, which abuts the rear yard of the retained parcel.

[39] The applicant replied that if accessory structures were the City's concern, she volunteered not to erect any in this "toe". Indeed, as a contingency, the City itself drafted a condition to that effect. This leads the Board to conclude that the City's concern, while understandable, is manageable. Subject to that condition, the Board finds no significant impediment on that account.

[40] Parenthetically, the agreed wording referred to the "toe" as representing "a portion of Part 1 outlined in green and marked as 'Part 1A' on the sketch attached hereto as Schedule 'A'." However, that green attachment was missing from the materials filed by counsel. The Board assumes that the parties have agreed (or can agree) on that demarcation – just as they have agreed on the other wording of this condition – and will proceed to finalize the demarcation by mutual agreement. If there are difficulties in that regard, the Board may be spoken to.

[41] There were, however, other aspects to the City's hypothetical contingency plan. The applicant disagreed with another City proposal, namely that tertiary treatment also be added to the *existing* dwelling. "The conditions requiring the installation and

inspection of the tertiary treatment system", said the City, "are appropriately applied to both the severed and retained lots in this case".

[42] The applicant countered that "there has been no evidence from the City or anyone that the septic system on the retained lands is in any way deficient or failing". The Board is compelled to agree: no such evidence was introduced. The Board was not shown the necessity for that supplementary condition.

[43] In conclusion, consent for a severance may be turned down if it fails to meet the statutory criteria; those are clearly outlined in the *Planning Act*, notably at s. 51(24). Despite the eloquence of counsel for the City and her witnesses, no legal impediment was shown to the Board's satisfaction. The Board is, however, prepared to attach conditions to the consent, in furtherance of the public interest.

ORDER

[44] The Board orders that the appeal is allowed, and the provisional consent is to be given subject to the conditions set out in Attachment 1 to this Order.

“M.C. Denhez”

M. C. DENHEZ
MEMBER

ATTACHMENT 1

Conditions to the Consent for Severance

1. The applicant shall submit a deposited Ontario Land Surveyor's Reference Plan to the Committee of Adjustment Office, unless exempted by the Land Registrar.

2. The applicant shall agree to include the following clauses in the consent agreement and in all purchase and sale and/or lease/rental agreements:

> "Purchasers/tenants are advised that sound levels due to increasing road traffic may occasionally interfere with some activities of the dwelling occupants as the sound levels may exceed the Municipality's and the Ministry of the Environment's noise criteria.
>
> No building, structure or accessory building shall be erected upon that portion of Part 1 outlined in green and marked as "Part 1A" on the sketch attached hereto as Schedule "A".
>
> The negative covenant, restrictions and provision herein set forth shall remain in full force and effect for 99 years from the date of registration of this application to register restrictive covenants pursuant to section 119 of the *Land Titles Act* (Ontario).
>
> It is the intent that the burden of these negative covenants, restrictions and provisions shall run with and bind those lands marked as "Part 1A" on the sketch attached hereto as schedule "A", and the benefit of these negative covenants, restrictions and

provisions shall be annexed to run with the Dominant Lands, municipally known as 12 Herbert Place"

3. The applicant 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 Tourism and Culture confirming that all archaeological resource concerns have met licensing and conservation requirements. All archaeological reports shall be submitted to the City of Hamilton concurrent with their submission to the Ministry of Tourism and Culture.

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

4. On the severed lot, the applicant shall install a tertiary treatment septic system with a treatment unit quality of effluent accordant with the proposed amended Ontario Building Code (Change Number S-B-08-06-06) Table 8.6.2.2.C being on Level of Treatment (Column 1) of N-1 and a Nitrogen Reduction (Column 3) of no less than 50%.

5. Upon installation of the tertiary treatment system from paragraph 4 above, the applicant shall contact the City of Hamilton and have the system inspected by the Manager, Environmental Health, Public Health Services And/or the Manager of Development Engineering.

6. The applicant shall submit, at her own expense, an inspection and maintenance report within six (6) months following installation of the tertiary treatment system from paragraph 4 above, with a copy of the inspection results provided to the Chief Building Inspector for the City of Hamilton.

7. The applicant shall enter into and have registered on title, a consent agreement with the City of Hamilton to deal with grading and drainage issues of the conveyed lot, to the satisfaction of the Manager of Development Engineering.

8. The applicant 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.

9. The applicant shall pay any outstanding realty taxes and/or all other charges owing to the City Treasurer.