

TAB 3

Critical Issues to Consider When Ensuring Compliance With the *Planning Act*

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Section 50 of the *Planning Act*² contains the enforcement mechanism preventing the division of land (without approval) thereby controlling such division with a view to appropriate planning principles. The basic prohibition is contained in the preambles to subss. 50(3) and (5), and the basic exceptions are contained in the ensuing clauses. The basic exceptions are provided because the purposes of subdivision control have otherwise been served. Subs. 50(3) is reproduced as follows:

(3) 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 an agreement of sale and purchase of 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;
- (d) the land or any use of or right therein is being acquired for the purpose of an electricity distribution line, electricity transmission line, hydrocarbon distribution line or hydrocarbon transmission line within the meaning of Part VI of the *Ontario Energy Board Act, 1998* and in respect of which the person acquiring the land or any use of or right therein has made a declaration that it is being acquired for such purpose, which shall be conclusive evidence that it is being acquired for such purpose;
- (d.1) the land or any use of or right therein is being acquired, directly or by entitlement to renewal for a period of 21 or more years but not more than 50 years, for the purpose of a renewable energy generation facility or renewable energy project, and in respect of which the person acquiring the land or any use of or right therein has made a declaration that it is being acquired for such purpose, which shall be conclusive evidence that it is being acquired for such purpose;
- (e) the land or any use of or right therein is being acquired for the purposes of flood control, erosion control, bank stabilization, shoreline management works or the preservation of environmentally sensitive lands under a project approved by the Minister of Natural Resources under section 24 of the

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² R.S.O. 1990, c. P.13

Conservation Authorities Act and in respect of which an officer of the conservation authority acquiring the land or any use of or right therein has made a declaration that it is being acquired for any of such purposes, which shall be conclusive evidence that it is being acquired for such purpose;

- (f) a consent is given to convey, mortgage or charge the land, or grant, assign or exercise a power of appointment in respect of the land or enter into an agreement in respect of the land;
- (g) the land or any use of or right therein was acquired for the purpose of an electricity distribution line, electricity transmission line, hydrocarbon distribution line or hydrocarbon transmission line within the meaning of Part VI of the *Ontario Energy Board Act, 1998* and is being disposed of to the person from whom it was acquired; or
- (h) the only use of or right in land that is granted is an easement or covenant under the *Conservation Land Act*. R.S.O. 1990, c. P.13, s. 50 (3); 1998, c. 15, Sched. E, s. 27 (4-6); 2006, c. 23, s. 21 (1); 2009, c. 12, Sched. K, s. 2 (1).

Subs. 50(5) is reproduced as follows:

(5) Where land is within a plan of subdivision registered before or after the coming into force of this section, no person shall convey a part of any lot or block of the land by way of a deed, or transfer, or grant, assign or exercise a power of appointment in respect of a part of any lot or block of the land, or mortgage or charge a part of any lot or block of the land, or enter into an agreement of sale and purchase of a part of any lot or block of the land or enter into any agreement that has the effect of granting the use of or right in a part of any lot or block of the land directly or by entitlement to renewal for a period of twenty-one years or more unless,

- (a) 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;
- (b) 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;
- (c) the land or any use of or right therein is being acquired for the purpose of a utility line within the meaning of the *Ontario Energy Board Act, 1998* and in respect of which the person acquiring the land or any use of or right therein has made a declaration that it is being acquired for such purpose, which shall be conclusive evidence that it is being acquired for such purpose;
- (c.1) the land or any use of or right therein is being acquired, directly or by entitlement to renewal for a period of 21 or more years but not more than 50 years, for the purpose of a renewable energy generation facility or renewable energy project, and in respect of which the person acquiring the land or any use of or right therein has made a declaration that it is being acquired for such purpose, which shall be conclusive evidence that it is being acquired for such purpose;
- (d) the land or any use of or right therein is being acquired for the purposes of flood control, erosion control, bank stabilization, shoreline management works or the preservation of environmentally sensitive lands under a project approved by the Minister of Natural Resources under section 24 of the *Conservation Authorities Act* and in respect of which an officer of the conservation authority acquiring the land or any use of or right therein has made a declaration that it is being acquired for any of such purposes, which shall be conclusive evidence that it is being acquired for such purpose;
- (e) the land that is being conveyed, or otherwise dealt with is the remaining part of a lot or block, the other part of which was acquired by a body that has vested in it the right to acquire land by expropriation;
- (f) a consent is given to convey, mortgage or charge the land or grant, assign or exercise a power of appointment in respect of the land or enter into an agreement in respect of the land;

