



Ontario
Home Builders'
Association

Discussion Paper

on

OMB Reform in Ontario

by

Ontario Home Builders' Association

August 30, 2004



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Home Builders'
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Honourable John Gerretsen
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August 30, 2004

Re: Ontario Municipal Board Reform

Dear Minister

We are pleased to be given an opportunity to present our views on Bill 26 on Ontario Municipal Board Reform by the Province of Ontario.

We have distributed the Discussion Paper amongst our members and have studied the impacts on the housing and development industry. While we are pleased that the Ministry is being pro-active in discussing reform of the Ontario Municipal Board in context with the discussion of Land-use Planning Reforms, we hope that the present structure of the OMB is not significantly changed. The development industry has worked hard with the previous governments to ensure that the OMB is a fair and impartial third party that will take make decisions based on the merits of the application and the Planning Act.

Thank you for the opportunity to present our views. We would be pleased to meet with you again, if required, and we look forward to hearing your decision in this matter.

Respectfully submitted:

Peter Saturno
President, OHBA



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About OHBA

The Ontario Home Builders' Association was formed in 1962 with 10 locals to give residential builders a voice in the provincial government, facilitate changes in the industry, and provide links among home-building businesses, suppliers and services.

Now, it is comprised of an Executive Committee, Board of Directors, and nine different standing committees. We have 30 locals and 3600 members. Member companies include builders, developers, trades, suppliers and service professionals who create employment for approximately 300,000 persons in the private sector. We represent the majority of the builders and developers in Ontario and we are the voice of the residential construction industry in Ontario.

Our members live, work and play in the municipalities that make up their community, and therefore, our comments should be taken in balance with the fact that we not only do business in the cities, towns and villages in Ontario, we also live and raise our families there.



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Executive Summary

The Ontario Municipal Board is an independent adjudicative tribunal that has been functioning since 1897 and plays a vital role in ensuring fairness in the decision making process for planning and development applications in Ontario.

OHBA recommends that the current role of the OMB be retained as an impartial appeal body for Land Use Planning decisions to be tested on the basis of the Planning Act.

The OMB should carry out its work in a business-like fashion to ensure that fairness in the decision-making process is maintained and develop a protocol whereby there is efficient use of mediation and Alternate Dispute Resolution procedures and scoped hearings.

OHBA recommends that the Government enhance the role of the OMB by:

- Attracting and retaining highly qualified members to the Board that are experienced in land use planning and land use legislation by appointing them to a minimum 5 year term with attractive compensation;
- Reviewing Board member performance on an annual basis and providing training to the members in the Planning Act and related legislation as well as Mediation and Alternate Dispute Resolution;
- Improving the decision-writing process by requiring members to provide a final decision in a short period of time following a hearing and providing a full written decision with reasons in a reasonable time thereafter;
- Developing an enhanced web-site that would provide current and archived cases and decisions;
- Discouraging frivolous applications by increasing the application fees; and
- Encouraging the use of Mediation and Alternate Dispute Resolution and providing an incentive by providing a partial refund of the application fee for successful mediation.



OHBA Discussion Paper

on

OMB Reform in Ontario

1. About this Paper

The Government has released a discussion paper “Reforming the Ontario Municipal Board”, in June 2004, in conjunction with the announcement by the Minister of Municipal Affairs and Housing that the Province of Ontario is reviewing the role and functions of the Ontario Municipal Board. This paper is in response to the Government’s request for comments on their Consultation Discussion Paper #3.

2. Our Vision

OHBA has a vision for a clean, green Ontario with a robust and healthy economy that consists of:

- strong and prosperous communities with a high quality of life;
- acceptance by all members of the communities to work together towards having strong economic growth;
- acceptance of regional and local identities within a larger social and economic community;
- an efficient, streamlined government with cost-effective delivery of services, using a rational and consistent set of policies for planning; and
- a level playing field with clearly defined rules allowing private sector to provide safe, affordable, healthy and quality housing

OHBA stresses that the builders and developers who make up its membership, must be part of the solution to achieve these significant goals, and is committed to working together with the Government to ensure that the end result meets the objectives of OHBA and the Ministry so as to benefit the citizens of Ontario.

3. The Issues

The issues identified by the Province regarding the OMB are as follows:

1. Role of the OMB in the Land Use Planning System
 - Accountability
 - Mandate and
 - Scope
2. Independence of the OMB
 - Appointment and Qualifications of OMB members
3. Competence and Accessibility of the OMB
 - Competence
 - Decision making, and
 - Accessibility

4. The Problem

Before we provide you with our recommendations, we would like to apprise you of some of the problems our members face with the Planning system and the OMB. Several issues have been raised by the Discussion paper on OMB Reform and we will try to address all the points brought forward.

