

**Ontario Municipal Board**  
Commission des affaires municipales  
de l'Ontario



**ISSUE DATE:** September 15, 2014

**CASE NO(S):** PL120075

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

Appellant:	City of Hamilton
Applicant:	David Mitchell
Subject:	Consent
Property Address/Description:	1308 Guyatt Road
Municipality:	City of Hamilton
Municipal File No.:	B-96/11
OMB Case No.:	PL120075
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Heard: Between December 5, 2012 and September 20, 2013 in Hamilton, Ontario

**APPEARANCES:**

**Parties**

City of Hamilton  
  
David Mitchell  
Roy-A-Lea Farms  
Leosta Farms Inc.

**Counsel**

M. Kovacevic  
  
R. Cheeseman

**DECISION DELIVERED BY K.J. HUSSEY AND ORDER OF THE BOARD**

[1] This appeal is brought by the City of Hamilton (the "City") against the decision of the Committee of Adjustment (the "COA") that was made on November 24, 2011, to approve an application to sever the property known municipally as 1308 Guyatt Road which is located within a prime agricultural area in the former Township of Glanbrook, now the City of Hamilton. Roy-A-Lea Farms Ltd., Leosta Farms Inc. and David Mitchell

(the “Applicants”) propose to sever a lot which contains an existing detached residential dwelling that was developed as a permanent farm help dwelling. The Applicants argue that the residence is surplus to the farm operation as result of a farm consolidation and can therefore be severed in accordance with provincial and area specific policies. The City objects to the severance on three grounds: 1) a farm consolidation has not occurred; 2) a farm help house is not a residence eligible to be severed on its own lot even if it is considered surplus to a farming operation, and 3) the new lot must, but fails to satisfy the Minimum Distance Separation (“MDS”) requirements.

### **Background in brief**

[2] The lands were owned by David Mitchell, and had been farmed by four generations of the Mitchell family. It consists of two separate parcels divided by a hydro corridor: north of the hydro corridor is a parcel that is 96.72 acres and south of the hydro corridor is a 50.0 acres parcel that contains the original farm residence, a livestock barn and other accessory buildings, as well as the farm help house in question. Mr. Mitchell operated a dairy farm and built the farm help house in 1999 for his sister Myra James and her husband who assisted with the dairy operation. The farm help house was a legally permitted development, described as “a bona fide permanent farm help house” in the Development, Maintenance and Use Agreement signed by the Corporation of the Township of Glanbrook and David Mitchell on May 14, 1997. The development was implemented by site plan control.

[3] In 2001, Mr. Mitchell’s dairy quota ended; the dairy operation ceased and the barn was stripped of all its dairy finishes. Mrs. James and her husband continued to occupy the house although their assistance on the farm was no longer required. Mr. and Mrs. James are still the occupants of the house and are desirous of purchasing it from the new owners to continue living there.

## **Previous Applications**

[4] This property has been the subject of previous applications for consent to sever the farm help house. The first was made in 2007, which was granted by the COA, and that decision was appealed to the Ontario Municipal Board by the City and one other individual. Prior to the hearing, Mr. Mitchell advised that he did not wish to proceed. There was no hearing and the Board, by administrative order, allowed the appeal.

[5] On October 24, 2011, Mr. Mitchell and Mrs. James, again applied to the COA for consent to sever 1.26 acres from the south parcel containing the farm help dwelling. On November 24, 2011, the COA once more approved the application. On February 9, 2012, an amended application was submitted which named Roy-A-Lea Farms Ltd. and Nikolas and Kylene Oreskovic, as intended purchasers and Applicants.

[6] In May 2012 the 50-acre parcel south of the hydro corridor containing the farm help house, the original farm residence, the livestock barn and other accessories buildings was transferred to Leosta Farms Inc. and the 96.72-acre north parcel to Roy-A-Lea Farms Ltd.

## **The Witnesses**

[7] The Board received expert opinion evidence from land use Planners: Mark Dorfman, retained by the City; John Ariens, retained by the Applicants; Agrologist Jerome Haggarty retained by the Applicants and provided opinion evidence on trends in Agriculture and challenges relating to surplus dwellings. Mr. Haggarty also provided his understanding of the holdings and the operational structure of Roy-A-Lea Farms Ltd., Michelle Spoelstra, one of the principals and the secretary/treasurer of Roy-A-Lea Farms Ltd. presented evidence on the history, structure, holdings and the individual roles of family members in their farm business.

