

# Consent Powers Under the Planning Act

Harold Elston, Elstons, Barristers & Solicitors

Aynsley Anderson, Elstons, Barristers & Solicitors

Lorelie Spencer, Ba.U.R.Pl., MCIP, RPP, Senior Planner, The Jones Consulting Group Ltd.

Brandi L. Clement, AICP, MCIP, RPP, Partner, The Jones Consulting Group Ltd.

# Consent Powers Under the Planning Act

## Presentation Outline:

- Introduction of Presenters
- What is a Consent to Sever?
- Plan of Subdivision vs Part Lot Control
- Committee of Adjustment Duties
- Planning Act – Section 53
- Evaluation of a consent – Planning/Legal Considerations
- Once a Consent, Always a Consent?
- Section 50(3)/50(5)
- How Courts Deal With This Situation
- Case Law
- Once a Consent, Always a Consent...Unless Stipulated
- Lots Created Pre March 1979
- Stipulated Consents
- Amendment to Planning Act – Section 50(12)
- Example Scenarios
- When Would it be Appropriate?
- Issues That May Arise
- How do Committees Deal With This Today?

# Consent Powers Under the Planning Act

## What is a Consent to Sever?

- Planning Act sets out the ground rules for land use planning in Ontario and describes how land uses may be controlled, and who has the authority to regulate them
- Consent (AKA Land Severance) is the authorized separation of a piece of land to form two new properties
- Consent to sever is required if a portion of the land is to be sold, mortgaged, charged, or is to form part of an agreement lasting more than 21 years. Also includes registration of rights-of-way, easements and any changes to existing property boundaries

# Consent Powers Under the Planning Act

## Plan of Subdivision vs Part Lot Control

- If a number of severances are intended in same area, plan of subdivision may be more appropriate
- Release of Part Lot Control is another form of subdividing land. This is used typically for existing blocks/lots on a Plan of Subdivision where further division is necessary

# Consent Powers Under the Planning Act

## Committee of Adjustment Duties

- Section 53 of the Planning Act permits the Committee of Adjustment to make decisions for changes in the configuration of land, specifically in the form of consents
- Provisional consent approval will require conditions which must be fulfilled to ensure the consent is finalized s.53(12)
- Conditions are to be met within one year and must be reasonable and able to be fulfilled within this timeframe
- Approval authority has no jurisdiction to impose a condition which cannot be satisfied
- Once conditions are met, a certificate is issued by the authority
- Consent must be effected within two (2) years, unless an earlier deadline is given

# Consent Powers Under the Planning Act

## Planning Act - Section 53

- s.53 permits a consent to be given where the approving authority is satisfied that a plan of subdivision of the land is not necessary for the proper and orderly development of the land
- s.53 establishes the procedures for the application and granting of consents, sets the powers related to land severances and specifies appeal mechanisms
- Applicant must submit the prescribed information or application can be refused
- s.53(12) provides that when considering an application the approval authority should have regard for matters considered on a subdivision approval set out in s.51(24)

# Consent Powers Under the Planning Act

## Planning Act - Section 53

- Once obtained, a consent may not be varied or amended by the approval authority - only on an appeal to the OMB
- Consent granting authority may change the conditions of a provisional consent at any time before a final consent is given. If the change is not considered minor in nature notice of the change must be given to required persons and public bodies
- A consent lapses two years from the date of the certificate, or earlier if specified as part of the application's conditions

# Consent Powers Under the Planning Act

## Evaluation of a Consent - Planning Considerations

- In considering a Consent application, the consent-granting authority evaluates the merits of each proposal against criteria such as at a minimum:
  - Conformity with Official Plan
  - Compliance with local Zoning By-law
  - Compatibility with adjacent lands
  - Suitability of land for proposed purpose (i.e. size and shape of lot(s) being created)
  - Adequacy of vehicular access and services
  - Protection from potential flooding
  - Minimum Distance Separation (where applicable)
- A Consent application must also be consistent with/conform to any applicable Provincial Plans (i.e. Provincial Policy Statement, PTG Plan)



