Recommendations to the Government of the Province of Ontario regarding the Ontario Municipal Board

Submitted by
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The Unionville Residents Association has been a party, participant and observer at several OMB hearings in Markham over the past number of years. We are also the largest and most active residents/ratepayers association in one of the most development-intensive municipalities in the province. Based on this experience we present the following recommendations:

1. Jurisdiction

Appeals to the OMB should be limited to issues that arise due to a municipality diverging from an up-to-date and in force Official Plan, secondary plan or zoning bylaw. Rejected Official Plan or zoning amendment applications should not be appealable to the OMB if they have been given due consideration by the municipality.

2. Role of Municipal Staff

It is not clear that all development applications need approval from elected councils rather than properly qualified municipal staff who have followed a properly documented and public process, including public consultations. In this way elected councils should act only as an appeal body with the power to decide which appeals to hear. Clearly defined and well-documented processes would avoid the politicisation of decision making in favour of either developers or local residents. Provincial policy should be crafted to ensure world-class long-term planning.

3. Keeping Municipal Policy and Resources Up to Date

It is important to note that the changes noted above require that municipalities keep all their plans, bylaws and policies up to date. They must be held accountable for investing appropriately in their planning and approval infrastructure so as not to cause inordinate delays or leave their decisions open to appeal on technicalities.

But accountability should be the responsibility of the province, not the OMB. For example, it would be wrong to approve a poor development proposal as "punishment" for an inadequately staffed municipal planning department. We fear that this is happening already.

4. Municipal Timeline Benchmarks

New appeal approval guidelines should include benchmarks and guidelines, rather than binding deadlines for municipal approvals, against which the board can judge whether to accept or reject appeal applications.

The URA believes that the reforms suggested here would significantly reduce the numbers of board hearings and might also streamline those that do occur. The result would likely be that only the largest and most complex development applications would be brought before the board. We recommend that research be conducted to determine the typical timeframe required by municipalities to review such applications.

5. Deference to Municipalities and Provincial Policies

In any appeal to the OMB where there are areas of interpretation, deference should be given to municipal decisions in the absence of any evidence of lack of good faith, corruption, undue political interference, or lack of accordance with local or provincial plans, policies, bylaws, laws, regulations and the like. The onus to prove lack of good faith etc. should lie with the appellant.

In the absence of evidence to the contrary, a municipality should not have to defend the quality of their decisions before the OMB. The OMB should not have the power to consider development applications from the beginning as a default starting point. It should have the power to review only those aspects of a municipal decision that evidence shows are deficient under local and provincial plans, policies, by-laws, laws and regulations.

The OMB should not have the authority to override provincial policies. For example Special Policy Areas, the Green Belt, the Oak Ridges Moraine, the Niagara Escarpment and other protected lands should be immune from OMB decisions that permit intensification. Where there are inconsistencies in policy, the OMB should defer to the province or its delegates (e.g. conservation authorities), not substitute it own decisions. This must be made explicit in the Board's terms of reference. (Please note that this recommendation comes from a situation where the Board approved intensification in an SPA despite very clear and relevant statements in the Provincial Policy Statement brought to its attention by the Toronto and Region Conservation Authority.)

We draw attention to the recent and successful court appeal of an OMB decision in Richmond Hill. It is our perception that the OMB steps outside its jurisdiction with some

regularity, yet its decisions are rarely appealed to the courts due to the associated legal costs. A court appeal should not be required in order to limit the OMB's actions. Please refer to Section 10 below.

6. Choice of Appeals to Hear

The OMB must also have the power to reject hearing appeals, based on an initial written assessment – as do appeal courts. An appeal to the OMB should not be an automatic right even where a municipality may have strayed slightly from the appropriate bylaws, policies etc. For example, missed application approval deadlines should not be automatic grounds for appeal, if the municipality can justify the delays as reasonable. OMB staffing should be maintained at a level that prevents it from hearing all appeals.