## **The Farm Operation**

### Roy-A-Lea Farms Ltd.

[8] Roy-A-Lea Farms Ltd. was established in 1989 by Randall and Michelle Spoelstra, who are shareholders. The business started out as a small dairy operation and has evolved into a sizeable farm operation of 2,200 acres, which is contained within multiple parcels of land. Of this land area, 400 acres, which is not contiguous, is owned by the Spoelstra family and the remaining 1,800 acres, also not contiguous, are leased.

[9] The farming operation is primarily cash crops and there is a small dairy and livestock production, which the Spoelstras do not intend to expand. The Spoelstra family, Randy and Michelle, their son Andrew and son-in law Nikolas Oreskovic, are fully employed by Roy-A-Lea Farms Ltd; Kylene Oreskovic, the wife of Nikolas Oreskovic and daughter of Randy and Michelle Spoelstra, is a school teacher and has minor responsibilities on the farm. She assists with barn maintenance. The lands owned by Roy-A-Lea Farms Ltd., Andrew Spoelstra, and Leosta Farms Inc., are combined as one farming operation conducted by Roy-A-Lea Farms Ltd.

### Leosta Farms Inc.

[10] Kylene and Nikolas Oreskovic are the Directors of Leosta Farms Inc., the purchaser of the 50 acre parcel south of the hydro corridor at 1308 Guyatt Road (consisting of the farm help house, the original farm residence, the livestock barn and other accessory buildings). Michelle Spoelstra testified that the lands registered in the name of Leosta Farms Inc. are held in trust for Roy-A-Lea Farms Ltd., which assumes all the financial responsibility for the lands. A signed Declaration of Trust between Leosta Farms Inc. and Roy-A-Lea Farms Ltd. was presented in evidence (Exhibit 3, Tab 38, p. 225-19). It states that the lands registered in the name of Leosta Farms Inc. are held in trust for the beneficiary Roy-A-Lea Farms Ltd. Also presented were the

mortgage documents which state that Randall and Michelle Spoelstra, Kylene and Nikolas Oreskovic are guarantors for the mortgage on the lands purchased by Leosta Farms Inc.

### **The Issues**

[11] These are the main issues raised by this appeal:

- A. Is there a farm consolidation to permit a lot creation for a residence surplus to a farming operation?
- B. Is a farm help house eligible to be severed as a residence surplus to a farm operation as a result of a farm consolidation?
- C. Does the application comply with the Minimum Distance Separation formulae?

### **The Applicable Law**

[12] The subject property is within a prime agricultural area. Policies concerning lot creation in prime agricultural areas are found in the Provincial Policy Statement (“PPS”), the Greenbelt Plan, and in the area specific policy documents, which in this case are the Hamilton Wentworth Official Plan, the Glanbrook Official Plan and the City of Hamilton Rural Hamilton Official Plan (“RHOP”).

#### Provincial Policies

[13] Lot creation is permitted in prime agricultural areas only in the specific circumstances set out under the PPS and the Greenbelt Plan. Of relevance to this application are Policies 2.3.4 of the PPS and 4.6 of the Greenbelt Plan, which permit lot creation for a *residence surplus to a farming operation* as a result of a *farm*

*consolidation*. The Greenbelt Plan requires the residence to have been an existing use as of the date that the Plan came into force, which was on December 16, 2004, and this condition is satisfied in this case.

[14] The PPS provides the following definition:

- *Residence Surplus to a Farm Operation*: means an existing habitable farm residence that is rendered surplus as a result of farm consolidation (the acquisition of additional farm parcels to be operated as one farm operation).

[15] The Greenbelt Plan provides further details:

- *Residence Surplus to a Farm Operation*: means one or 2 or more existing farmer residence is located on lands held under the same ownership as a result of a farm consolidation.
- *Farm Consolidation*: means the acquisition of additional farm parcels to be operated as one *farm operation* for the purposes of expanding the farm operation and or sustaining the viability or continued *agricultural use* of the lands.
- *Farm Operation*: means a single farm business comprised primarily of an agricultural use and all of the land holdings and utilized land associated with the farm business.

[16] Both provincial documents require the planning authority to ensure that new residential dwellings are prohibited on the remnant parcel and both stipulate that new land uses, including the creation of lots, shall comply with the MDS formulae.

