

ISSUE DATE:

**December 2, 2011**



PL110838

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: William Simone  
Appellant: Victor Veri  
Applicant: 1201159 Ontario Ltd.  
Subject: Consent  
Property Address/Description: 186 Ferguson Ave N. and 201 Robert St.  
Municipal No. B-44/11  
Municipality: City of Hamilton  
OMB Case No.: PL110838  
OMB File No.: PL110838

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

Appellant: William Simone  
Appellant: Victor Veri  
Applicant: 1201159 Ontario Ltd.  
Subject: Consent  
Property Address/Description: 186 Ferguson Ave N. and 201 Robert St.  
Municipal No. B-45/11  
Municipality: City of Hamilton  
OMB Case No.: PL110838  
OMB File No.: PL110839

IN THE MATTER OF subsection 45(12) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant: William Simone  
Appellant: Victor Veri  
Applicant: 1201159 Ontario Ltd.  
Subject: Minor Variance  
Variance from By-law No.: 6593, 07-026 (amending), 08-021 (amending)  
Property Address/Description: 186 Ferguson Ave N. and 201 Robert St.  
Municipality: City of Hamilton  
Municipal File No.: A-130/11  
OMB Case No.: PL110838  
OMB File No.: PL110840

**APPEARANCES:**

**Parties**

Victor Veri  
William Simone

**Counsel\*/Agent**

Elbert van Donkersgoed

1201159 Ontario Ltd.

Nancy Smith\*

**MEMORANDUM OF ORAL DECISION DELIVERED BY M. C. DENHEZ ON  
NOVEMBER 1, 2011 AND ORDER OF THE BOARD**

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**1. INTRODUCTION**

Although some important issues in this severance/variance dispute were settled, others were not.

1201159 Ontario Ltd. (the Proponent) owns 2.45 hectares of vacant land in the City of Hamilton (the City), across Barton Street East from Hamilton General Hospital (HGH), at the corner of Ferguson Avenue North. The Proponent proposed to deal with this large property in two parts:

- Away from Barton Street East, it would lease space for hospital parking ("the hospital parking site");
- Facing Barton, it wanted two drive-through restaurants (the "restaurant site", including driveways). The space for those restaurants would need to be severed (in two severances). Restaurant development would also involve six variances.
- *Only those severances and variances* are currently before the Board (the hospital parking was addressed in a previous Board Decision).

City planning staff supported the applications for severances and variances, which were approved by the Committee of Adjustment (COA). However, some nearby owners had misgivings – *not* about the restaurant development (which they supported), but about parking, notably apprehensions about hospital parking being converted to commercial parking, and about potential spread of parking (which, in the vernacular, the Board could call "parking creep"). When the COA approved these applications for variances and severances, Victor Veri and William Simone (the Appellants) appealed to the Board.

At the hearing, the Proponent was represented by Counsel, Ms Smith, with the support of a Planner, Mr. Webb. The Appellants were represented by their Agent, Mr.

van Donkersgoed, with the support of a Surveyor, Mr. Woods. The City Planner on the file, Mr. Barnett, testified under summons in support of the applications; the City did not otherwise attend, nor did HGH.

There was some accommodation. The Proponent abandoned its request for one of the variances, and volunteered to clarify another; the Appellants, for their part, said they were “comfortable” with many of the Proponent’s requested terms. However, some items were still in dispute.

The Board has carefully considered all the evidence, as well as the submissions of both sides. The Board concludes, as City staff and the COA did,, that the proposal meets the terms of the *Planning Act* for variances and severances; the appeals are dismissed – but this Decision nonetheless records several key clarifications requested by the Appellants. The details and reasons are set out below.

## **2. BACKGROUND AND EVENTS**

### **2.1 Geographical Context**

In 2007, the City adopted By-law 07-026 to amend its Zoning By-law 6593. By-law 07-026 rezoned all 2.45 hectares, referring to it as four "Blocks":

- **“Block 1”** faced Barton Street, at the corner of Ferguson, and extended 25 metres back from the Barton frontage.
- **“Blocks 2, 3 and 4”** were further back from Barton, i.e. behind Block 1. They were each subject to an "H" ("Holding") provision under Subsection 38 of the *Planning Act*, preventing development on Blocks 2-4. This reflected the City's intention for Block 1 to be developed first.