- (g) the land or any use of or right therein was acquired for the purpose of a utility line within the meaning of the *Ontario Energy Board Act, 1998* and is being disposed of to the person from whom it was acquired; or
- (h) the only use of or right in land that is granted is an easement or covenant under the *Conservation Land Act*. R.S.O. 1990, c. P.13, s. 50 (5); 1998, c. 15, Sched. E, s. 27 (7-9); 2006, c. 23, s. 21 (2); 2009, c. 12, Sched. K, s. 2 (2).

Other exceptions are also permitted, several of which are referred to in the chart at the end of this paper.

Because the Act provides that any transaction which contravenes it “does not convey or create an interest in land” (subs. 50(21)), the consequences of mistake in its interpretation are severe – to both the client who thought it had acquired an interest in land and the lawyer who gave a “good and valid” title opinion.

To ensure agreements dealing with land (offer to lease, agreement of purchase and sale) are binding and fully enforceable, be sure that they contain an express condition that such agreements are to be effective only if the provisions of Section 50 are complied with (subs. 50(21)). The OREA forms contain such a condition, but care should be taken to include a similar clause in any and all agreements dealing with land interests.

In his book³, Sid Troister identifies four aspects of the duty imposed upon lawyers by Section 50. First, there is a duty to search for past contraventions whenever acting for a party acquiring the ownership or other interest in land. (While my employer, Metrolinx, is a Crown agent exempt from the subdivision control provisions (subss. 50(3)(c) and 50(5)(b)), I must still search for past contraventions. A Crown agent can create a division of land without consent, but it cannot cure a past contravention.) Second, the lawyer must ensure that the proposed transaction will comply with Section 50 (e.g. a 20-year lease which also contains an option to purchase). Third, the

³ Sidney H. Troister, *The Law of Subdivision Control in Ontario*, 2nd Ed, Carswell Thomson Professional Publishing (1994)

lawyer must take the necessary steps to ensure compliance with Section 50 where the client is under the obligation to take positive steps to comply (i.e. obtain any required consent in a timely manner). Fourth, the lawyer must ensure that all of the searches and steps taken result in a title which solicitors acting for subsequent purchasers will accept without undue hesitation or concern. This last aspect can be further assured by the parties signing the *Planning Act* statements (subs. 50(22)).

No abutting land searches are required if the subject property:

- (1) is a condominium unit;
- (2) consists of the whole of a lot (or block) on a registered plan of subdivision; or
- (3) is the subject of an unqualified consent to sever.

In all other cases, one must perform an abutting land search. Lands meeting at a point without a common border do not abut. Lands divided on a horizontal plane (e.g. mining or air rights) are deemed not to abut (subs. 50(2)). When searching abutting lands, you must also consider the system in which the subject land is located to determine when the search must commence.

The following chart may be of assistance.

Registry	Land Titles Absolute	Land Titles Conversion Qualified	Land Titles Plus
<p>All adjoining owners forward from the date of latest transfer of the property where all 3 <i>Planning Act</i> statements are signed; or</p> <p>if no such transfer, all adjoining owners forward from June 27, 1970 if no part-lot control by-law* is registered on title; or</p> <p>if a part-lot control by-law is so registered, all adjoining owners forward from June 15, 1967.**</p>	<p>All adjoining owners forward from the date of latest transfer of the property where all 3 <i>Planning Act</i> statements are signed; or</p> <p>if no such transfer, all adjoining owners forward from June 27, 1970 if no part-lot control by-law is registered on title; or</p> <p>if a part-lot control by-law is so registered, all adjoining owners forward from June 15, 1967.</p>	<p>All adjoining owners forward from the later of (i) the date of conversion from Registry; or (ii) the date of the latest transfer of the property where all 3 <i>Planning Act</i> statements are signed.</p>	<p>All adjoining owners forward from the later of (i) the date of conversion from LTCQ; or (ii) the date of the latest transfer of the property where all 3 <i>Planning Act</i> statements are signed.</p>

*Under former *Planning Act* legislation, land on a plan of subdivision was automatically exempt from subdivision control unless part lot control was invoked by by-law (since June 27, 1970, all land in Ontario is subject to subdivision control unless an exemption is provided). **June 15, 1967 is the most recent date upon which former *Planning Act* legislation (the *Planning Amendment Act, 1967*) deemed a curative provision such that any prior contraventions were cured and deemed not to have occurred.