### Area-Specific Policies

[17] The City adopted its RHOP on September 27, 2006, which would have repealed the Hamilton Wentworth Official Plan and the Glanbrook Official Plan. However, the RHOP was appealed, and in particular, policies relating to lot creation for surplus farm residences were under appeal. The Application with respect to this matter was made before the decision on the appeal to the RHOP was rendered and therefore the lot creation policies contained in the Hamilton Wentworth Official Plan and the Glanbrook Official Plan (approved by Council in October 1985), are pertinent to this application. The RHOP contains policy changes with respect to lot creation for surplus farm dwellings that are now in effect. Those policies are informative if only to provide an understanding of the Municipality's current approach on those matters and to determine whether this application is in step with the current approach.

### Hamilton Wentworth Official Plan

[18] The Hamilton Wentworth Official Plan (Policy D-8.1) leaves the details of lot creation on prime agricultural lands to the local municipality's Official Plans, with the added provision that those policies must be consistent with the Hamilton Wentworth Official Plan. In this case the Glanbrook Official Plan is the local plan.

[19] These policies are relevant to this application.

### Glanbrook Official Plan

[20] Policy D.2.2.9 provides as follows:

...a severance may be considered for a surplus farm house created as a result of a farm consolidation under policy D.2.2.6....

Policy D.2.2.6 requires the consolidation of agricultural holdings to be by acquisition of abutting lands for the purposes of increasing the size of, or establishing a

viable farm operation.

### Rural Hamilton Official Plan

[21] The now in force RHOP provides policy direction for severance of a surplus farm dwelling as a result of a farm consolidation, on lands that are abutting and on non-abutting lands.

### **Non-Abutting Lands**

[22] Policy 1.14.2.2:

- c) In cases of a farm dwelling made to surplus as a result of acquisition as part of a farm operation that does not result in the merging in title of parcels of land, applications for severance of a surplus dwelling shall comply with the following conditions:
  - I. the owner and operator of the farm maintains an existing dwelling on lands that is also part of the consolidated Farm operation;
  - II. the parcels of land comprising the consolidated farm operation shall be a minimum of 38.4 (95 acres) hectares (“ha”) in total;
  - III. the parcel of land from which the surplus dwelling is severed shall be a minimum of 8.1 (20 acres) ha in size for lands designated specialty crop on Schedule D Rural Land Designation, or 16.2 hectares (40 acres) in size for lands in the designated Agriculture or Rural on Schedule D -Rural Land Use Designations;
  - IV. prior to granting of final consent one of the following conditions shall be met for the retained Farm parcel as a result of a surplus

farm dwelling severance:

- V. the land owner shall apply for and receive final approval to rezone the farm parcel to prohibit the construction of a dwelling unit; or
- VI. the land ownership grant in favor of the city a restrictive covenant which prohibits the construction of any dwelling unit.

### **Abutting and Non-Abutting lands**

d) In all cases where surplus farm dwellings are to be severed the following conditions shall also apply:

- I. the proposed surplus farm dwelling:
  - 1. shall have been built on or before December 16, 2004; and
  - 2. shall be habitable on the date of the application for the surplus farm dwelling severance and it shall meet the city's standards for occupancy without requiring substantial demolition and to new construction.
- II. The surplus dwelling lot shall be a minimum of 0.4 ha (1 acre), or such larger area as may be required by Section C .5 .1, sustainable private water and wastewater services of this plan;
- III. A private water well and a private sewage disposal system shall be provided in accordance with sections C .5 .1, sustainable private water and wastewater services of this plan
- IV. The shape and dimension of the surplus farm dwelling lot shall:

1. not impair agricultural operations on the retained land is;
  2. generally not exceed a debt of 122 m (400 feet);
- V. The surplus dwelling lot shall not include barns or other farm buildings which are not suitable to be used as accessory structures to a residential use prescribed by the zoning bylaw, and no such buildings or structures shall be used for industrial or commercial purposes.
- VI. Where a barn or other farm building exists within the immediate vicinity of the surplus residents, the city may require demolition of the barn.

[23] All of the relevant area specific planning documents require compliance with the MDS formulae.

### **Analysis and Findings**

A. *Has there been a farm consolidation?*

[24] The debate on whether there is a farm consolidation to permit creation of a lot for a surplus residence has raised these questions:

1. To permit severance of a surplus dwelling is the farm consolidation limited to the acquisition of abutting lands, as specified by Policy D.2.2.6 of the Glanbrook Official Plan?
2. Does a farm consolidation require common ownership by the farm operator?

