



REVIEW OF THE ONTARIO MUNICIPAL BOARD

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Introduction

The Ontario Bar Association (“OBA”) appreciates the opportunity to make a submission on the Province’s review of the role and responsibilities of the Ontario Municipal Board (the “OMB”) in land use planning matters.

Land use planning is a unique field of practice. In addition to applying statutory and regulatory authorities, our members are challenged to integrate Provincial, Regional, and Local policies that are further translated into regulatory instruments and implementation requirements. There are often multiple layers of approvals necessary in any given matter, leading to a complex intersection of planning, engineering, environmental stewardship, and local politics. Our members strive to ensure that the process of navigating and ultimately resolving these matters is done in a fair, transparent, and supportable manner that accords with principles of natural justice and the rule of law.

The OBA takes comfort that the Province recognizes the important role the OMB plays in assisting public and private entities to resolve land use disputes. The OBA also acknowledges the need to ensure the OMB, its role, and its processes continue to reflect the needs of our policy-led planning system. It is in that spirit that we have prepared the following comments for the Province’s consideration, which we have organized in accordance with the key themes identified in the Province’s public consultation document (the “Consultation Document”). As always, we remain available to discuss any of the proceeding comments in detail.

The OBA

Established in 1907, the OBA is the largest voluntary legal organization in Ontario, representing approximately 16,000 lawyers, judges, law professors and law students. In addition to providing legal education for its members, the OBA is pleased to analyze and assist government with many policy and legislative initiatives each year – both in the interest of the profession and in the interest of the public.

This submission was prepared by members of the OBA Municipal Law Section, which has over 350 lawyers who are leading experts in municipal and land use planning law matters representing proponents, municipalities, residents, developers, and other stakeholders. Members of the Municipal Law Section often advocate before municipal councils and committees, all levels of court in the Province of Ontario, and the various tribunals that comprise the Environment and Land Tribunals Ontario (“ELTO”), including the OMB. As we represent a broad spectrum of clients, who at times have diverse and sometimes competing interests, our objective is to assist the Province in its review of the OMB by providing commentary that represents a balance of the various interests of our members and their clients.



Comments

Theme 1: OMB's Jurisdiction and Powers

1) *Protect Public Interests for the Future*

It is recognized that there are matters of Provincial interest that are common regardless of Regional or Local area – matters such as clean and safe drinking water, the prevention of flooding, and the protection of the natural environment. It is a supportable objective to ensure a common, predictable outcome regardless of the context in which these issues arise. This is reflected in the Provincial-level planning policies of the 2014 Provincial Policy Statement. It is also reflected on a more Regional-level through policy documents such as the Growth Plan for the Greater Golden Horseshoe, the Greenbelt Plan, the Oak Ridges Moraine Conservation Plan, and the Niagara Escarpment Plan.

According to the Consultation Document, the Province is considering limiting appeals on certain land use planning decisions, including exempting from private appeal any decision by the Province to approve a new official plan or a proposed official plan amendment where municipalities are required to implement Provincial Plans. Presumably, such decisions of the Province would be issued where the Province has determined that all or portions of a new official plan or official plan amendment is in conformity with one or more of the above-noted Provincial policy documents.

Through Bill 73, *Smart Growth for Our Communities Act, 2015*, the Province has already moved towards implementing restrictions on private appeals where a Regional or Local official plan is implementing a matter covered by Provincial policy. It is not clear from the Province's Consultation Document how much further the Province intends to go with such restrictions.

The current system of approvals under the *Planning Act*, in particular the approval of new official plans or official plan amendments, does not require a decision of the Province in all cases. It is not clear if the Province is proposing some new form of Ministry review where Provincial decisions are issued in order to determine which portions of a new official plan or proposed official plan amendment will be restricted from potential private appeals to the OMB. Further clarity is requested on this issue.

2) *Bring Transit to More People*

Accessible transit is a Province-wide goal. However, the implementation of this goal at the Regional and Local level can raise a myriad of issues for both existing and future residents. The key is to ensure that the Province's goal is realized without unduly and unfairly limiting substantive input from those who will actually live with and use the transit infrastructure being provided.



To this end, the Province must give careful consideration to how it defines “transit supportive development”. For most, the phrase implies an increase in residential and/or employment densities centred around transit hubs or along transit corridors in order to make best use of investments in infrastructure. The equation appears simple – there should be more people living and working around available transit. However, the site-specific implementation is not quite as straightforward. For example, proposals to intensify in historically low-rise areas are often met with resistance from existing residents. This in turn puts pressure on local politicians in deciding on higher density applications. Limiting or removing rights of appeal on either side may directly impact the Province’s goals. The forum of the OMB is often needed in order to resolve these matters.

There will always be context-specific instances where transit priorities directly interface with existing communities. There is a need to ensure the Province’s transit goals are implemented in a manner that is compatible with the local context. Further information regarding how the Province proposes to define “transit supportive development” in relation to localized contexts is needed to provide appropriate feedback on this proposal.