When you have your adjoining land searches completed, you must review each one to determine whether any current and prior owners of the subject land have owned any adjoining lands at the same time. If they have, you may have a prior contravention. I say “may” because often there is a satisfactory answer, but one may have to dig a little deeper (e.g. a consent may have been granted but the transfer may not have been stamped, the consent not registered or otherwise noted on the parcel). Timing is important because the legislation has evolved over the years and one must consider the provisions in place at the time of the impugned transaction.

On occasion, a common interest between the person dealing with land and the person retaining control over the abutting land can give rise to a concern of a contravention. This issue arises because the owner of two abutting parcels holds the interest in different capacities (e.g. as sole beneficial owner, trustee, executor, joint or co-owner). One must determine (1) who is the relevant party and (2) does the relevant party alone hold the “power of disposition” over abutting lands. Case law has consistently concluded that both entities must be identical, so if A and B own Parcel 1 and A alone owns Parcel 2, either Parcel can be conveyed without contravention. In each case the grantor (or grantors) is not identical and does not have the “power of disposition” over the abutting Parcel.

Where a trust or “suspicion” of a trust relationship is involved, determining whether there is a contravention is more difficult, and the complexity cannot be dealt with in this paper. However, careful analysis of the trust fact situation (whether the lands are in Registry or Land Titles, whether there is further documentation on title or “actual knowledge”) is required to make an appropriate determination.

Where a consent has been granted (pursuant to Section 53), there is no requirement to register the certificate on title or to have the transfer endorsed (stamped); however, doing so will assist successors in title. If a certificate of consent is given, the transaction document must be “engrossed, executed and delivered” to the other party within two years of the date the certificate was issued (registration itself is not a requirement as title passes when the transaction is completed, not when a deed is registered, although those actions generally coincide). Subs. 53(42) provides that the certificate itself is “conclusive evidence that the consent was given” and that the necessary provisions of the Act have been complied with. Without a certificate, the courts have held that the following steps must be investigated: the application was made, notice

was given, a public meeting was held, the consent was granted by majority vote, written reasons (decision) were given, notice of approval was given, no appeal was taken, and it must be established that the transaction took place prior to the consent lapsing.

Effective March 31, 1979, what is now subs. 50(12) was added to the Act. It states that, where land is conveyed by way of deed or transfer with consent, the prohibitions in subs. 50(3) and (5) do not apply to subsequent conveyances or other transactions involving the identical parcel of land, unless it is stated otherwise (as set forth in subs. 50(13)). It is important to note that the consent obtained must have been in respect of a deed or transfer. Consent given for a mortgage or partial discharge has no lasting or future effect.

A concern arises in respect of pre-1979 consents - whether or not they are retroactive. There are arguments for and against retroactivity which I will not discuss in this paper, but the issue remains unresolved, so caution must be exercised if dealing with a consent granted prior to March 31, 1979.

For the exception to continue to apply, the property must be the identical parcel of land as was dealt with in the consent. If a strip of land is subsequently conveyed to or expropriated by a municipality for road widening purposes, the parcel is no longer identical and the provisions of subs. 50(3) and (5) will again apply.

In my title searches, I have come across several instances where a past contravention appears to have occurred (usually as a result of a mistake in a consent). However, where the *Planning Act* statements have been completed, by virtue of subs. 50(22), “any contravention ... does not and shall be deemed never to have had the effect of preventing the conveyance...”. This is an extremely powerful tool which should be utilized in all real estate transactions including, I would

argue, those where consent is obtained. Neither negligence nor malfeasance (the latter being the subject of a hefty fine) will destroy the effect of signed *Planning Act* statements provided the instrument is registered on title.