# Consent Powers Under the Planning Act

## Evaluation of a Consent-Legal Considerations

- Solicitor ensures that the consent is properly depicted and recognizes where there may be a problem
- Creating a parcel of land is an important land use planning process
- Once a severance has been approved, the new land parcels may be sold or resold without further approval
- Only exception is if the consent-granting authority has specified that further conveyance should not occur without further approval
- Subdivision Rules have evolved over time and one of the newest rules came into effect in March of 1979 – “Once a Consent, Always a Consent”

# Consent Powers Under the Planning Act

## Once a Consent, Always a Consent?

As of 1979, Section 50(12) reads:

*“Where a parcel of land is conveyed by way of a deed or transfer with a consent given under Section 53, subsections (3) and (5) of this Section do not apply to a subsequent conveyance of, or other transaction involving, the identical parcel of land unless the Council or the Minister, as the case may be, in giving the consent, stipulates either that subsection (3) or subsection (5) shall apply to any such subsequent conveyance conveyance or transaction.”*

# Consent Powers Under the Planning Act

## Subdivision Control

### Section 50(3) Subdivision control

*“No person shall convey land by way of a deed or transfer, or grant, assign or exercise a power of appointment with respect to land, or mortgage or charge land, or enter into any agreement that has the effect of granting the use of or right in land directly or by entitlement to renewal for a period of twenty-one years or more unless,*

- (a) The land is described in accordance with and is within a registered plan of subdivision;*
- (b) The grantor by deed or transfer, the person granting, assigning or exercising a power of appointment, the mortgagor or chargor, the vendor under an agreement of purchase and sale or the grantor of a use of or right in land, as the case may be, does not retain the fee or the equity of redemption in, or a power or right to grant, assign or exercise a power of appointment in respect of, any land abutting the land that is being conveyed or otherwise dealt with other than land that is the whole of one or more lots or blocks within one or more registered plans of subdivision;*
- (c) The land or any use of or right therein is being acquired or disposed of by Her Majesty in right of Canada, Her Majesty in right of Ontario, or by any municipality;*

### Section 50(5) Part-lot Control

# Consent Powers Under the Planning Act

## How the courts have considered Section 50(12) and How the Problem Arises

- *R & R Estate (1989)*
- *Ochitwa v. Biddulph (1992)*
- *Thompson Estate v. London (1997)*
- *Miller v. Welland (City) (2009) (OMB)*

# Consent Powers Under the Planning Act

## **R & R Eastern Estates Ltd. v. Van Heurn**

- 1974: Owners obtain consent to convey Part 1 of their land, and retain Part 2
- After a number of conveyances, both Part 1 and Part 2 are registered under the same name (R & R Eastern Estates Limited) in 1981
- R & R tries to sell Part 1 to Van Heurn in 1986
- Van Heurn says that R & R owns the adjacent lands (Part 2) and as a result, the properties have merged

# Consent Powers Under the Planning Act

## R & R Eastern Estates Ltd. v. Van Heurn

*“Decisions where courts have found that further consent was not necessary appear to be based on logic, practicality and common sense, and not on any analytical consideration of the retrospectivity of s. 49(12). I agree with this approach. If Parts 1 and 2 had remained registered in the names of different owners, the issue would not have arisen; the 1974 consent would have been sufficient. Why then would the result be different simply because in the circumstances the same party became seized of both parts? The distinction is completely artificial and to recognize it would, in my view, be contrary to the goal and spirit of the Planning Act.”*

*“Furthermore, I am of the view that the Legislature intended that s. 49(12) [now 50(12)] be retroactive... It would be an artificial anomaly to distinguish between consents given before the enactment and those given after and would be contrary to the “true intent and meaning” of the enactment.”*

