

Ontario Land Tribunal
Tribunal ontarien de l'aménagement
du territoire



ISSUE DATE: September 09, 2021

CASE NO(S): PL190506

PROCEEDING COMMENCED UNDER subsection 53(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant: Faisal Chalya and Alaa Chalya
Subject: Consent
Property Address/Description: 1426 Indian Grove
Municipality: City of Mississauga
Municipal File No.: B021/19
OLT Lead Case No.: PL190506
OLT Case No.: PL190506
OLT Case Name: Chalya v. Mississauga (City)

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Applicant and Appellant: Faisal Chalya and Alaa Chalya
Subject: Consent
Property Address/Description: 1414 Indian Grove
Municipality: City of Mississauga
Municipal File No.: B022/19
OLT Lead Case No.: PL190506
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Heard: June 2-4, 2021 and August 13, 2021 by
video hearing

APPEARANCES:

Parties

Faisal and Alaa Chalya

Counsel

Russell Cheeseman

City of Mississauga

Andrew Biggart

Laurence Kuysten

Ian Flett

DECISION DELIVERED BY SHARYN VINCENT AND ORDER OF THE TRIBUNAL

BACKGROUND

[1] Faisal and Alaa Chalya (“Appellants”), the owners of 1414 and 1426 Indian Grove, have appealed the refusal of requests to the Committee of Adjustment (“Committee”) to sever the rear portions of the two abutting properties in order to create two new lots fronting onto an existing privately owned laneway, Madigan Lane, held in separate ownership by a numbered company controlled by the Appellants. The proposed lots meet the minimum frontage and lot area requirements, and therefore are not subject to related requests for variance.

[2] The existing properties known as 1414 and 1426 Indian Grove are generous, very deep lots having similar frontages of approximately 25 metres and depths of approximately 130 metres. The Appellants proposed to sever approximately 37 metres and 40 metres respectively from the rear yards of existing lots to create two new lots, of differing depths, which would front onto, and be accessed by Madigan Lane. The Tribunal was advised that Madigan Lane is one of five historic anomalies recognized by the City of Mississauga (“City”) and deemed for the purposes of the zoning by-law, to provide frontage despite not being a public right-of-way, thereby rendering the subject lots to be through lots.

[3] The applications were refused as the Committee was not satisfied that the applications would result in a proper and orderly development, and specifically cited, the failure to satisfy the criteria of s. 51(24), the test under the *Planning Act*.

[4] The City appeared in support of the refusal by the Committee and tendered planning and engineering witnesses, Allan Ramsay and Muneef Ahmad, who were both qualified by the Tribunal to assist in its determination by providing opinion evidence in their respective areas of expertise. Laurence Kuysten (who is currently the President of the Kane Road Ratepayers Association) was also a party in opposition to the requests to sever and tendered planning witness, Kevin Bechard.

[5] Evidence, on behalf of the Appellants, was given by TJ Cieciora who was qualified to assist the Tribunal with opinion evidence in areas of land use planning.

Context and Overview of Issues

[6] There are seven similarly generous, deep, through lots lying between the subject properties and Indian Road, which also extend to Madigan Lane. The visual evidence and the testimony of the planning witnesses identified three irregularly shaped infill lots, which appear to have been created through severance of a portion of the rear yards of properties fronting onto Indian Grove, two of which are distinguished in that they have frontage on and access to Indian Road. The third fronts onto and takes access from a portion of Madigan Lane running 62 metres from Indian Road, which has been improved to appear as a public right-of-way. As Madigan Lane continues beyond the end of the pavement, it reads as a tree lined, hard packed country lane for approximately 89 metres, and then narrows to a beaten footpath where it intersects with the proposed front lot lines of the lots to be severed from the subject properties, which is the last portion being approximately 142 metres. The original homestead and one other detached dwelling front onto the laneway portion.

[7] Madigan Lane is separated from Edistel Crescent, a local residential street running perpendicular to the lane, by a 0.3-metre reserve held by the City, which is physically demarcated by a guard rail to clearly signal a terminus, and prevent vehicular access beyond the end of the crescent.

[8] The proposed lot creations are premised upon the Appellants securing approvals to service and provide emergency access only to the proposed new lots from Edistel Crescent, which in turn requires the Appellants receive the necessary approvals of City Council to allow both, followed by the necessary lifting of the reserve.