Whether or not the *Planning Act* statements are included at the time of registration, the prudent lawyer should always subsearch the abutting lands from the date of the initial search to the date of registration (to confirm that the vendor has not acquired abutting land in the interim).

I cannot stress enough the importance of signing *Planning Act* statements. Some will argue that if the property is the whole of a lot on a registered plan of subdivision or has been the subject of a consent, then signing the statements is unnecessary. My response: What if a by-law was enacted which de-registered the plan of subdivision (a vehicle utilized by municipalities in the 1950s and early 1960s) and the de-registering by-law was not carried forward by Teranet during conversion? What if the consent is not evidenced by a certificate on title? Signing all three statements will resolve those issues on a going forward basis. As lawyers, we are required to make judgment calls. Interpreting the Act together with the case law will invariably lead to differing conclusions among practitioners and the courts. Signing the statements eliminates doubts and allows an unqualified opinion on the matter.

Having said that, the statements should not be signed without following the steps prescribed. The vendor's solicitor should ensure that his/her client is questioned as to whether, after sale, it will own any land having a common boundary with the land sold explaining that that would contravene the Act (sometimes this is done by way of a written explanation to the client and an acknowledgement by the client that it understands the explanation and confirms no adjoining lands are owned). These steps then allow the vendor's solicitor to make his/her statement. The purchaser's solicitor is simply confirming that he/she has done the appropriate searches, made

such other investigations as are required and that the instrument does not contravene the section.

The standard is no higher than that of a prudent solicitor.

Subs. 50(22) is produced below.

(22) Where a deed or transfer,

- (a) contains a statement by the grantor, verifying that to the best of the grantor's knowledge and belief the deed or transfer does not contravene this section;
- (b) contains a statement by the grantor's solicitor, verifying that,
 - (i) he or she has explained the effect of this section to the grantor,
 - (ii) he or she has made inquiries of the grantor to determine that the deed or transfer does not contravene this section,
 - (iii) based on the information supplied by the grantor, to the best of the solicitor's knowledge and belief, the deed or transfer does not contravene this section, and
 - (iv) he or she is an Ontario solicitor in good standing; and
- (c) contains a statement by the grantee's solicitor, verifying that,
 - (i) he or she has investigated the title to the land and, where relevant, to abutting land,
 - (ii) he or she is satisfied that the record of title to the land and, where relevant, to abutting land, reveals no existing contravention of this section or a predecessor thereof or of a by-law passed under a predecessor of this section or of an order made under clause 27 (1) (b), as it existed on the 25th day of June, 1970, of *The Planning Act*, being chapter 296 of the Revised Statutes of Ontario, 1960, or a predecessor thereof, that has the effect of preventing the conveyance of any interest in the land,
 - (iii) to the best of his or her knowledge and belief, the deed or transfer does not contravene this section, and
 - (iv) he or she acts independently of the grantor's solicitor and is an Ontario solicitor in good standing; and
- (d) is registered under the *Land Titles Act* or the *Registry Act*,

any contravention of this section or a predecessor thereof or of a by-law passed under a predecessor of this section or of an order made under clause 27 (1) (b), as it existed on the 25th day of June, 1970, of *The Planning Act*, being chapter 296 of the Revised Statutes of Ontario, 1960, or a predecessor thereof, does not and shall be deemed never to have had the effect of preventing the conveyance of any interest in the land, but this subsection does not affect the rights acquired by any person from a judgment or order of any court given or made on or before the day the deed or transfer is registered. R.S.O. 1990, c. P.13, s. 50 (22).

Finally, if there has been a prior contravention such that the *Planning Act* statements cannot be

signed (i.e. any of the grantor, grantor's solicitor or grantee's solicitor is aware of a

contravention), the Act provides an opportunity to obtain a validation certificate which cures the

contravention:

57. (1) A council authorized to give a consent under section 53, other than a council authorized to give a consent pursuant to an order under section 4, may issue a certificate of validation in respect of land described in the certificate, providing that the contravention of section 50 or a predecessor of it or of a by-law passed under a predecessor of section 50 or of an order made under clause 27 (1) (b), as it read on the 25th day of June, 1970, of *The Planning Act*, being chapter 296 of the Revised Statutes of Ontario, 1960, or a predecessor of it does not have and shall be deemed never to have had the effect of preventing the conveyance of or creation of any interest in such land. 1993, c. 26, s. 63; 1996, c. 4, s. 30 (1).