# Consent Powers Under the Planning Act

## Ochitwa v. Biddulph (Township)

- 1969: 10 acres (Parcel 1) is severed from 100 acre parcel
- 1977: 1.3 acres (Parcel 2) is severed from the remaining 90 acre parcel
- 1992: Owner would like to convey the 1.3 acres without obtaining a consent, and asks the court for a declaration to this effect

# Consent Powers Under the Planning Act

## Ochitwa v. Biddulph (Township)

*“... Subsequent dealings with the same parcel of land can be taken upon the authority of the prior consent without regard to the ownership of abutting lands. It is clear that it is intended to apply to all consents, past, present and future. If it does not apply to all consents, including those pre-dating the legislation, the true intent is defeated.”*



# Consent Powers Under the Planning Act

## Zurich Indemnity Co. of Canada v. Anchelle Holdings Inc. (1995)

*“The Legislature intended that a consent, once given, should suffice to authorize the continued conveyance of the identical parcel of land. There is nothing in the Section to suggest that the intention ends when the land is reunited with its former companion, as it were, or when the passage of time may mean that different planning considerations might prevail than prevailed when the consent was given. The two cases which are contrary to this view, are, as I have noted, cases in which the whole of the jurisprudence was not cited to the court and in which the decision, in any event, went off on a different ground”*

# Consent Powers Under the Planning Act

## Thomson Estate v. London (City)

- 1970: Consent for Thompson to convey part of 15 acres (Parcel A) to Director of the Veterans Land Act for security for financing is granted, Thompson retain remainder of 15 acres (Parcel B)
- 1995: Parcel A is reconveyed to Thompson, Thompson owns both Parcel A and B
- Executors of Thompson Estates seek declaration that there are 2 separate parcels

# Consent Powers Under the Planning Act

## Thomson Estate v. London (City)

### Findings:

- Section 50(12) was not intended to be retroactive, and prior to 50(12) a consent was valid for one transaction only
- Cannot be held to be retroactive, if that was the intent of the legislature, it could have been easily expressed
- Prior to 1979, When the Committee considered an application, they did not have to consider the application on the basis that once separated, the subject land would be treated as a separately conveyable parcel for all time
- Troister's *Law of Subdivision Control in Ontario* favours the approach in *Ochitwa*, but Haines J. does not agree in this instance

Distinguishable because the intent of the original conveyance was to allow the Thompsons to obtain financing, not for the purpose of creating a new lot

# Consent Powers Under the Planning Act

## Millar v. Welland (City) (OMB)

- Committee of Adjustment grants consent to sever 1.2 hectares (Parcel B) and retain 1.2 hectares (Parcel A), City appeals Committee's decision
- City appeals because of inconsistency with PPS, Niagara Regional Policy Plan, and City of Welland Official Plan
- Parcel A and B were two parcels, created in 1969, and conveyed by one deed in 1977, again in 1986, and again in 1992

# Consent Powers Under the Planning Act

## Millar v. Welland (City) (OMB)

### Findings:

- Board's jurisdiction is limited to whether the consent meets the requirements of the *Planning Act*: consistency with the PPS, conformity with the Niagara Regional Policy Plan and the City of Welland Official Plan, and the criteria in Section 51(24)
- Board is not satisfied on the planning merits of the application
- Board will not determine the legality of the merger of title

# Consent Powers Under the Planning Act

## Today: Once a Consent, Always a Consent...Unless Stipulated

*“...unless the Council or the Minister, as the case may be, in giving the consent, stipulates either that subsection (3) or (5) shall apply to any such subsequent conveyance or transaction.”*

and 50(13):

*“Where the Council or the Minister stipulates in accordance with subsection (12), the certificate provided for under subsection 53(42) shall contain a reference to the stipulation, and if not so contained the consent shall be conclusively deemed to have been given without the stipulation.”*

# Consent Powers Under the Planning Act

## Today: Once a Consent, Always a Consent...Unless Stipulated

- To stipulate is similar to the concept discussed in Thompson Estate, the “one-time transaction”, but problematic for creating a new lot
- Useful for lot additions or boundary adjustment
- A obtains consent to convey C. B purchases C. B could not convey C in the future if the Committee as stipulated that section 50(3) will apply to future conveyances