In our opinion, the role of the OMB should not diminish such that it is a shell without any authority. It was always intended to be the appellate body to which decisions made by a municipal body could be referred to and tested against proper planning policies.

Sometimes decisions made at the municipal level are the outcome of an emotional political debate. It is appropriate to have an independent adjudicative tribunal like the OMB to provide a sober second thought, to remove the emotion from the decision and to provide a decision based on the planning merits of the application.

The regulatory environment that encapsulates the development and home building industry depends to a large degree on the decision of a municipal council to grant approval after all the studies have been done and all the planning objectives have been met.

Whereas there is a general belief among the public that the un-elected OMB tends to overturn local municipal decisions made by the elected body of Council, it also works in reverse that a Council may deny an application, against the advice and recommendations of their planning staff, because of pressure from the residents of the community sometimes based on self-serving interests.

We will demonstrate with examples, some of the problems our members face:

1. *Timing*

One of the problems faced by the development industry is the reluctance of the municipality to deal with a complete application, especially if it is controversial, thereby leading to delays in obtaining approvals which delays the production of new housing, adds unnecessarily to costs, restricts and discourages innovation and ultimately discriminates against new home buyers and the development industry.

This is particularly true in intensification projects in an established neighbourhood. The issue that our municipal leaders have to address is the question of changing an established neighbourhood to meet housing objectives and Provincial goals of transit-supportive densities, growth management and planning policies.

2. *The NIMBY Syndrome*

Any development, small or large, is subject to opposition from neighbours because of the NIMBY (*Not In My Back Yard*) syndrome – that is human nature. How much this impacts on the municipal council and its decision depends on various factors such as the scale of the development, experience of council on understanding NIMBYism and how outspoken the objectors are.

3. *Frivolous Objections*

The development industry deals with this problem on an ongoing basis – approvals may be appealed on a frivolous basis by anyone upon paying the requisite fee and putting in a brief letter outlining the reasons for the objection. Once received, the municipality and the Board have to proceed with the process that provides the objector a fair hearing of the issues related to the objection. Sometimes, the issues that are of a concern to the appellant are unrelated to planning principles but rather are based on misconceptions of the development and the process involved. Whereas the OMB has expanded powers to dismiss an appeal without a hearing based on the grounds that an appeal is not based on any apparent land use planning principles or the appeal is not made in good faith or is frivolous or vexatious, or is made only for the purpose of delay, this is rarely enforced without at least a short hearing. Costs are rarely awarded against the appellant in these instances.

4. *Complete Applications*

What constitutes a complete application has always been a debate between the municipality and the development industry. While the municipality would like to have answers to all their questions before they give approval, it is unreasonable to expect the proponent to invest in expensive in-depth studies before there is any assurance that approval will be granted.

When delays occur due to unreasonable demands by the municipality for detailed studies, the proponent has the ability to appeal to the OMB. However, there should be an onus on the proponent to provide sufficient information to the municipality so that the problem and the suggested solutions can be assessed.

Clarity on the type of studies required in support of development applications would be helpful in assisting the stakeholders to define and provide a complete application.

5. What is Needed

It is our belief that a workable balance is required to make the system work. This balance needs to:

- distinguish between frivolous applications and dismiss them without appeal
- provide mediation consensus building using expanded Alternative Dispute Resolution principles
- make consistent decisions with regard for the Planning Act
- reduce the time taken to arrive at decisions

We will now examine each of the issues raised in the Consultation Discussion paper in detail:

5.1 *Role of the OMB in the Land Use Planning System*

5.1.1 Accountability

The question has been asked: "***Should there be some appeal mechanism for land-use planning decisions?***"

Absolutely. To take away the right of appeal would be a significant step backward in both governance and fairness. What makes the system work is the requirement to make a decision that can be defended on the grounds of good planning principles. Take away the right to appeal and we will see decisions by municipal councils and recommendations from municipal staff that would not necessarily be made with planning principles in mind but rather with the thought of what the "community" does not want in its neighbourhood.

To avoid planning decisions based on short term political circumstances, the right of appeal should always be available for the applicant and the public to ensure good planning decisions are made based on the merits of the application.

Should the courts be used as the appeal body for land-use planning decisions?

