ISSUE DATE:

January 25, 2013

PL120517

Ontario

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

Jamie Lundy. has appealed to the Ontario Municipal Board under subsection 22(7) of the Planning Act*, R.S.O. 1990, c. P.13, as amended, from Council's refusal to enact a proposed* amendment to the Official Plan for the Township of East Garafraxa to allow a proposed consent of a surplus dwelling at 351520 17th Line as a result of a farm consolidation notwithstanding Sec 4.1.4 a) which requires the lands to have been owned by the applicant for 10 years prior the application being made and Sec 7.14 regarding the Minimum Distance Separation requirements for all proposed severances
Township's File No.OPA1/12
OMB Case No.: PL120517
OMB File.: PL120517

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

Applicant and Appellant:	Jamie Lundy
Subject:	Consent
Property Address/Description:	351520 17th Line
Municipality:	Township of East Garafraxa
Municipal File No.:	B1/12
OMB Case No.:	PL120517
OMB File No.:	PL120518

A P P E A R A N C E S :

Parties	**Counsel**
Jamie Lundy	Ian Rowe
Township of East Garafraxa	Jeff Wilker

DECISION DELIVERED BY J.V. ZUIDEMA AND ORDER OF THE BOARD

[1] The matters before the Board are an application for a severance and an official plan amendment ("OPA"). Jamie Lundy ("Appellant") initiated these applications in order to sever a lot from a farm property located along the 17th line Conc. XVII Lot 9 in the Township of East Garafraxa ("subject property").

[2] The Appellant purchased the subject property in December 2011. He wished to consolidate this farm property with the Lundy farm holdings and in doing so, wished to sever a portion on where the farm residence was situated. The applications were refused and as such, appeals were launched to this Board. There was little dispute concerning the *bona fides* of the Lundy farming operations. It is a genuine, viable and successful farming operation with numerous farm parcels throughout the municipality and the county.

[3] The Lundys have been in the farming business for many years and there is no doubt in my mind that Jamie Lundy intended to add this recently acquired farm to his family operation. The Lundys have invested considerable funds into their operation and machinery. The Appellant wishes to sever the farm residence, sell it and take those funds to re-invest into his family farm. The farm house lot is proposed to be roughly 2 ½ acres in area; it contains a residence, a pool and a tennis court. He does not want to act as landlord and rent out the residence. As his Planner put it, the severance and OPA are business decisions in order to further the farm operation.

[4] However, utilizing the subject property to further the family farm can be achieved without severing the farm residence. In determining that the appeals are dismissed, I rely on the policy framework currently in place which includes the 2005 Provincial Policy Statement ("PPS"), the Township of East Garafraxa ("Township") Official Plan ("OP") and Minimum Distance Separation ("MDS") Guidelines as well as the criteria under ss. 51(24) of the *Planning Act ("Act")*. My decision is rooted in planning policy more than whether the severance makes good financial sense for the Appellant. The details of the rationale supporting my decision follow.

[5] Firstly, both the Township and the Appellant called qualified expert land use planning evidence. Gordon Knox testified on behalf of the Appellant. He provided the history, background and geography of the subject property and on the family farm operation.

[6] Mr. Knox was a capable and competent witness. He reviewed that the subject property contains Class 1 lands according to the Canada Land Inventory ("CLI"); he confirmed the capability of the lands given that they are relatively flat and contain no ravines or significant barriers to their use for farming. A barn which was once on the

subject property had been removed; although Mr. Knox did not inspect the interior prior to its demolition, he testified that the barn was in a state of disrepair to the point where salvaging it might have proved to be financially untenable.

[7] The subject property is considered prime agricultural lands within a prime agricultural area. This is just the kind of farm land which the PPS looks to protect. Mr. Knox explained that there were efficiencies with larger operations which result in lower costs to consumers. I have no reason to doubt those conclusions.

[8] And while the PPS has removed the opportunity for the severance of farm retirement lots, it did maintain the ability for a severance of a farm residence when there is a consolidation of a farming operation. It is under this provision upon which the severance is sought. However, the PPS also requires compliance with the MDS Guidelines and this is where the application fails. Section 2.3.3.3 of the PPS indicates:

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

[9] The language is mandatory. In this instance, there is a barn located on a farm property directly across the road from the subject property. In calculating the MDS distances, there is a shortfall. According to Mr. Knox, the shortfall is approximately 12 m or 40 ft. Mr. Knox relied on the calculations provided by the Township's in-house Planner, Christine Gervais. He did not do his own independent calculations. Mr. Knox, under cross-examination, admitted that he was "not an expert in MDS" matters.

[10] Robert Stovel, called by the Township was qualified as both an Agrologist and a Planner. He, on the other hand, did do his own calculations using both software available through the Ministry of Agriculture, Food and Rural Affairs and manually. His calculation on the MDS shortfall was considerably greater at 40 to 50 m or 120 to 150 ft.

[11] In the worst case scenario, according to Mr. Stovel, the entire proposed severed lot would be impacted by the MDS arc. Mr. Stovel, in doing his analysis, had direct communication with the owner of the farm across the subject property where the pertinent barn is situated. The barn housed cattle at one point and through his discussions with this farmer, Mr. Stovel learned that there were 11 additional acres of tillable land. Those additional pieces of information were factored into the MDS arc, thereby creating a larger area of influence. Neither Ms. Gervais nor Mr. Knox had such

direct communications. On this point, Mr. Stovel's approach was more thorough and as such, I give it more weight than that of the other two Planners.

