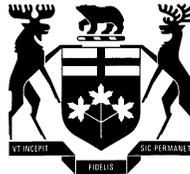


ISSUE DATE:

**August 21, 2012**



Ontario

Ontario Municipal Board

Commission des affaires municipales de l'Ontario

PL120525

IN THE MATTER OF subsection 53(31) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Motion By: The City of Hamilton  
Purpose of Motion: Request for an Order Dismissing the Appeal  
Appellant: 1146663 Ontario Limited (Margabe Construction)  
Subject: Consent  
Property Address/Description: 55 Onyx Court  
Municipality: City of Hamilton  
Municipal File No.: B-05/12  
OMB Case No.: PL120525  
OMB File No.: PL120525

IN THE MATTER OF subsection 53(31) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended

Motion By: The City of Hamilton  
Purpose of Motion: Request for an Order Dismissing the Appeal  
Appellant: 1146663 Ontario Limited (Margabe Construction)  
Subject: Consent  
Property Address/Description: 59 Onyx Court  
Municipality: City of Hamilton  
Municipal File No.: B-06/12  
OMB Case No.: PL120525  
OMB File No.: PL120526

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

Applicant and Appellant: 1146663 Ontario Limited (Margabe Construction)  
Subject: Consent to sever  
Property Address/Description: 55 Onyx Court  
Municipality: City of Hamilton  
Municipal File No.: B-05/12  
OMB Case No.: PL120525

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

Applicant and Appellant: 1146663 Ontario Limited  
(Margabe Construction)  
Subject: Consent to sever  
Property Address/Description: 59 Onyx Court  
Municipality: City of Hamilton  
Municipal File No.: B-06/12  
OMB Case No.: PL120525  
OMB File No.: PL120526

**APPEARANCES:**

**Parties**

**Agent**

City of Hamilton

L. Magi

1146630 Ontario Ltd.  
(Mario Lacivita and Cid Pietrantonio)

**DECISION DELIVERED BY J. CHEE-HING AND ORDER OF BOARD**

The City of Hamilton (the “City”) has brought a motion to dismiss the appeal of 1146630 Ontario Ltd. (the “Applicant/Appellant”) without holding a hearing, pursuant to subsection 45(17) of the *Planning Act* (the “Act”). The Applicant/Appellant had appealed the decision of the City’s Committee of Adjustment (“COA”) to deny granting a consent respecting 55 and 59 Onyx Court. The purpose of the consent is to convey the severed portions of 55 and 59 Onyx Court to 48 Arrowhead Drive for residential purposes.

In its motion filings and submissions, the City submits that the notice of appeal does not disclose any apparent land use planning grounds upon which the Board could

allow all or part of the appeal (Exhibit 1). The City submits that the notice of appeal disclose only that the severances are needed in order to accommodate a swimming pool in the backyard of 48 Arrowhead Drive. No planning justification was indicated in the notice of appeal nor did the Applicant/Appellant indicate how the proposed severances met the applicable statutory tests under the Act. At the motion hearing, counsel for the City submitted that the Applicant/Appellant indicated in the notice of appeal that he will not be calling any expert witnesses to provide evidence in support of his application. The City submits that the desire to locate a swimming pool in the rear yard is not a genuine, legitimate or authentic planning reason upon which the Board could grant or refuse provisional consent.

The Applicant/Appellant in his notice of response as well as in his submissions at the motion hearing states that the consent application would not result in the creation of irregular shaped lots as the City contends. Furthermore, that the subdivision is fully built out and the consent application would not make it difficult to assemble adequate parcels of land as no further land assembly is possible (Exhibit 3). Mr. Pietrantonio is one of the owners of 1146630 Ontario Ltd. He acknowledged at the hearing, that his notice of appeal did not contain any planning reasons that form the basis for his appeal to this Board. He admits that his knowledge of the appeal process is rudimentary and was not aware that he had to provide planning reasons in the notice of appeal. He submitted that it is his intention to retain a planning expert at the hearing into his appeal.

Mr. Pietrantonio informed the Board that his application has since changed and involves two rather than three properties making the land assembly less onerous. He testified that it is now his intention to sever a portion of 59 Onyx Court which would be conveyed to 48 Arrowhead Drive. 55 Onyx Court has since been sold and is not now part of the proposed severance. He argues that his consent application will not

result in the creation of an irregular shaped lot nor will it be incompatible with the lotting fabric of the area.

Counsel for the City submits that the notice of appeal contains no planning reasons or justification upon which the appeal can be successfully argued in front of this Board pursuant to subsection 45(17) of the Act.

In considering this motion to dismiss, the Board must look at subsection 45(17) of the Act. In accordance with this subsection, the Board may dismiss all or part of an appeal without holding a hearing on its own initiative or on the motion of any party if,

- a) it is of the opinion that,
  - (i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Board could allow all or part of the appeal,
  - (ii) The appeal is not made in good faith or is frivolous or vexatious,
  - (iii) The appeal is made only for the purposes of delay, or
  - (iv) The appellant has persistently and without reasonable grounds commenced before the Board proceedings that constitute an abuse of process.

The City submits that the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Board could allow all or part of the appeal. The Applicant/Appellant by his own admission states that to be correct. However, it is his submission that he is a small builder and his knowledge of the planning appeal process is very limited.

The Board finds that the Applicant/Appellant cannot cite his rudimentary knowledge of the appeal process as a valid reason to justify the lack of any planning justification or reasons in his notice of appeal. The notice of appeal must be properly considered

and the planning reasons for filing an appeal must be given some serious thought. The Board has consistently held in its jurisprudence on motions for dismissal without holding a hearing, that the grounds for appeal must anticipate the scope of the appellant's concerns and hold the promise of contrary sustainable evidence to be called upon which the Board can either allow or dismiss the appeal. In this matter, the Board finds that the applicant's reason that the severance is required to accommodate a swimming pool in the rear yard is not a sufficient planning justification upon which the appeal could be sustained.

The Board notes that the Applicant/Appellant asserted that he would be retaining an expert witness to give planning evidence at the hearing into his appeal. The promise of contrary sustainable evidence to support his consent application is not enough. The Board finds that the Applicant/Appellant has demonstrated a lack of preparedness even at this motion hearing by not demonstrating to the Board that he at least knows of the planning criteria (subsection 51(24) of the Act) upon which his consent application will be tested.

It is for these reasons that the Board finds that the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Board could allow all or part of the appeal. The Board will allow the City's motion and dismiss the appeal.

Finally, the Board notes the evidence of the Applicant/Appellant that his consent application has changed in that it now involves only two rather than three residential lots. As a result of this material change, he may have an opportunity to file another consent application with the City. The Board hopes that he now has a much better understanding of the planning approval and appeal process and the requirements that must be met when filing an appeal to this Board.

Therefore, the BOARD ORDERS that the motion for dismissal of the appeal without holding a hearing is granted and the appeal is dismissed.

So Orders the Board.

“J. Chee-Hing”

J. CHEE-HING  
MEMBER