None of these lands, however, have been severed; the boundary lines between Blocks are on zoning and site plan documents, *not* on land titles. Indeed, the restaurant site bore little resemblance to the Blocks: the site would include all of Block 1, plus part – though not all – of Block 2. Block 2, in turn, would be divided into three parts: a northern strip for restaurant use, a central strip to become part of the driveways, and a southern strip to be merged with the hospital parking area.

In March 2008, the property was further rezoned to permit drive-through restaurants. Plans were prepared for two such restaurants, called "Building A" and "Building B" (modelled on Tim Horton's and A&W; but no firm arrangements had been finalized with any occupant yet). Each would have its own severed land (Parcel A and Parcel B), with its own exterior area for parking, access, queue lane and landscaping. Finally, there would also be a Parcel C including joint driveways on the east and south sides (with multiple easements for joint access/use and infrastructure). These joint driveways would also be shared with the hospital parking.

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## **2.2 The Matters Now under Appeal**

As mentioned, the Proponent sought two severances for Parcels A and B, plus provisions for the driveways with easements, all of which turned out to be uncontested.

The requested variances were numbered as follows:

- #1.** To permit a maximum setback from Ferguson Avenue North to Building B (including proposed canopy) of 4.0 metres, whereas the zoning maximum was 2.0 metres.
- #2.** To permit windows on Building B to have a minimum head height of 2.1 metres, whereas the zoning minimum was 2.4 metres.
- #3.** To permit the garbage enclosure for Building B to be located within the easterly sideyard, whereas that location would not normally be permitted by the By-law.

- #4. To permit the same garbage enclosure to be located 0.0 metres from Barton Street East, instead of the zoning minimum of 0.45 metre.
- #5. To permit parking spaces to have minimum dimensions of 2.6 metres by 5.5 metres, whereas the By-law required 2.7 metres by 6.0 metres.

There was also a sixth variance, described by the COA as follows:

To permit parking and site access, required for and accessory to the proposed Buildings A and B, to be located partially on Block 2, notwithstanding that all uses are prohibited until such time that construction of Buildings A and B has commenced.

The first five variances were explained as being necessary for practical reasons. The sixth was said to allow activities to begin on Block 2, in *anticipation* of construction (notwithstanding the “H” Holding provision which was still binding on Block 2, and which would otherwise prevent any development on that side of the site).

The COA agreed, issuing separate Decisions on the severances and variances. In its Notes, it also imposed Conditions, though they were essentially identical for the severances and variances.

### **2.3 The Appellants’ Concerns**

The Appellants expressed longstanding concerns with parking lots. That issue had been debated during discussions of the adjoining hospital parking site. The Appellants did not agree with the site plan for that hospital parking (and wished to record their ongoing concerns on that account).

When the City nonetheless approved the site plan for the hospital parking site, it did so *conditional* on rezoning that site (which rezoning excluded the restaurant site). When that rezoning was adopted by Council, it was appealed to the Board in ***Orev Investments Ltd. et al. v. City of Hamilton et. al.***, Decision issued on June 29, 2010. That appeal was ultimately settled, on terms described by Board Vice-Chair Seaborn in that Decision:

The (original) wording of the By-law makes it possible that parking be permitted for those other than employees of the hospital... The wording (should) reflect the intent, being, parking for employees and visitors to the hospital, as opposed to the wider public... The appeal is allowed in part and By-law 09-246 is modified...

The Board thereupon amended the By-law to specify that the parking area in question would be "used for parking only in conjunction with the Hamilton General Hospital".

