

Anthony Usher Planning Consultant

63 Deloraine Avenue, Toronto, Ontario M5M 2A8

(416) 425-5964

auplan@bellnet.ca

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Provincial Planning Policy Branch
Ministry of Municipal Affairs and Housing
777 Bay Street, 13th floor
Toronto, Ontario
M5G 2E5

Dear Madam or Sir:

**Re: Proposed Provincial Policy Statement
Environmental Registry 019-0279**

I am writing on behalf of my clients, the Minaki Conservancy (formerly the Minaki Cottagers Association Inc.) and residents of Minaki represented by Alex Rheault, to comment on one particular aspect of the July 2019 proposed PPS.

My clients and I are concerned about the proposed changes to Policy 1.6.6.3. My clients have a particular interest in this matter, and I will explain why in the background section below.

Summary

In the context of the PPS's servicing hierarchy policies, Policy 1.6.6.3 clearly prohibits communal services outside municipalities, whereas the proposed changes to that policy would permit such services. My clients and I are asking that the proposed policy be reworded to maintain the present prohibition. This prohibition, based on 14 years of PPS policy and at least 24 years of MECP policy, and validated in a recent Ontario Municipal Board decision, has served the Province well. It has helped protect the environment and public health and safety, not to mention the Province's taxpayers. We are not aware of any reason or justification for changing the existing policy.

Background

Minaki townsite lies in the unorganized portion of Kenora District, outside the jurisdiction of a planning board. Therefore the only planning policy that applies is the PPS, and the only planning controls that apply are Provincial approval of land division (and hypothetically, a Minister's zoning order).

The former Minaki Lodge property is a focal point of the townsite and has been vacant for some years (there are buildings, but no active occupation or use). The owners applied for two condominium descriptions, the Province approved them in 2016, my clients appealed those approvals, and an Ontario Municipal Board hearing took place in 2017.

Minaki Lodge's water and sewage treatment systems had been mothballed but remained in place. The

applicants proposed (and had obtained a Permit to Take Water and Environmental Compliance Approval) to restart the systems to service both condominiums.

Of course, there are not and could not be municipal services in Minaki, as there is no municipality and Minaki is not and cannot be a "settlement area" (Policy 1.6.6.2 in the applicable 2014 PPS). The parties agreed that the proposed water and sewage services would be "private communal services" for purposes of Policy 1.6.6.3.

What the parties did not agree on, which became a key issue at the hearing, was whether Policy 1.6.6.3 then permitted the use of "private communal services" in this particular case, or if the only option in the policy hierarchy for servicing the Minaki Lodge property would be "individual on-site services" as per Policy 1.6.6.5.

My evidence to the OMB was that Policy 1.6.6.3 simply did not permit private communal services in unorganized territory. As I advised the Board,

"... a plain reading of the hierarchy of services is that the only services allowed to serve new development in unorganized territory, are individual onsite services. As well, there is no suggestion that the pre-existence of works that could theoretically perform communal services, as in this case, would make any difference to the application of these policies. In my opinion, and taking into account Policy 1.6.6.6 which integrates the hierarchy of services with the division of land, the PPS does not permit the development as proposed, and would only permit multi-lot or multi-unit development on the site if the lots/units were served by individual on-site services."

To the best of my knowledge, the question of the applicability of Policy 1.6.6.3 (or its 2005 PPS equivalent) to unorganized territory had never previously been adjudicated.

The OMB, in its decision (PL160402, October 18, 2017) refused the applications. For the Board, the proposed water and sewage services were determinative. The decision says,

"[38] The Board however must be, and is not satisfied [sic] that the proposed use of communal infrastructure is consistent with the servicing hierarchy outlined through s. 1.6.6.2, s. 1.6.6.3, s. 1.6.6.4, and s. 1.6.6.5. of the PPS and that the development is appropriate to the infrastructure planned or available.

"[39] It is Mr. Usher's evidence that addressed the hierarchy and in particular, the various implementation guidelines which, as described on their face are:

intended to guide municipal land use planning for sewage and water servicing such that planning decisions shall have regard to the Provincial Policy Statement under Section 3 of the Planning Act

and which assisted the Board in its determination."

The Local Planning Appeal Tribunal, as it had by then become, refused the applicant's request for a review of the decision on May 23, 2018. I enclose the OMB decision and the LPAT refusal letter.

Existing policy and precedent

Therefore, the existing servicing hierarchy policies are clear - private communal services are not permitted in unorganized territory. However, under the proposed rewording of Policy 1.6.6.3, private communal services would be permitted as the policy deems appropriate, without regard to whether the site is in a municipality or unorganized territory. And in unorganized territory, private communal services would be at the top of the servicing hierarchy.

My clients and I ask that Policy 1.6.6.3 be reworded to clearly prohibit communal services outside municipalities, for the following reasons arising from existing policy and precedent.