In our opinion the courts are not geared towards training or understanding of the land-use planning principles or the planning system. To expect the legal and judiciary system to train itself to make decisions based on Provincial and other Planning Policies would lead to a branch that would look like the current OMB process in a few years. This would then be equivalent to replacing an established forum with a similar one in a few years and we question if that is a wise use of valuable time and resources.

Should the OMB's ability to substitute its decision for that of an elected council be modified?

We believe that this suggestion would not allow the OMB to be an independent adjudicative tribunal. If the decision of the OMB does not hold weight, but is rather only a recommendation that the Municipal Council may or may not accept, we believe it would be a waste of time and money to have gone through the process if the Municipal Council does not accept the OMB decision.

5.1.2 Mandate

Should the OMB continue to conduct "de novo" hearings looking at the full merits of a planning matter?

We believe that the OMB should continue to conduct its hearings "de novo". This philosophy works for and against the development industry depending on the circumstances of the appeal but it allows the Board member overseeing the hearing to review all the evidence and have a complete understanding of all the issues brought forward by all stakeholders. We believe that this is a fair way of implementing the Planning Act.

We do believe that the current practice of requiring the issues to be scoped should be continued so as to allow the Board member to reduce the time and money spent on the hearing. By scoping the issues, the time can be better spent on making a decision of the contentious issues

and determining how they can be resolved. However, it is imperative that the Board member get an overview of all the issues so as to understand the "big picture" of the appeal.

5.1.3 Scope

Should the scope of matters which can be appealed to the OMB be narrowed?

The OMB currently is the final arbitrator on *all* decisions related to the *Planning Act*. To remove this function, or to dilute it by allowing an option for the municipality to deal with secondary appeals, undermines the independent third party status of the OMB.

The OMB as an independent third party can make an impartial decision based on the merits of the case which is sometimes not possible at the municipal level. Having made the original decision, it is difficult to expect the municipality (or a committee within the municipal model) to be an impartial third party.

As stated previously, to take away the right of appeal would be a step backwards in governance and fairness.

5.2 Independence of the OMB

5.2.1 Appointment and qualifications of OMB members

What qualifications and experience are important for a member of the OMB?

Experience in Land Use Planning is imperative for any member of the Board. To expect a Board member to make decisions on applications based on its merits related to the *Planning Act* without having experience in Land Use Planning is to suggest that the Board is not a professional body. Though the Board members may be of any related profession, (i.e. lawyer, planner, engineer, etc.), their primary experience should be in land use planning and land use legislation.

Sometimes in a complicated appeal it may not be possible to have a member who is experienced in all issues such as transportation, economic forecasting, environmental, etc., and therefore it is advisable

to have more than one Board member at large complicated appeals so as to harness the strengths of the individual Board members.

How can we create a more open process for recruiting and appointing qualified applicants? Will increasing the appointment term make for better decisions by the members and remove the perception that decisions are being made under pressure?

Appointment of qualified applicants should be done on the basis of the applicant's merits. **Political affiliation should not have a bearing on the selection of a Board member.** Selection of potential candidates should be done on a merit point system that evaluates their qualifications, experience, personalities and dedication.

We would recommend that a minimum appointment term of five years be implemented. In business it is a well known fact that a new employee/executive reaches high efficiency after about three years. Using that equivalency, a Board member is just reaching his/her peak performance when the appointment is over. In order to receive the best use of its investment in new members, the Board should implement an appointment term of at least five years.

Is a probationary period of one year desirable?

No. In order to attract highly qualified professionals, a one year probationary period would act as a disincentive. A screening process at the beginning, before the appointment, is strongly recommended.

How should a complaint against a member be dealt with?

The OMB should deal with all complaints in a professional manner. All professional associations have a process that deals with complaints against their members by a panel of their peers and we would recommend that this model of peer review of complaints be followed.

What comparables and criteria should be considered in establishing compensation levels for OMB members?

In any industry, compensation is established as a range based on the job description first and then within the range compensation is offered based on knowledge and experience in the field. It would be impractical to provide a range of compensation based on the original profession of the Board member; however compensation should be sufficient to attract highly qualified "A team" candidates.

5.3 Competence and Accessibility of the OMB

5.3.1 Competence, Decision Making and Accessibility

Should member performance be reviewed and assessed annually? How should member performance be reviewed and assessed?

It would be bad business practice if any business did not review the performance of its employees on an annual basis. The OMB should implement a process by which it reviews the performance of its Board members against set criteria and expectations at least once a year. The review can be spread out over an extended period so that the load for reviewing all the Board members at the same time is spread over time.

