
Subdividing Land: Can a Lapsed Consent Be Revived?

The Ontario Planning Act provides municipal governments with a great deal of control over how their communities develop. It provides numerous mechanisms for municipalities to designate what can be done with the land within their borders. The general purpose of these mechanisms is to foster stable, healthy communities. They include the powers to establish zoning by-laws, collect development charges, and create official plans to guide community growth. One of the Act's most powerful tools, however, is the power to decide how landowners can subdivide their land.

At common law, a landowner can subdivide a single piece of land by selling off portions of it to different owners. The Act, however, prohibits doing so without municipal approval (or provincial approval in remote communities without municipal governments). The most visible example of this is the process for creating new residential subdivisions, where prospective

developers must submit detailed plans not only for the housing they intend to build and sell, but also for the services that they must build or pay for to serve those properties such as roads, drainage, utilities, parks, etc. The municipality must ensure that the plans meet their standards and conform to their official plan before they will be approved under the Act.

Another less visible, but still important, growth control mechanism under the Act is "consent to severance". Through the granting of consent to sever, a municipality may authorize a person to subdivide land on a smaller scale, and without the need for a formal subdivision plan. These severance consents are used for a wide variety of land use and development purposes, including small scale property development.

In order to further control development allowed by severance consent, the Act empowers municipalities to attach

conditions to consent approvals. The range of potential conditions is very broad, and covers anything that the approval authority feels is required for proper development. In order to provide stability to the severance consent process, the Act also imposes timelines on the processes for approving consent applications, satisfaction of conditions, and the validity of certain documentation. These timelines are highly technical in nature, and both municipalities and developers need to pay careful attention to exactly what they regulate.

In general, an applicant has one year to meet any conditions attached to the decision granting their severance consent; if they do not do so, their original application is deemed to be refused. The Act also requires that the municipality be satisfied that those conditions are met, but it does not connect that requirement to the "deemed refusal". Once the municipality is satisfied that the conditions are met, it can

issue a certificate saying that consent was granted, and that the consent is valid for at most two years from the date of issue.

While this system appears to be fairly straightforward, the technical language in the Act and the case law interpreting it has proved otherwise.

Unless a municipality imposes specific conditions in each consent decision describing when they are to be notified that the condition has been met, there is case law that establishes that a municipality cannot require that an applicant do so within the one year timeframe.

Many municipal consent authorities operate on the basis that if an applicant fails to inform them within one year that their conditions were satisfied, no consent exists. The Act, however, places such consent decisions “in limbo” and a municipality who then refuses to grant final consent in those circumstances could be

compelled to do so by a court. The court could also require the municipality to pay the legal costs of the applicant in obtaining the court order required.

All of these consequences can be avoided by municipalities simply taking a few simple steps. A municipality can attach conditions to each consent decision they issue that require the applicant to provide evidence that the other conditions involved have been satisfied within a year. Further, municipalities should be proactive in issuing consent certificates as soon as the conditions attached to a consent decision have been satisfied – doing so will immediately start the two-year validity period.

While all of this sounds like a potential windfall for land developers, developers need to consider the value of disputing the timeframe for making a consent valid. While a developer may be able to successfully obtain an order from the court extending the life of a severance consent

despite the stance by the municipality that it has lapsed, these approaches can be both costly to pursue and may strain relations with the issuing municipality. Instead, developers dealing with land severance and consent issues ought to work towards being proactive in satisfying consent conditions. For example, they should appoint a single key person to manage the process of meeting the required conditions. That person should engage suppliers, consultants, and legal counsel early in the process, establish a timeline for satisfying conditions, and check in on the process regularly. Proper management will cost a developer relatively little compared to the costs required to salvage a lapsed consent decision that is necessary to accomplish a larger project.

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