ISSUE DATE:

June 07, 2013

PL130025

Ontario

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

IN THE MATTER OF subsection 53(19) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	William Kirkby
Subject:	Consent
Property Address/Description:	Lot 4, Concession 4, PIN 61315-01047
Municipality:	District of Timiskaming
Municipal File No.:	54-C-120011
OMB Case No.:	PL130025
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A P P E A R A N C E S :

Parties	**Counsel**
William Kirkby	W. Ramsay
Ministry of Municipal Affairs and Housing	S. Lee, J. F. Paquin

MEMORANDUM OF ORAL DECISION DELIVERED BY M. C. DENHEZ ON MAY 15, 2013 AND ORDER OF THE BOARD

[1] William Kirkby (the "applicant") owns a two-storey home in northern Ontario, on 56.4 hectares, in an unincorporated township, i.e. outside organized municipal territory. He is a retired person with mobility problems; he wanted to sever a portion of his land, so that he could build a new one-storey house there, and sell the existing house (and the land surrounding the house). He applied for a severance accordingly.

[2] Planning approval for such severances, in this unorganized territory, was required from the Ministry of Municipal Affairs and Housing ("MMAH"). MMAH turned down the application, on the ground that it was contrary to the Provincial Policy Statement ("PPS"). The applicant appealed to the Ontario Municipal Board (the "Board").

[3] At the Board hearing, the applicant was ably represented by counsel. MMAH deployed two lawyers and an expert planner, Charlsey White.

[4] The Board has carefully considered all the evidence, as well as the submissions of counsel. The Board concludes that although it is understandable for the applicant to wish to continue living on his land, which has been in the family for generations, the proposed severance to build a new dwelling in unorganized territory is specifically contrary to Provincial policy, by which this Board is bound. The Board is compelled to dismiss the appeal. The details and reasons are set out below.

[5] The subject property is in the unincorporated geographic Township of Henwood ("Henwood"), in the District of Timiskaming, some distance northwest of New Liskeard. Henwood has a post office some distance away, in a former whistlestop called Kenebeek; there is also a community hall some distance from that, and a general store in yet a different location; Henwood also has a Local Roads Board, under the *Local Roads Boards Act*. However, it has no significant settlement, and no municipal government. Although the closest municipality is the Township of Kerns to the east, it too is sparsely populated, with few facilities; the applicant said he did his major shopping in New Liskeard.

[6] Notwithstanding the lack of amenities associated with the subject property, the applicant wanted to continue living there. The property has belonged to his family for a century. However, his existing two-storey house is "too large for me to look after, at my age." Given his mobility problems, he would prefer to split the lot, and build a new single-storey home with easier access. Indeed, he had already begun work on clearing the area, installing a new septic system, and laying out a new driveway. When he discovered that selling the existing house (and its land) separately would require a severance, he applied to MMAH.

[7] MMAH had several objections. The first and most important was that, on principle, the PPS opposes new lot creation in this territory, unless the property is involved in management or use of resources or resource-based recreational activities. MMAH also said that in the absence of a comprehensive planning study, the application should be refused.

[8] The applicable criteria for approving consents for severances are outlined in separate sections of the *Planning Act* ("Act"). The relevant provision for consents, s. 53(12), refers to the criteria in s. 51(24):

> ...Regard shall be had, among other matters, to the health, safety, convenience and welfare of the present and future inhabitants of the municipality and to,
>
> (a) The effect of development... on matters of provincial interest...;
>
> (b) Whether the (proposal) is premature or in the public interest;
>
> (c) (Conformity with an Official Plan);
>
> (d) The suitability of the land for the purposes...;
>
> (e) (Highways)
>
> (f) (Dimensions and shapes of lots);
>
> (g) The restrictions or proposed restrictions, if any, on the land proposed to be subdivided or the buildings and structures proposed to be erected on it….
>
> (h)-(l) (Natural resources, floods, services, schools, land dedications, energy)

[9] As to "matters of provincial interest", s. 2 of the Act also outlines "Provincial interests" which the Board "shall have regard to."

> The Minister… and the Municipal Board, in carrying out their responsibilities under this Act, shall have regard to, among other matters, matters of provincial interest such as,
>
> (h) the orderly development of safe and healthy communities; (and)
>
> (p) the appropriate location of growth and development….

[10] Equally important, for this case, the PPS declares that Ontario is a "planning system led by Provincial policy"; and the PPS reasserts that this system is "policy-led". The Act specifies, at s. 3(5), that decisions of the Board must not only have "regard" to, but "shall be consistent" with the PPS.

[11] MMAH relied on several PPS provisions, notably the following:

> 1.1.3.1 Settlement areas shall be the focus of growth….
>
> 1.1.5.1 In rural areas located in territory without municipal organization, the focus of development activity shall be activities and land uses related to the management or use of resources and resource-based recreational activities.
>
> 1.1.5.3 In areas adjacent to and surrounding municipalities, only development that is related to the management or use of resources and resource-based recreational activity shall be permitted unless:
>
> a) the area forms part of a planning area; and
>
> b) it has been determined, as part of a comprehensive review, that the impacts of growth will not place an undue strain on the public service facilities and infrastructure provided by adjacent municipalities, regions and/or the Province.

[12] Counsel for the applicant replied that the subject property was not “adjacent to” or “surrounding” a municipality, and hence, the PPS restriction did not apply.

[13] The Board was unconvinced. The Board heard no evidence that the road, which is immediately in front of the property and which leads directly to Kerns, would be considered an undue distance by local standards.

[14] The Board is also mindful of first principles. This is an appeal under the Act. The *Concise Oxford Dictionary* defines “to plan” as “to arrange beforehand”. What has been “arranged beforehand”, in this case, was detailed in Provincial policy. In interpreting those planning documents, the Board is also mindful of the courts' instruction that they should be viewed from a purposive perspective.

[15] In unorganized territory, the purpose is clear. The Province does not normally support permanent new homes in territory where there is no planning system or infrastructure to deal with them. Sometimes, there is no choice – notably where there are resources, which are out of reach of existing municipalities; the PPS provides a specific exception to deal with that situation. However, those are not the circumstances here.

[16] The Board has dealt with similar situations before. Indeed, in *Seguin v. Phelps (Unorganized Township)*, [1997] O.M.B.D. No. 493, the Board said:

> Board decisions have consistently dismissed appeals seeking scattered development where there is no local policy, and which contravene the Provincial interest as expressed in 2(h) of the *Planning Act*: "the orderly development of safe and healthy communities."

[17] In *Fejos v. Van Horne (Unorganized Township)*, [2006] O.M.B.D. No. 35, the Board added:

> The occurrence of unplanned, ad hoc, development in the unorganized Township seriously interferes with the Province's interest in orderly growth and development.

[18] Similarly, in *Pacey v. Timiskaming (District)*, issued on October 7, 2011, the Board said:

> The development of a (residential) lot does not in the Board's opinion constitute "resource-based recreational activity."

[19] The Board is statute-bound to issue decisions which are "consistent with" the PPS; it has no discretion to ignore it. The PPS does not support severances in unorganized territory, other than in certain specified situations. This was not one of them. Although the applicant's preference is clearly understandable, the present circumstances are not appropriate for the Board to grant consent to the proposed severance. It is ordered that the appeal is dismissed.

"M. C. Denhez"

M. C. DENHEZ
MEMBER