That appeared to dispose of the concern about "commercial" parking. However, when the City next turned to the question of the restaurant site (and its severances and variances), the preamble to the COA's Notice of Decision used this wording:

IN THE MATTER OF AN APPLICATION... to permit the conveyance of a vacant parcel of land... on plan prepared by A.J. Clarke and Associates Ltd., dated May 6, 2011, for commercial purposes....

This apparently led some observers to infer that the Proponent was trying to reopen the door to generalized commercial parking. The Appellants, said Mr. Veri, did not want to "go back to square one" on that subject.

They also expressed concern about parking creep. If a restaurant failed to be built, would its land go to parking? And could there be more parking than anticipated, because of inaccuracies in measurement?

At the hearing, after private discussion between the Parties, the Appellants summarized their position:

- They were "comfortable" with:
  - the proposed **severances** (but were disturbed by references to "commercial purposes" in the COA Decision's preamble);
  - The **size and location of the buildings and their respective parking/access spaces**; and
  - The **activities / uses** proposed for the buildings;
- They wanted "clarity", notably for overall measurements for the restaurant

site *vis-à-vis* the hospital parking site;

- They wanted assurance that if development failed to proceed at Parcels A or B, the land would not be converted to more parking (they added that the sixth variance, notably its permission for anticipatory parking and site access on Block 2, could potentially be misused for that purpose); and
- They wanted more assurance against parking creep.

On that last concern, they pointed to the hospital parking's zoning map (Exhibit 2, page 124), formally attached to the By-law rezoning the hospital parking site (and similarly attached to the By-law in Vice-Chair Seaborn's Board Order). That map, apparently prepared at the City, included measurements. Although those measurements were almost impossible to read without a microscope (notably in the copy attached to the Board's Decision), close study suggested that they could not possibly be reconciled *verbatim* with the City's line drawing of the zoning boundaries. This led the Appellants to infer that there might be some hidden initiative afoot, to expand the space of the hospital parking site at the expense of the restaurant site.

Parenthetically, they also questioned why joint driveway space, to be ultimately shared by hospital parking, would be carved out of the restaurant site rather than the hospital parking site; alternatively, they said, the Proponent should have insisted that the hospital parking use driveways of its own, without sharing those of the restaurants.

### **3. APPLICABLE CRITERIA**

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

...Regard shall be had, among other matters, to the health, safety, convenience, accessibility for persons with disabilities 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)

Consent for the severance, however, is linked to the variances. For variances, the criteria (often called “the four tests”) are set out at Subsection 45(1) of the *Planning Act*, namely that a variance must be minor, desirable for the appropriate development or use of the property, and maintain the general intent and purpose of both the Zoning By-law and of the Official Plan.

The 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 proceed by way of subdivision.

## **4. OBSERVATIONS AND FINDINGS**

### **4.1 Uncontested Matters**

These appeals did not unfold in the usual way. On one hand, the Notices of Appeal challenged both the severances and the variances, sometimes referring to concerns about dimensions in the applications. At the hearing, on the other hand, the Appellants said they were “comfortable” with the severances. They raised no objections, and gave not the slightest indication of any non-compliance with statutory criteria.

The same was generally true of the variances. The Proponent withdrew Variance #4, for proximity of Building B’s garbage enclosure to Barton Street. Except for the sixth variance (to allow preliminary activity on Block 2, notwithstanding the “H” Holding provision), the Appellants raised no concerns about the remaining variances, and again gave no indication of any non-compliance with the four tests of the *Planning Act*.



In short, for all practical purposes, the Appellants essentially withdrew their appeals of those severances and variances. Nonetheless, out of an abundance of caution, the Proponent's Planner outlined how the requested severances and variances complied with all statutory requirements. That expert opinion was unchallenged, and the Board finds no reason to disagree. The Board's Decision will therefore be the same as the recommendation of City staff and the COA's Decision, concerning the severances and Variances #1, #2, #3 and #5, including the same COA Conditions.

That left the questions of "commercial parking", parking creep, and the implications of conditions and measurements.

#### **4.2 Clarifications**

Certain preliminary clarifications should be of some assistance.