[25] Notwithstanding Policy D.2.2.6 of the Glanbrook Official Plan, the Board finds that the answer to the first question is that a farm consolidation is not limited to the acquisition of abutting lands.

[26] Neither the PPS nor the Greenbelt Plan stipulates that requirement. The Board fully recognizes that the provincial policy documents represent minimum standards and that the official plan is the most important vehicle for implementation of provincial policies and can require more stringent standards. However, to protect provincial interests, planning authorities are required to keep their official plans up to date. Lot creation policies of the Glanbrook Official Plan date back to the 1980s. Much has changed in agricultural practices since then and there are now new policies in effect in the municipality that respond to the sector's changing economic realities.

[27] The Board heard evidence from Agrologist, Jerome Haggarty, that between 1996 and 2006, there was a reduction of over 10,000 farms in the Province of Ontario ("Province"), but commensurate with farm reductions, there was an increase, overall, in the size of farm operations, with acquisition of leased and owned lands. Mr. Haggarty testified that this trend to increase farm sizes is directed at farm operations realizing economies of scale. That is, it becomes feasible for farm operations to acquire new technologies to be more efficient and therefore more competitive globally. He testified that although larger farms represented only 15% of all farms in the Province, they accounted for 72% of the gross receipts reported in 2000, and this trend has continued.

[28] Roy-A-Lea Farms Ltd. is a farm operation that fits within that model. It has a land base of 2,200 acres of owned and leased lands; it is a large farm corporation.

[29] The Province's interest is Ontario's long-term prosperity, which includes protecting agriculture. Any policy that would impede sustainability of farm operations would not be in keeping with provincial interest. For farms to operate efficiently and be able to compete globally, it may be necessary to acquire more lands. Abutting lands may not be available to increase the size of a farm operation, and indeed the RHOP now provides for that condition. The RHOP is fully operative, though not in effect at the time the application was made. The lot severance policies have been updated to recognize the well-established trend towards larger farm operations through acquisitions

of parcels of land as part of a farm operation that do not necessarily abut or result in the merging of title. The RHOP permits a farm dwelling to be made surplus as a result of non-abutting acquisitions and sets out conditions for such severances. All those conditions are met by this application.

[30] With respect to the second question, on whether farm consolidation requires common ownership by the farm operator, the City argued that it does and submitted that there has been no acquisition of additional farm parcels for the purpose of a consolidation. The Board disagrees. The Board accepts the Applicants' position that a consolidation has occurred. The Board finds that additional farm lands have been added to the acreage operated by Roy-A-Lea Farms Ltd.

[31] The Board heard evidence that the lands are held in trust by Leosta Farms Inc., for the beneficiary Roy-A-Lea Farms Ltd. The City submits that Roy-A-Lea Farms Ltd. is a legal entity separate and distinct from Leosta Farms Inc., and the Board should reject the evidence of the trust, as evidence of consolidation as the trust is not irrevocable; it can be rescinded mutually by Leosta Farms Inc. and Roy-A-Lea Farms Ltd. at any time and is therefore not evidence of any permanent consolidation.

[32] The Board finds that it is unnecessary to consider the trust agreement. The Board finds on the facts presented at this hearing that there has been a farm consolidation.

[33] The Board finds that the newly acquired parcels north and south of the hydro lines at 1308 Guyatt Road, have been consolidated with the other lands assembled by the Spoelstra family under one farm operation conducted by Roy-A-Lea Farms Ltd. The Board finds that this arrangement does not offend the definition of "farm consolidation" under any of the applicable planning documents. The most stringent definition found in any of the documents states that a farm consolidation means "the acquisition of additional farm parcels be operated as one farm operation for the purpose of expanding

the farm operation and or sustaining the viability or continued agricultural use of the land.” The Board finds the situation in this case answers the definition of “farm consolidation”.

[34] Accordingly, the Board finds that the Applicants have satisfied the requirement for a consolidation to occur to permit a lot creation for a residence surplus to the farm operation.

B. *Is the farm help house eligible to be severed as a residence surplus to a farm operation as a result of a farm consolidation?*

[35] The City has argued that a farm help house is not a farm residence. Its use is clearly distinguishable in the Glanbrook Official Plan and the only legal use of the dwelling is its accessory use as a farm help house, which cannot be severed. Further, it ceased to be an accessory use to the farm in 2004 and became surplus then and not as a result of the farm consolidation.