3) *Give Communities a Stronger Voice*

This section of the Consultation Document provides suggested changes to the land use planning and appeal system so that more land use decisions can be made locally. The OBA provides the following comments on three of these proposals:

i. Expand the Authority of Local Appeal Bodies

The objective behind the establishment of a Local Appeal Body (“LAB”) is to permit a municipality to appoint its own tribunal for appeals of Committee of Adjustment decisions. Expanding this authority to include site plan matters would further the mandate of LABs in local matters. However, as of the date of the Province’s Consultation Document, no Ontario municipality has yet created a LAB. The cost associated with implementing a LAB is most often cited as being prohibitive. The City of Toronto is the furthest along in the process of creating a LAB and its experience will be instructive to the Province and other municipal authorities as to the utility, logistics and costs of a LAB. While there is merit in considering bestowing more powers to a LAB, the LAB process is still in its infancy and may need to mature before further powers are accorded.

ii. Limit OMB Authority to Matters that are Part of the Municipal Council’s Decision

It is unclear how this proposal differs from the restriction that is already placed on the OMB by subsection 17(50.1) of the *Planning Act*, which does not allow the OMB to approve or modify any part of an official plan that is in effect and was not dealt with in the decision of council to which the appeal relates. However, there are times when it is difficult to determine whether municipal council has rendered a decision in respect of a portion of an official plan. For example, if a landowner proposes a modification to the designation of a site as part of an official plan



review, but council's decision does not address the requested modification, it is not clear whether maintaining the existing designation of the site forms a part of council's decision. Further clarity is needed in this area, which may require that the language of subsection 17(50.1) (which was added to the *Planning Act* in 2006) be revisited.

iii. *Require the OMB to Send Significant New Information Back to Municipal Council for Re-Evaluation*

It is unclear how this proposal differs from those sections of the *Planning Act* that already allow for motions to determine that new evidence is being presented at a hearing that could have materially affected council's decision. For example, under existing subsection 17(44.4), the Board may not allow new material evidence to be admitted until the council of the relevant municipality has been notified of the new evidence and been given an opportunity to reconsider its decision in light of the new material. This process has been available for the last ten years; however, in the experience of our membership, there have been few instances where the process has been used. Thus, the OBA seeks clarification as to what changes are envisioned to the current process. Depending on the response, it may be that the existing provisions may need to be revised to ensure they address the Province's stated objective of ensuring that municipal council is provided with a reasonable and timely opportunity to review significant new information before it is presented to the OMB.

4) *De Novo Hearings*

There are two types of appeals that are filed to the OMB in respect of private *Planning Act* applications: appeals of decisions (positive or negative) and appeals of non-decisions (where the municipality has failed to render a decision within the statutorily-prescribed timeframe). Imposing a standard of review respecting decisions of municipal authorities first requires that there be a decision. Where there is no decision, the OMB considers the matter *de novo*, or in its first instance, to ensure that the appellant, the municipal authority, and any interested parties or participants are able to provide their best evidence on the matter. It is unclear from the Consultation Document how the Province would propose to implement a standard of reasonableness on appeals of non-decisions.

Further, implicit in the reasonableness standard is that deference is to be accorded to the decision under appeal. Deference is accorded, in part, because the original decision maker (or trier of fact) had the benefit of considering the totality of the evidence, both for and against, before rendering its decision. The OBA recognizes that there are divergent opinions on the appropriateness of applying a standard of reasonableness to municipal decisions. Whatever the approach chosen with respect to the treatment of *de novo* hearings, we would welcome an opportunity to discuss the procedural considerations in any chosen approach, and hope that there will be further stakeholder consultations with respect to the specifics of any proposed amendments.



5) Transition and Use of New Planning Rules

The Province has recently required planning decisions to be based on Provincial policies in effect at the time of the decision. As an example, the 2014 Provincial Policy Statement applies to all decisions in respect of the exercise of any authority that affects a planning matter made on or after April 30, 2014 – regardless of when the matter being decided was first commenced. However, expanding these transition rules to municipal policies could have greater implications given the pace at which municipal planning policies can change. The OMB-created “Clergy Principle” generally directs the OMB to consider the municipal policies in force and effect on the date of the application. We note that the “Clergy Principle” has been reviewed by the Ontario Courts on appeal and determined to be appropriate.

Theme 2: Citizen Participation and Local Perspective

The OBA supports the Province’s initiatives towards ensuring that the planning appeals process is understandable and accessible to all citizens that have an interest in the outcome. To this end, we would support expansions to the Citizen Liaison Office to include an in-house or duty lawyer to assist members of the public. This resource is available to the public in other tribunal contexts (for example, the Landlord and Tenant Board and the Human Rights Tribunal) and a similar format could benefit the OMB.

In addition to a duty lawyer, the Province could consider a duty planner that would provide general information to the public regarding Provincial, Regional, and Local policies and zoning regulations. This resource could be made available via appointment or through a telephone “hotline”. The primary purpose would be to educate the public about how to obtain and navigate the applicable planning instruments, much of which is now available via online resources.

Finally, the Province could make legal aid funding available to residents with a direct interest in an appealed planning matter, but who lack the resources to marshal an evidence-based case to the OMB. We would be pleased to provide our membership’s input on the criteria for allocating such funding should the Province wish to further explore this suggested initiative.