Review should consist of an assessment of the Board member's ability to:

- consistency in decision making
- ability to make decisions on complicated cases and understanding expert testimony
- interaction with the public and the witnesses

What learning and training initiatives would benefit OMB members?

Mediation and Alternative Dispute Resolution would go long way in making the OMB a friendlier place to resolve appeals. Board members should have formal training in alternate dispute resolution so that it can be utilized during the course of the hearing as far as possible.

What else can the Board be doing to promote consistency?

Training of new Board members and performance evaluation of existing Board members to ensure that decisions are being made based on set criteria in any part of the province will go a long way towards ensuring consistency in the decision-making process. However, any criteria should be flexible enough to take into consideration local conditions that may require a decision that could be in conflict with an overall set of policies.

5.3.2 Decision making

How can the OMB better communicate its decisions and decision-making processes?

The current practice of the Board in providing written decisions with reasons is very comprehensive and should be continued. It provides the basis for consistency and reference in future cases.

Our members in the development industry have to make their investment decisions with confidence and they need to be assured that the OMB will make a decision based on Planning issues rather than on any other policy or influence. It is important that the reasons why a decision is made is provided for all cases.

How should the Board ensure that it has the best evidence on which to base a decision?

The Board usually has to rely on the facts as they are presented by the proponent and the appellant. – it would be unrealistic to suggest that the role of the OMB should be to uncover new evidence or change the terms of reference of studies etc. However, depending on the experience of the Board member, questions asked regarding the validity of certain assumptions and/or the implications of suggested actions may clarify certain issues that may otherwise not have been presented. We would suggest that it would be beneficial for the Board member to be aware of the local circumstances so that any decision is made based on the community

Are there any improvements to the decision-writing process and the accessibility of decisions that should be made by the OMB? What improvements could be made to case management at the OMB?

Case management at the OMB has improved dramatically in the past few years. The timing for hearing an appeal has reduced considerably and we congratulate the Government on achieving that objective of streamlining the appeal process.

The decision-writing process could be improved by requiring Board members to provide a decision at the end of the hearing (or shortly thereafter) to be followed within a reasonable time with the written decision. This allows the municipality and the appellant to deal with other issues while waiting for the written decision.

It would also be advantageous to use the Internet to its fullest potential by using the dedicated OMB web-site to readily provide cases and decisions (both interim and final written).

We would suggest that a cross-reference to the OMB web-site be provided on the web-site of the Ministry of Municipal Affairs and Housing.

We recommend an expanded use of the OMB web-site to provide an archive for cases and decisions that would allow stakeholders, (the proponents, municipal staff and the public), to properly examine the effects of past decisions thereby weighing the merits of their own disputes.

Should the OMB have the authority to require parties to mediate? How can the OMB inform the public of the option of avoiding hearings through mediation and settlement?

We are strong supporters of the Alternative Dispute Resolution process and believe that mediation should be mandatory in any appeal. We recognize that mediation does not work in all cases and in those cases would be wasteful, but usually the use of mediation and proper alternative dispute resolution practices can be beneficial to all parties.

Usually, a telephone conference between the parties would assist the Board member to determine the need of mediation, and unless there is a strong case to be made against mediation, the Board member should have the authority to direct the parties to mediate before setting a hearing date.

We suggest that the application fee for an appeal be increased in order to discourage frivolous applications. However, the incentive for a substantial refund (approx. 50%) should be provided if the matter is resolved through mediation without the need of a hearing.

5.3.3 Accessibility

How can the public be better informed about process at the OMB?

The current publications available from the Ministry of Municipal Affairs and Housing are excellent sources of information. These are available at all municipal offices and are available on the internet as well. Our review of the material shows that any enhancement of these publications would be minimal in the amount of new information it would provide.

Should there be an "advisor" at the OMB to perform this role?

Most municipal planning departments provide this service to the public over the counter. To provide advice at another level of government may not be the most efficient use of limited resources.

6. Conclusions

In summary, OHBA recommends that the current role of the OMB be retained as an impartial adjudicative body for Land Use Planning decisions to be tested on the basis of the Planning Act.

The OMB should carry out its work in a business-like fashion to ensure that fairness in the decision-making process is maintained and develop a protocol whereby there is efficient use of mediation and Alternate Dispute Resolution procedures and scoped hearings.

We recommend that the Government enhance the role of the OMB by:

- Attracting and retaining highly qualified members to the Board that are experienced in land use planning and land use legislation by appointing them to a minimum 5 year term with attractive compensation;
- Reviewing Board member performance on an annual basis and providing training to the members in the Planning Act and related legislation as well as Mediation and Alternate Dispute Resolution;
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