[36] The Board disagrees with the City’s position. In the Board’s view, the City’s argument makes a distinction without a difference. There is no dispute between the parties that the dwelling that was built in 1999 as a farm help house is an existing habitable farm residence. The residence is no longer needed as a farm help house and has not been used for this purpose for some 10 years. It is on that basis that the City argues that it is not a legally existing use and therefore does not conform to the Greenbelt Plan. The City suggests that the residence ought to be demolished although it is sound and was legally constructed, or in the alternative, it should be kept vacant. In the Board’s view neither would further the objective to support a viable and sustainable farm operation.

[37] As evidenced by the photographs presented, it is an attractive well maintained bungalow with a footprint of 1900 square feet, with an attached two vehicle garage at

the rear of the dwelling of 860 square feet. It possesses all the attributes necessary for a stand-alone single detached dwelling. It is located on Guyatt Road, a public road to which there is direct access the proposed lot frontage would exceed the by-law requirement by a significant margin and the lot area is also in excess of the requirement. It has its own septic system, its own well, and the applicants pointed out that development charges and cash-in-lieu of parkland were paid to acquire a building permit for its development.

[38] The Board finds no impediments within the planning documents that would prevent this residence from meeting the standards that are required for a stand-alone residence. The RHOP has changed its policies on farm labour residences and no longer permits permanent dwellings for that purpose. However, that does not change the permanent nature of the residence in question and it is not caught under the new policies.

[39] The Board therefore finds that in this case, the former permanent farm help house is eligible to be severed as a residence surplus to a farm operation as a result of a consolidation.

C. *Does the application comply with the Minimum Distance Separation formulae?*

[40] The Board finds that the application does not comply with the MDS formulae.

[41] The Applicants do not dispute the City's contention that the proposed lot line fails to comply with the MDS requirements and the Applicants do not challenge the calculations provided by Mark Dorfman Planner Inc. Mr. Dorfman's calculation indicates that the lot line for the proposed severed lot is approximately 15 metres from the existing barn. By his calculation, the required separation distance, depending on the use, would range from 190 metres to 250 metres.

[42] The Applicants submit that there is no new constraint on the existing livestock

facility, or additional odour conflict potential related to the severance. The Applicants argued that there are 12 other residences within close proximity to the livestock facility and within the applicable MDS 1 separation distance; it is therefore meaningless both in terms of mitigation of odour potential for the surplus residence and in terms of the alleviation of potential constraints on livestock facility expansion to apply the MDS formulae. Further, the applicants argued, the surplus dwelling without the severance would typically be occupied by a nonfarm resident and there would be no difference in odour conflict potential and no purpose served in specifying separation distance to mitigate potential odour problems.

[43] While the Applicants' argument may have logical resonance, those arguments do not alter the Board's obligation under the *Planning Act* to make decisions that are consistent with the PPS. The prohibitory language of the PPS regarding compliance with the MDS formulae removes the Board's discretion in this matter.

[44] Policy 2.3.3.3 of the PPS provides as follows:

New land uses, including the creation of lots, and new or expanding livestock facilities shall comply with the minimum distance separation formulae.

[45] The Board finds that in this case the application does not meet the implementation guidelines and does not qualify as an exception. The Implementation Guidelines state that "MDS 1 is applied to a proposed lot with an existing dwelling when the dwelling is presently located on the same lot as the subject livestock facility", which is the case in this instance. However, there is an exception provided by Implementation Guideline 12, which states:

MDS 1 is applied to new proposed development, even though there may be existing non-agricultural uses that do not conform to MDS one requirements. Where there are 4 or more existing and nonfarm uses closer to the subject livestock facility and in immediate proximity to the current application, MDS 1 will not be applied. The

current application must not be located closer to the livestock facility than the 4 or more, existing non-farm uses.

[46] The Applicants have not demonstrated that the proposed lot would fall within the exception; the Applicants have not demonstrated that there are four other non-farm uses that are closer to the livestock facility. Further, the fact that the livestock facility is empty does not provide an exemption. MDS 1 applies to the facility if it is structurally sound and reasonably capable of housing livestock.

[47] The Board finds that the application fails to comply with the MDS formulae and is therefore not consistent with the PPS, does not conform to the Greenbelt Plan and does not conform to the Municipality's Official Plans.

#### **ORDER**

[48] The Board orders that the appeal is dismissed and provisional consent is not given.

*"K.J. HUSSEY"*

K.J. HUSSEY  
VICE-CHAIR

#### **Ontario Municipal Board**

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