Theme 3: Clear and Predictable Decision-Making

The OBA supports increasing the number of OMB adjudicators and placing a greater emphasis on training to ensure that they possess the necessary skills to carry out their mandate in an effective and efficient manner. We believe it is important that OMB members have experience in the intricate and complex areas of law and policy that are often the subject of OMB hearings. We also believe that more OMB members should have experience in Alternative Dispute Resolution, as the use of Board-assisted mediation is increasing.

Our membership often receives questions from members of the public as to how OMB members are appointed and their respective qualifications. We believe the Province should more actively



promote the exemplary qualifications of the present and future members of the OMB as a means of engendering confidence in the OMB and the appeals system in general.

In the past, longer, more complex hearings have benefitted from having multiple OMB members hear the evidence and render a decision, allowing for collective decision deliberations. However, as a result of many of the Province's initiatives since the early 2000s, our sense is that the length of hearings has gradually reduced. Multi-member panels may well be appropriate in various circumstances, including for more complicated hearing events. However, in other cases, particularly for prehearing conferences, settlement hearings, and relatively simple hearing events, a single member panel may be sufficient and represent an efficient use of the OMB's resources.

Theme 4: Modern Procedures and Faster Decisions

As is the case in any area of administrative law, it would be helpful if general timelines were established for rendering decisions or providing updates if decisions are not issued within the expected timeline. However, the OBA appreciates that OMB adjudicators must be given the necessary resources and time to write effective decisions. The hope is that increasing the number of qualified adjudicators will assist in that regard.

Some of the suggestions provided by our membership for achieving a more efficient process include the following:

- Requiring the parties to an OMB appeal to come to the first pre-hearing conference prepared to discuss their issues and determine the course of the appeal. Currently, first pre-hearing appearances are often used for taking attendance and setting future dates. Revising this process to make pre-hearings more akin to judicial pre-trial conferences would allow OMB adjudicators to actively direct how issues will be tried and matters will be scheduled.
- In larger, multi-party appeals, making meetings of like-experts and the creation of Agreed Statements of Fact mandatory for each hearing would assist in determining the areas of true difference between professional witnesses.
- Where appropriate, setting time and page limits on final argument akin to the Civil Procedure Rules concerning appeals would assist the expectations of both the OMB members and the parties.
- Creating a streamlined process for electronic and/or written evidence on settlement matters that can be disposed of without the need for *viva voce* evidence.
- Requiring persons intending to participate in a hearing event to “pre-register” with the OMB and/or known parties (e.g. the municipality and applicant/appellant). This would assist the OMB and parties to understand the level of interest an appeal has generated in



advance and may, in some circumstances, allow the OMB and the known parties to avoid an in-person appearance where it is understood that there is little or no interest from third parties.

There are many existing processes that the OMB does well. For example, the OMB's *Rules of Practice and Procedure* provide for the electronic circulation of most documents associated with a hearing event, including witness statements, reports, visuals, and motion records. The Board also circulates its decisions electronically and posts them online. However, there are opportunities for improvements in the hearing process – particularly, the pre-hearing process where active adjudication and directed formats for hearings could assist the parties in having issues heard and determined more quickly, but in a manner that continues to accord with the principles of fairness and natural justice.

Theme 5: Alternative Dispute Resolution and Fewer Hearings

Board-assisted mediation is increasingly becoming an important tool in resolving, or narrowing, issues. Our members who practice before the OMB have generally had success with the OMB's current mediation services and the OBA supports efforts to increase and enhance the OMB's mediation capabilities. However, we recognize that the OMB needs to be given adequate resources to improve and expand its existing mediation resources.

The Province has taken steps through Bill 73 to allow municipal authorities to seek mediation with appellants before appeals are filed with the OMB. However, mediation remains a voluntary process that only works if the parties are prepared to explore opportunities for resolution beyond what an adjudication may provide. In some cases, parties are more prepared to engage in mediation with a qualified OMB member than they would be through a private mediator. The gravitas added to the process by an OMB member can often be helpful in encouraging clients to try mediation. This same gravitas is likely not present if the screening or the actual mediation is carried out by municipal or OMB staff.

It should also be recognized that mediation can add time and costs to a proceeding. In some cases, an unsuccessful mediation can result in double the cost to the client to having the matter ultimately resolved. To address this, parties should be encouraged to narrow or scope their issues through mediation in order to streamline the eventual hearing. In this way, mediation can add value to the process even if a full resolution is not possible.

Conclusion

The OBA supports the Province's efforts to ensure that the OMB continues to function as a necessary and well-regarded component of the land use planning approvals system. Our membership understands the challenges raised by both the private and public sectors in dealing



with appeals to the OMB as well as the public perception of how OMB appeals are adjudicated and ultimately resolved.

The Province's Consultation Document has provided some insight into the types of reforms currently being considered. As indicated in this submission, various proposals put forward have merit and should be further explored in consultation with stakeholders to determine how best to implement changes that would continue to allow the OMB to render substantive, timely, and cost-efficient decisions on planning matters.

We thank you for considering our input and we look forward to reviewing any further or more refined proposals arising out of this review and making further comments at that time.