First, the matter currently before the Board, over which it has jurisdiction, specifically concerns the appeals of the COA Decisions on the *severances and variances*. The Board is not currently mandated to adjudicate site plans or zoning, which were not the subject matter of those Decisions, and are hence, not under appeal; nor is the Board mandated to adjudicate anything about the abutting property (the hospital parking site), let alone its zoning boundaries.

Second, this case is not a revisitation of whether to permit "commercial parking". The Board discerns no intent to allow parking on the restaurant site, other than for patrons. The Board was advised of nothing, in the preamble to the COA Decisions, which could introduce commercial parking as a zoned use, which it is not.

Third, in the hypothetical event of a restaurant failing to be built, the Board has no expectation that its land could thereupon be converted to parking, under the existing documents. In the words of the Proponent's Planner, the documents are structured so that "the only way that parking happens (on the restaurant site) is as part of a Building Permit" (i.e. for the restaurants). For good measure, Counsel for the Proponent volunteered to replace the sixth variance as follows, for greater clarity:

To permit parking and site access, on that portion of Block 2 of By-law 07-026 located on the lands subject to Site Plan approval SPA-10-127, notwithstanding the By-law 07-026 prohibits such uses, until buildings are

constructed. It is understood that the parking and site access may only be constructed in association with buildings constructed under Site Plan approval and cannot be built as an independent and separate use.

The Board agrees with this clarification. The Board adds that under Subsection 45(18.1.1) of the *Planning Act*, it finds the change from the original application sufficiently minor that it does not warrant re-circulation. The Board amends the applications accordingly, and is prepared to authorize that variance as modified.

#### **4.3 Remaining Questions**

That left the question of the measurements, and the sharing of driveways.

The Board agrees with the expert opinion of the Surveyor, Mr. Woods, that the figures on the zoning map of the abutting hospital parking site do not coincide with the line drawing on that map. He added that if some of those figures were to be believed, the hospital parking site might have less space zoned for cars than previously thought.

As intriguing as that question may be, it is for a different site, with different issues. There was no suggestion, let alone proof, that the measurements were incorrect for the severed parcels themselves, as described in the applications – or for the variances, for that matter. The concerns stemming from alleged cartographic oddities on the abutting site have no direct bearing on the approvals currently before the Board.

As for the wisdom of sharing driveways with the hospital parking, the Board was not persuaded that this topic was relevant to the statutory compliance of the requested severances and variances. Even if it were, the Board agrees with the Proponent's Planner that there are important positive aspects. By combining points of access, there will be fewer points of entrance and egress, thereby reducing the number of locations where there could be potential interference or conflict with traffic. Furthermore, since services would be buried under the driveways, doubling up would also assist combined servicing. The Board finds nothing that would stand in the way of the requested severances and variances on that account.

## 5. CONCLUSION

The Board finds that the requested severances and variances should proceed, subject to one modification to one of those variances. The Board is not, however, leaving the Appellants empty-handed, in terms of clarifications that they considered important.

### THE BOARD ORDERS:

1. The appeals to **Variances #1, #2, #3 and #5** herein are dismissed, and the said variances to By-law 6593 of the City of Hamilton (as amended) are authorized, subject to the Conditions set out by the Committee of Adjustment.
2. The Board acknowledges that the request for **Variance #4** has been withdrawn.
3. The Board, having been asked to consider an application for a sixth variance which was amended from the original application, and the Board having determined under Subsection 45(18.1.1) of the *Planning Act* that no further notice is required, authorizes the said variance in accordance with the following terms:

To permit parking and site access, on that portion of Block 2 of By-law 07-026 located on the lands subject to Site Plan approval SPA-10-127, notwithstanding the By-law 07-026 prohibits such uses, until buildings are constructed. It is understood that the parking and site access may only be constructed in association with buildings constructed under Site Plan approval and cannot be built as an independent and separate use.

4. The appeals to the severances are dismissed, and the provisional consent is to be given, subject to the Conditions set out by the Committee of Adjustment.

It is so Ordered.

“M. C. Denhez”

M. C. DENHEZ  
MEMBER