[9] It is the position of the City that the issue of the 0.3-metre reserve is but one of four 'fatal' bases for which the appeals should be dismissed, which, when considered cumulatively, result in the proposed severances being characterized as creating two isolated lots, which fundamentally, does not represent good planning, and are not in the public interest. The City also lead evidence with respect to lack of conformity to Official Plan policies, the failure of the Appellants to demonstrate that stormwater management was feasible for the lands, and the fact that Madigan Lane is separately held, does not form part of the appeals before the Tribunal but is being proffered as providing vehicular access to the two proposed lots, which are otherwise 230 metres from a public right-of-way.

[10] Despite understanding that the City's opposition to the applications extends beyond the issue of servicing, the Appellants have elected to pursue conditional approvals of provisional consents through these appeals with the full knowledge that the Tribunal has no jurisdiction to compel the lifting of the reserve.

[11] The issues addressed on behalf of Mr. Kuysten align with the position of the City that the proposed lot creations do not represent good planning, are not compatible with the character of the existing neighbourhood, do not meet many other Official Plan policies and fail to satisfy some of the criteria of s. 51(24) of the *Planning Act*.

The Evidence

[12] There were significant differences in the planning evidence with respect to the opinions as to whether the new lots to be created would enhance and be compatible with the character of Clarkson-Lorne Park community. The relevant 'Neighbourhood

Character Area' subject of specific Official Plan policies is to be considered in combination with those applying City-wide, when creating new lots in this area.

[13] Mr. Cieciora, in support of the severances, focused his opinion on the fact that the proposed lots would be compliant with the minimum lot frontage and area requirements of the zoning by-law and were therefore *de facto*, compatible with the surrounding community, lying both to the east and west of Madigan Lane, which share the same zoning, despite having considerably different lot areas. The witness also elected to default to prescribed mandatory future approval processes of site plan control and approval pursuant to the tree preservation by-law, to address any impacts arising from the development of the two lots, thereby compartmentalizing consideration of the creation of the lots from the ultimate development thereof.

[14] Messrs. Ramsay and Bechard applied more rigorous analyses to the neighbourhood specific and City-wide Official Plan policies, drawing to the attention of the Tribunal s. 9.2.2.3, which sets out policies for change in Neighbourhoods, which are considered 'Non-Intensification Area' and which requires as follows:

While new development need not mirror existing development, new development in Neighbourhoods will:

- a. respect existing lotting patterns;
- b. respect the continuity of front, rear and side yard setbacks;
- c. respect the scale and character of the surrounding area;
- d. minimize overshadowing and overlook on adjacent neighbours
- e. incorporate stormwater best management practices
- f. preserve mature high quality trees and ensure replacement of the tree canopy; and
- g. be designed to respect the existing scale, massing, character and grades of the surrounding area.

[15] Mr. Ramsay characterized the proposed lot creations as being a significant departure from the existing lotting pattern, which introduce new rear yard relationships for the retained lots and the two isolated lots to be created at the end of a 230-metre private laneway, which would not be owned by the respective owners of any new dwelling dependent thereon for access.

[16] With respect to the balance of s. 9.2.2.3, items c through g, the witness indicated that no sufficient detail had been provided by the Appellant to assess these aspects for conformity to the Official Plan or s. 51(24)(d) of the *Planning Act*, which requires the Tribunal to determine the suitability of the land for which it is to be subdivided beyond simply what it is zoned to permit. He also expressed concerns about dealing with these two lots in isolation of the seven other similarly deep lots, lying between the lots subject of the appeals and Indian Road, as to whether the granting of these severances would preclude orderly development for the balance, thereby raising the issue of prematurity.

[17] Mr. Bechard's evidence was similar to that of Mr. Ramsay with greater emphasis on the probable impact of removing existing trees, both on the proposed lots and Madigan Lane itself, citing photographs of Exhibit 10C, and in particular, photographs 9 and 11. It is the opinion of Mr. Bechard that the proposed development of the new lots would require the removal of most of the vegetation in the rear yards of the existing lots and along Madigan Lane. An arborist inventory report formed part of the materials submitted in support of the consent applications, and the Tribunal was advised that, while offering no assessment of the likely impact of development of the two lots and associated access, the inventory identified 115 trees in the rear yards of 1414 and 1426 Indian Grove, and on or adjacent to Madigan Lane.