[12] The *Planning Act* mandates that Board decisions be consistent with the PPS and its policies. All the experts were *ad idem* that the proposed severance does not comply with the minimum distance separation formulae. Mr. Knox suggested to the Board that the application should not fail simply on the basis of a 12 m shortfall given the existence of an exception found in OMAFRA Guideline #8:

> Where a new lot is proposed with an existing dwelling, and that dwelling is already located on a lot separate from the subject livestock facility, MDS 1 is not applied as the potential odour conflict is already present between the neighbouring livestock facility and the existing dwelling. However, municipalities may choose to apply MDS 1 from the neighbouring livestock facility to a proposed lot with an existing dwelling, Direction to apply MDS 1 in these circumstances should be clearly indicated in the municipality's planning documents. [Ex. 2 tab 21]

[13] Mr. Knox contended that the odour concern already exists and as such, the purpose of the MDS, which is to avoid odour conflicts, is academic. He explained that that was rationale behind Guideline #8, namely to recognize this circumstance. However, Guideline #8 permits municipalities to implement MDS 1 even where the odour conflict already exists. Here there was a differing opinion between Messrs. Knox and Stovel. Mr. Knox was of the opinion that the Township's Official Plan was not clear to indicate this direction whereas Mr. Stovel opined that it did. The Township OP provision read as follows:

> s. 5.1.4 (d) A maximum of one lot may be severed per original farm of approximately 40 hectares where no lot has been previously created, and where the applicant has owned the subject lands for a minimum of 10 years. The consent may be granted to create either
>
> (ii) a lot for a retiring farmer, provided that a retirement lot has not been taken from the original parcel after January 1, 1970 and the applicant owned the lands prior to January 1, 1994 and the proposed severance meets the following criteria:
>
> (b) the new lot complies with Minimum Distance Separation Formula 1 (MDS 1) as amended from time to time;

[14] For the purposes of this part of my analysis, it is the language of s. 5.1.4 (d)(ii)(b) that is relevant. While Mr. Knox opined that the municipal planning document did not clearly state the application of MDS 1, Mr. Stovel had exactly the opposite view. I agree

with Mr. Stovel. A plain reading of the above-noted section takes the reader to no other conclusion other than the applicability of MDS 1. I find the language to be clear and unambiguous in this regard.

[15] Concerning the fact that s. 5.1.4 (d)(ii)(b) is connected with other requirements as articulated in s. 5.1.4, it is also important to note that what is before me is an application for an amendment to the official plan policy requiring ownership for 10 years. The Appellant seeks an exception from this requirement given that the Appellant purchased the lands just over a year ago. The appeal associated with the refusal of the OPA by the municipality is also dismissed for the following reasons: firstly, given that the severance is not granted, the associated OPA must also fail at this time as the two are intrinsically connected. The purpose of the OPA was to realize the creation of the proposed lot. Secondly, the municipality is in the process of reviewing its Official Plan through its five-year review. Given my decision on the severance, I do not wish to encumber the municipality concerning it review process. That process should continue independent of this decision and nothing should be construed from this decision as a comment on the substance of that process.

[16] Another factor in my decision to deny the severance is the PPS's long term goal to protect agricultural operations. This means protecting both small and large operations. While Mr. Lundy is anxious to consolidate and create a larger farming operation for financial efficiencies, the removal of the residence from the farm parcel also removes the possibility for this farm to be used for livestock in the future.

[17] I heard considerable evidence from Mr. Knox that the likelihood of the farm to be used for livestock would be slim to none but by allowing the severance, that option is gone entirely. As Mr. Stovel emphasized, the PPS mandates the protection of agricultural operations over the long haul and in coming to my decision, I have balanced Mr. Lundy's business interest with the public interest. Mr. Lundy is not precluded from using the farm parcel for his farming operation and the public interest is maintained through the preservation of this residence with the farm parcel for the potential of livestock or animal husbandry operations in the future.

[18] Finally ss. 51(24)(b) of the *Planning Act* requires that regard be had for whether the proposed severance is premature or in the public interest. Given my reasons as

noted above, I determine that at this time it is not in the public interest and as such, does not meet the criterion enunciated by the legislation. On that ground, the severance application fails.

[19] In closing submissions, Counsel for the Appellant took me to a recent decision of this Board differently constituted wherein Mr. Lundy sought and was granted a severance for a farm consolidation concerning a surplus farm dwelling in Amaranth Township. The facts of that case were similar in that Mr. Lundy acquired the farm parcel, wanted to sever the residence and sell it rather than lease it, and take the proceeds to reinvest into the farming operation. Mr. Knox testified at that hearing as well and from the Board's disposition, likely gave very similar evidence as that provided at this hearing.

[20] Mr. Rowe suggested that I follow the same reasoning and hence, come to the same decision as my colleague. The Board strives to maintain consistency within its decisions but is not bound by other Board or tribunal decisions. The principle of *stare decisis* does not apply for such decisions.

[21] In the Amaranth severance case, the issue of MDS was also at play but in that instance, applicable to an existing barn on the property subject to the severance. In our fact situation, Mr. Lundy went ahead and removed the barn on the subject property prior to the hearing commencing. Whether or not that barn was truly unsalvageable is unknown because even his own Planner did not do a proper inspection prior to its demolition. The MDS issue in our case dealt with a barn on a neighbouring property.

[22] The policy framework in place for the Township of Amaranth may have been different than that of East Garafraxa. The Township of East Garafraxa has clear language on the applicability of MDS 1 as described above and that is the applicable policy for this hearing.

[23] In other words, the circumstances of these two cases are different and therefore, the Amaranth decision is distinguishable.

[24] For the foregoing reasons, the appeals are dismissed.

ORDER

[25] Therefore the Board orders that the appeals are dismissed.

"J.V. Zuidema"

J.V. ZUIDEMA
VICE CHAIR