- ▶ The present servicing hierarchy was introduced in the 2005 PPS and has stood the test of time, subject to the clarification and improvement over time that most policies require. The hierarchy was renewed in the 2014 PPS. The Environmental Registry posting and the proposed PPS itself confirm that the Province intends to renew the servicing hierarchy once again, with clarifications but not substantive changes. I note that the only mention of servicing policies on the Registry posting says, "Allow flexibility for communities by clarifying perceived barriers to sewage and water servicing policies for lot creation and development in rural settlement areas" - and unorganized areas are not mentioned at all.
- ▶ The OMB concluded that the interpretation of Policy 1.6.6.3 put forward in my clients' case was not only correct based on the wording of the policy itself and in the context of the servicing hierarchy as a whole, but was also consistent with and appropriate in light of guidelines to implement the policy - more on this below. This conclusion was strongly reaffirmed in the LPAT's letter refusing review of the decision. While it is the Province's prerogative to now change the PPS, to do so without justification would in my view be disrespectful of the considered view of the OMB/LPAT in their only adjudication of the subject to date.
- ▶ As the Board was advised, MECP's Procedure D-5-2 on Application of Municipal Responsibility for Communal Water and Sewage Services is premised on requiring responsibility agreements between municipalities and proponents that will enable and guarantee private communal services where municipal services cannot be provided. The Procedure (which predates the 2005 servicing hierarchy) says, "Communal services in areas without municipal organization will only be considered in the situation where they are required to address remediation of failed individual on-site services" (section 4.2).
- ▶ As the Board was advised, MECP's Guideline F-15, the Financial Assurance Guideline, does appear to contemplate the possibility of private communal services in unorganized territory, but stipulates that in such a case, "the Ministry will continue to require . . . another governmental organization to enter into a responsibility agreement for the long-term operation and maintenance of communal sewage works and systems" (section 4.3.3), failing which financial assurance would have to be provided as per the guideline. In the Minaki case, the only other governmental option would have been the Minaki Local Services Board, which is not mandated to provide water or sewage services. No responsibility agreement or financial assurance was provided for in the proposed approvals.

- ▶ I also advised the Board that my investigations showed that in unorganized Ontario, there are only two condominiums with private communal services (investigation of possible subdivisions with private communal services was not a realistic task, but it is very unlikely that any such exist). One condominium, near Kenora, dates from 1977, and is serviced by a septic tank-tile field system that was locally approved as was then permitted. The other, near Willisville, dates from 1984, and is serviced by a "legacy" 1940s community plant - no environmental approval was ever required. Both condominiums were approved long before any PPS let alone the servicing hierarchy, and long before the above-cited MECP guidelines. That no such approvals have been granted in the last 35 years may speak not only to lack of demand but also to the inappropriateness of such approvals in the current policy-led context.
- ▶ The Board relied heavily on Procedure D-5-2 and Guideline F-15 in supporting its decision. The failure of the proposal to comply with these directions, and the absence of any financial assurance or oversight beyond that provided through the condominium corporations themselves, were critical to the Board's conclusions:

"[45] The Board therefore finds in the absence of appropriate public oversight as a back stop to ensure public safety and health and that of the environment, the proposed private communal STP is not consistent with s. 1.6.6.3 of the PPS, and approval of the draft plans of condominium as such, do not represent good planning and are not in the public interest."

Good policy and good planning

Now, let's leave behind existing policy and precedent, including the circumstances of and the OMB's findings on the Minaki case. Would it generally represent good policy and planning to allow private communal services outside municipalities? My clients and I do not believe so, and we again ask that Policy 1.6.6.3 be reworded to clearly prohibit communal services outside municipalities, for the following reasons.

- ▶ The PPS makes clear that unorganized territory is a very different kettle of fish. Unorganized territory has no settlement areas. Existing permanent communities are tolerated, but within what has generally been interpreted as commuting distance from municipalities, no new permanent residential development is permitted unless the area is (among other things) part of a planning area and subject to an official plan. In areas like Minaki that are near municipalities but do not meet the latter criteria, the only new residential development permitted is seasonal recreational. The Province is not proposing any changes to the unorganized territory policies in section 1.1.6 of the PPS.
- ▶ With whom would a proponent conclude a responsibility agreement in unorganized territory? Where local services boards exist, even if they have water and sewage responsibilities, they have no taxing powers, and they can only levy fees for services provided to existing residents. Where planning boards exist, they have no mandate or powers at all beyond those provided by the *Planning Act*, and are solely reliant on Provincial funding (and application fees) for the services they provide in unorganized territory. Neither body is capable of providing a backstop. The Province could, but it was clearly evident in the Minaki hearing that the Province had not the slightest interest in entering into responsibility agreements.

- ▶ It is surely also relevant that in unorganized territory, planning control can be as minimal as the Minister's approval power over land division and the Minister's power to impose a zoning order - in other words, the planning regime typical in rural municipalities 50 years ago. It is entirely appropriate to permit development on private communal services in municipalities, which now almost universally have a full suite of planning controls available to regulate such development. Such controls can include the choice of whether to permit private communal services (some municipalities do, some don't), and if such services are permitted, to specify under what circumstances. Is it appropriate to permit development on private communal services in unorganized territory where planning can be as minimal as it was half a century ago in rural municipalities?

Conclusion

The prohibition on private communal services in unorganized territory in the present Policy 1.6.6.3 has served the Province well. It has helped to protect the environment and public health and safety in the unregulated environment of unorganized Ontario. It has also helped to protect the Province's taxpayers, who would undoubtedly be called on as the ultimate financial backstop should any such systems fail. Again, we are not aware of any reason or justification for changing the existing policy.

I trust these comments will assist the Government in its development of the final new PPS.

Yours sincerely,

[original signed by]

Anthony Usher, RPP