# Consent Powers Under the Planning Act

## Stipulated Consents

- Circumstances exist which could require the approval authority to stipulate that additional approval would be required for the subsequent conveyance of the lot
- These circumstances typically involve boundary adjustments (i.e. A lot addition to accommodate additional room on an undersized lot for a septic system)
- In order to prevent the lot addition lands from becoming a separate parcel, the consent granting authority must stipulate that the lands merge



# Consent Powers Under the Planning Act

## What about lots created pre March 1979?

- What happens when adjoining lots become a single parcel?
- How do Planners evaluate a consent application to re-create the previous lot line?
- All Applications are reviewed with consideration to applicable policies of the day. A previous lot line may or may not conform to the relevant policies and site considerations
  - Policy considerations (i.e. PPS, Growth Plan)
  - Official Plan Policies (Upper and lower-tier, where applicable)
  - Applicable Zoning By-law provisions
  - Suitability of the site, access, location of existing and / or required services, abutting land uses (i.e. Minimum Distance Separation), location of hazard lands
  - The location of existing structures and the location of the proposed lot line

# Consent Powers Under the Planning Act

## Amendment to Planning Act - Section 50(12)

- Prior to March 1979; consents were considered to be in effect for the one transaction for which it had been granted
- Subsequent conveyances required the Applicant to go back
- The Act was amended to indicate that once a consent was given it remained a consent and could be subsequently conveyed without further consent, unless the consent was granted with stipulations

# Consent Powers Under the Planning Act

## Example Scenarios – Pre 1979

- Property owner severs farm land into two parcels to eventually give second parcel to children to build a house. When deeds are registered both are in the same name and parcels automatically merge back in title effectively eliminating the severance unbeknown to the owner. Many years later attempts to obtain a building permit to construct house on second lot and realizes that by no fault of his own the second property does not exist.
- Person purchases semi-detached house and several years later purchases other side of semi-detached unit and puts both units in the same name. Wants to deed second unit to relative and finds out that properties have merged together

# Consent Powers Under the Planning Act

## When Would the Lot Line Re-Creation be Appropriate?

### Examples

- Two (2) single detached dwelling units on what is now considered a single lot, complete with full municipal services. Both lots would meet the requirements of the Zoning By-law when severed (i.e. frontage, depth, coverage, etc.) or a Zoning By-law Amendment or Minor Variance Application could be supported by Planning Staff
- Two farm parcels, both meeting the minimum parcel size of the Official Plan and maintaining the required Minimum Distance Separation, with no building encroachments or concerns with the proposed property line

# Consent Powers Under the Planning Act

## Issues That May Arise

- Dependent on when the lot was created, the policies of land use planning may have changed
- A lot once created on hazard lands or with limited access that has not been developed may no longer be considered appropriate for development from a planning perspective
- Services which were once planned for the area were not developed and the land has limited ability to accommodate private services as a result of the terrain of the former lot
- The previously approved lot was undersized and no longer maintains the standards of the current Official Plan or Zoning By-law
- The lot cannot meet MDS to an existing farm operation

# Consent Powers Under the Planning Act

## How Do Committees Deal With This Today?

- Advise Applicants to consult a Real Estate Lawyer and to ensure the parcels are not registered in the same name. (i.e. if husband and wife are currently registered on one parcel, registering the adjacent parcel in one of their names only will retain the previously granted consent).
- During the Application process, requiring a Parcel Abstract Page as part of a complete application, or a letter from a Solicitor confirming all of the registered Owners of the subject lands can ensure that the Secretary Treasurer of the Committee of Adjustment is informed of the registered property Owners on the subject lands.
- Requiring that draft deeds are received and reviewed by the Municipality's legal representation well in advance of the date where conditions are required to be fulfilled.

# Consent Powers Under the Planning Act

Balancing the issues when making a decision.