I was involved in one such application for the Yonge-Eglinton Centre. The YEC had obtained an easement for access from the neighbouring apartment building. Negotiations for the easement were settled shortly after the 1967 *Planning Act* amendment legislation was passed which rendered the easement void. At the time of my application, the easement had been enjoyed for over 25 years. It appeared that the parties (or their lawyers) simply were unaware of the contents or effect of the then recent planning legislation. Contraventions deliberately intending to thwart or flout the legislation will not be easily cured; however this is a handy section designed to eliminate technical infractions.

The following chart identifies various situations which, currently, may or may not require *Planning Act* consent, assuming the basic exceptions are not available (all references are to Section 50, unless otherwise noted).

Issue (assume grantor owns the adjoining land)	Yes	No	Maybe	Comments
Whole lot, Registrar's Compiled Plan	X			A Registrar's Compiled Plan is prepared for abstract purposes and is not a registered plan of subdivision (neither are Township plans, reference plans, <i>Boundaries Act</i> plans).
Part lot, registered plan of subdivision			X	(5)(b) A part lot on a registered plan of subdivision may be conveyed provided the owner retains the whole of one or more lots or blocks.
Air rights, together with easement for access and/or support			X	(2) The air rights severed on a horizontal plane will not require consent. If the easement for access and/or support is over only a portion of the land below, then consent will be required.

Issue (assume grantor owns the adjoining land)	Yes	No	Maybe	Comments
Part lot where adjoining land is subject of consent given			X	(6) Provided the remainder lands are conveyed before the consent lapses (2 years from the date of certificate), consent will not be required.
Part lot where exempting by-law is registered		X		(7) Most exempting by-laws have limited duration or are repealed by subsequent by-law.
Conveyance of 10 acres or more	X			Prior to May 2, 1968, a conveyance of at least 10 acres while retaining at least 10 acres was allowed.
Simultaneous conveyances	X			Effective April 28, 1971, simultaneous conveyances or other dealings are prohibited by deeming the grantor to retain the fee in abutting land.
Release by a joint tenant or tenant in common of an interest to one or more of the other tenants while retaining the fee in abutting lands (alone or with another)	X			(19) effective November 23, 1978
VTB where purchaser already owns adjoining land		X		(8) effective June 18, 1974 (appears to be retroactive) This would require consent but for the exception.
99-year lease of three suites or floors in an office building		X		(9) effective August 1, 1983 (appears that long-term leases granted prior to this date are not caught by the Act) This would require consent but for the exception. Be careful to consider whether ancillary rights of access, storage, outside parking, etc., are included as those are not within the exception.
Permanent easement entered into pursuant to Section 2 of the <i>Drainage Act</i>		X		(10) effective June 26, 1981 Provided the easement relates to the construction, maintenance or access to drainage works as defined in the <i>Drainage Act</i> , consent is not required.
Partial discharge	X			(16) effective December 17, 1973 (appears that partial discharges granted prior to this date are not caught by the Act) Unless one of the basic exceptions is available or the exceptions contained within (17), consent is required (see (18) and (18.1) for foreclosure and power of sale.
Part lot with an order made under the <i>Partition Act</i>	X			(20) effective June 26, 1981 (orders made under the <i>Partition Act</i> prior to this date are not caught by the Act) Unless one of the basic exceptions is available, consent is required.

Issue (assume grantor owns the adjoining land)	Yes	No	Maybe	Comments
Part lot conveyed by way of gift	X			Prior to June 27, 1969 the conveyance of land by gift was considered not to be by way of "deed or transfer on any sale" and therefore was not considered to be prohibited.
Part lot conveyed under will	X			50.1 (effective June 27, 1991 as to wills made after July 26, 1990 or if wills were made at a prior time where the testator died after this date) Unless one of the basic exceptions is available, consent is required.
Whole lot, <u>un</u> registered plan of subdivision			X	52(1) Provided the developer has received draft approval under s.51, it may offer for sale lots on an unregistered plan of subdivision.

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