7. Committees of Adjustment

Appeals of Committee of Adjustment (COA) decisions should, in the first instance, be handled by local councils, not the OMB. As with OMB appeals, appeals to local COAs and subsequent appeals to councils, should be limited. COAs and councils should be able to pick those appeals they wish to hear and they should involve only situations where municipal staff have deviated from the relevant bylaws, policies and processes.

To clarify and limit the work of municipal staff and COAs, a clearer and more consistent definition of "minor variance" is required. For example 5% might be the threshold for increased lot coverage. Also an elevated number of minor variances related to one application (more than 3?) should be considered together as a "major" variance beyond the jurisdiction of a COA.

8. Board Member Qualifications and Numbers

The qualifications and training of both COA and OMB members should be enhanced and appointments must not be political. All should have an academic background in urban planning, engineering, architecture and/or development law. The province should develop appropriate in-depth training programs for both COA and OMB members.

The Board should be able and required to appoint more than one member to any appeal hearing, depending on the size, complexity and issues before it. Leaving massive multi-million dollar decisions in the hands of a single, potentially under-qualified member detracts from the public sense of transparency and justice associated with board decisions.

9. Eligible Parties

No change seems to be required in those parties able to make appeals to the OMB, including developers, residents, conservation authorities, etc.

10. Hearing Procedures and Public Access

OMB hearings should not be adversarial. The URA believes strongly that the OMB process should be limited to mediation. The adversarial process favours parties with deep pockets able to afford lawyers and teams of experts. The use of lawyers as representatives of the parties should be discouraged, as should legalistic rules of evidence and cross-examination.

The costs related to the adversarial process discourage municipalities from investing appropriately in OMB hearings. The result is that municipalities will often compromise with applicants, not because they believe the result reflects good planning, but because an OMB appeal is simply too costly.

Also, the adversarial process discourages the involvement of local residents, businesses and associations. The legal costs are often prohibitive. Yet acting as a "party" to a hearing without legal representation is often ineffective.

Further, the cross-examination process and insistence on other legalistic procedures can be intimidating and discourages participation. (We have seen local residents at hearings deliberately humiliated by lawyers and board members.)

The current hearing process is also flawed in so far as it works like a court, but there is no transcript against which to analyse the final board decision. Some board members even fail to take notes. An audio recording of proceedings, which could be digitally transcribed if needed, seems like a cost-effective compromise to improve the perceived fairness and transparency of the process.

11. Precedent and Innovation

A greater reliance on precedent should be considered, to ensure greater consistency of decision-making. But it would be a mistake to completely bind board decisions in this way. It would take away the ability of municipalities and developers to innovate.

The province should consider adding to the board's terms of reference the encouragement of innovation to improve design quality, energy efficiency, sustainability and other provincial objectives.

12. Site Visits

By default all OMB hearings, particularly those involving brown-field and infill sites, should include a site visit so that the board and all parties have a clear context for the process and the final decision. A site visit should be dispensed with only on agreement of all parties. Lack of site visits brings into question the impartiality and transparency of the process.

13. Experts

The URA also questions the board's over-reliance on so-called "experts". In our experience planners, in the absence of a commonly agreed definition of "good planning", often tend to drift toward the positions of their clients or employers – developers, municipalities or even community associations. Resolutions of differences among the experts then often rely on lawyers trying to pick apart the credibility of opposing experts. A focus on the best planning result can be lost in this "game".

Further, the over-reliance on expert opinion, possibly to the point of overriding or ignoring lived experience, tends to denigrate the perspectives of local residents and downplays the contributions of others with relevant expertise, even it they lack the formal academic qualifications. The result can be that the board excludes serious consideration of very real community impacts even though they cannot necessarily be quantified or backed by academic or technical studies. The terms of reference of the OMB must require due consideration of the perspectives of those directly impacted by development. (This parallels in some ways the reliance on indigenous oral history in other contexts.)