[18] In the opinion of the witness, tree removal will disrupt the character of the area and is also contrary to the direction of the Official Plan to preserve, protect and enhance the Urban canopy.

[19] The Parties also took very different positions with respect to the "adequacy of utilities and municipal services", another of the considerations pursuant to s. 51(24) of the *Planning Act*. The Appellants take the position that provisional consent can be granted on the condition(s) that satisfactory arrangements are made with the various City and Regional departments responsible, whereas the City maintains that the feasibility of servicing the lots in principle is more appropriately determined, prior to the

granting of provisional consent. The City's engineering witness was of the opinion that despite the requirement that any development on the lots be subject to site plan approval, a question of feasibility was not appropriately deferred until after provisional consent was granted or to site plan approval. More importantly, the existing 0.3-metre reserve held by the City precludes any extension of servicing, even if demonstrated to be feasible, without the approval of City Council, which holds unilateral authority in deciding any request to lift the reserve. The witness for the Appellants suggested that if extending the servicing from Edistel was not approved by the City, that servicing could be routed down Madigan Lane to Indian Road. The feasibility of this alternative had not been formally submitted to the City for review and the Tribunal is therefore without evidence as to the feasibility.

[20] The Tribunal also heard evidence with respect to conceptual alternatives for access to the new lots for both private and emergency vehicles. As explained in the first paragraph of this Decision, Madigan Lane is privately held by a third party, legal entity, and as such is not part of the lands subject of the appeals. The lane is, however, proposed as the primary access for the new lots, to be secured through the imposition of a condition that an easement be granted in perpetuity. Emergency access would also be dependent upon utilizing a portion of the private lane at the terminus of Edistel Crescent. The concept would require the removal of the guard rail, the creation of a hard surface hammerhead (capable of supporting a fire truck), the installation of removable emergency bollards, and the creation of easements in favour of the City to use the emergency access, if necessary, and site plan approval of Council.

[21] Counsel for the City takes the position that, the appeals if granted in the absence of registered easements, would create two land locked parcels.

Analysis and Findings

[22] Having considered all of the evidence and submissions, including the extensive list of 20 conditions, precedent recommended to support the granting of provisional

consent at this time, and marked as Exhibit 4, the Tribunal is not satisfied, that the severances are not premature or in the public interest, including the welfare of present and future inhabitants.

[23] The Tribunal prefers the evidence of Messrs. Ramsay and Bechard that the severances will be at variance with the lotting pattern for the seven other remaining lots, which currently regard Madigan Lane as their respective rear lot line. The Tribunal agrees with the characterization of the proposed two new lots as being isolated, relating to neither the Indian Grove neighbours, nor the Edistel Crescent neighbours, other than perhaps when taking their garbage bins over to the terminus of the crescent for municipal pickup. This remedy demonstrates in a very practical way the isolation of the two lots.

[24] The Tribunal was left with inconclusive evidence with respect to the adequacy of utilities and municipal services other than assurances from Counsel for the Appellant, that only his clients assume the risks associated with the pursuit of resolutions to these uncertainties, and in a specified time frame. The Tribunal, however, is required by s. 51(24) of the *Planning Act* to make a determination with respect to the suitability of the lands subject of the appeals for which they are being subdivided. Given the cumulative uncertainties, each one of which, proving potentially fatal to the viability of the two lots for infill development, and compounded by the finding that the lots are isolated, the Tribunal is not satisfied that the lands are suitable.

[25] Perhaps, most fundamentally, the Tribunal finds that the lands to provide the required frontage for the proposed lots and access to Indian Road, some 230 metres away, are not currently before the Tribunal as part of appeals pursuant to s. 53(19) of the *Planning Act*, and therefore, the Tribunal's authority to impose conditions pursuant to s. 51(25) of the *Planning Act* on these lands falls beyond the appeals under consideration.

[26] The Tribunal finds that the creation of the two new lots would not constitute good planning.

ORDER

[27] The appeals are dismissed.

"Sharyn Vincent"

SHARYN VINCENT
VICE-CHAIR

Ontario Land Tribunal

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