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## **Cost-effective strategies to promote better planning and development in your municipality**

Are you facing an uphill battle to promote better planning and development in your municipality? Many individuals and community groups are daunted by the prospect of participating in local planning decisions and a possible related Ontario Municipal Board (OMB) hearing. These processes can involve complex legal issues and a considerable investment of time, energy and money.

There are practical ways to cost-effectively participate in local planning decisions and address planning changes at the OMB. This article reviews some of the strategies that can be employed to do so.

### **1. Ontario Municipal Planning: A Basic Overview**

Land use planning is intended to allow communities to change and expand in an orderly way that serves the infrastructure, economic and social needs of their residents, businesses and institutions while protecting local ecosystems and natural heritage. But it doesn't always seem to work that way.

Progressive ideas to establish mixed land use, protect sensitive wildlife habitats, build social housing, transit and bike paths and create other socially important landscape features are often secondary considerations. Sometimes developers of housing subdivisions, large condo projects or massive shopping centres claim these issues are beyond their mandates and some municipalities are reluctant or refuse to support them because of the cost.

For decades, the Ontario Ministry of Municipal Affairs and Housing and various provincial government ministries were directly involved with many community planning decisions and issues. To support increased local autonomy in land use planning, in 1997 the province began to transfer approval authority to municipal councils, municipal planning authorities and planning boards, where possible. Today, provincial involvement is mainly limited to setting policy in documents such as the Provincial Policy Statement (PPS) and approving regional or large official plans and other decisions not delegated to municipalities.

In practical terms, this means that most planning decisions are made by municipal councils and/or other municipal planning authorities (the "approval authorities"). If you disagree with one of their decisions, you can appeal to the Ontario Municipal Board (OMB) under the Ontario Planning Act.

### **2. Consultation**

The *Planning Act*, PPS and other provincial policies contemplate that developers, municipal officials and staff will make a genuine effort to consult with residents, community groups and other stakeholders about their concerns, hold public meetings, and answer questions in a timely manner. When community groups have appealed to the OMB on the basis that public consultation was inadequate, they have had mixed results.

For example, *Re Lakeshore (Town) Zoning By-law LA054-ZN-98*<sup>1</sup> involved approval of a proposed residential development. Numerous residents of an adjacent community appealed. The residents claimed that there were numerous irregularities in the way that the planning application was dealt with: authorities did not follow the proper consultation process or they neglected to take adequate account of the views of the residents.

However, the OMB decided that the evidence showed that the process followed was entirely consistent with the requirements of the *Planning Act* and that the process followed by the planners allowed considerable public consultation: “Meetings were held, documents and studies were prepared and made available, and concerns were answered promptly and fully.” The Board heard “no specific convincing instances where the public process was flawed or inadequate... There is no ground for dispute based on the planning process”.

In this case the Board member was satisfied that the municipal staff and council had dealt with the concerns of the residents carefully and completely. As a result, the member could not find a basis for allowing the appeal. The member was “especially concerned that the evidentiary plans of the appellants consist of speaking as *lay persons* on the prospective merits of the proposed development and of calling public sector witnesses whose viewpoints are already established. They plan also to use the occasion of the hearing to cross-examine to get the answers they seek.” [emphasis added]

While the OMB considered the residents to be sincere, their concerns rested “primarily on mere suspicions and apprehensions, none of which have any apparent factual basis.” The OMB relied on an early decision of the OMB on early dismissals, *East Beach Community Association v. Toronto (City)* 1996 O.M.B.R. No. 1890:

It is our finding that it is not good enough simply to raise apprehensions. It would not constitute apparent planning grounds by saying that further expert study is required with the hope that once a hearing is convened, more real issues can come forth. Such an approach will never lead to any finality, no matter how careful and sound an opinion is founded.

This decision and other similar ones suggest that provided that developers and municipalities follow the appropriate planning procedures regarding consultation, the OMB is not likely to interfere with a municipal decision on the basis of inadequate consultation.<sup>2</sup> It also leads to this conclusion: lay people’s evidence is largely irrelevant. ***You need experts to give evidence.*** This is discussed in more detail below.

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<sup>1</sup> 1999 CarswellOnt 5334, 39 O.M.B.R. 471

<sup>2</sup> However, if the municipality makes errors in notification so that it does not comply with the regulations under the *Planning Act* for consultation, it may well be that a decision taken thereafter is void. For example, for official plan amendments, a public meeting and notice of that meeting must be given by personal service or ordinary mail to every landowner within 120 metres of the subject land. Failure to give proper notice could potentially void a decision. Similarly, Council’s decision to approve an official plan amendment or zoning by-law must include, among other things, “the last date for filing an appeal”. If the date is incorrect, and someone misses an appeal period because of it, this likely would void the notice.

### **3. How to cost-effectively make your voice heard**

#### **3.1 Participate in the consultation process**

Participation in consultation is obviously essential if the community hopes to either stop a proposed development or significantly alter a developer's initial proposal.

In addition, in 2006, the *Planning Act* was amended in various ways. One of them related to who was entitled to appeal a decision to the OMB or who would be entitled to become a party to an appeal.

As a result of those changes, to ensure an appeal right, citizens must speak at the approval authority's public meeting(s), or give them their views in writing, before the authority releases its decision. If you do not, you have no right of appeal under the *Planning Act*. In addition, you will not be permitted to be a party to an appeal.<sup>3</sup>

#### **3.2 Engage the relevant experts during the consultation period and before decisions are made**

As noted above, the apprehensions or concerns of lay persons do not carry much weight with the OMB, who decides what constitutes "good planning" on the basis of expert evidence.<sup>4</sup> Lay persons' opinions may carry more weight with political decision-makers, as they are subject to being voted in or out by those same lay persons, come election time. However, our general recommendation is to engage experts sooner rather than later. It makes you more credible during consultation: the municipality's own professional staff will have to take you more seriously; and it is absolutely critical in the event of an appeal.

From a legal perspective, there is a good reason to engage experts early. One of the other changes to the *Planning Act* in 2006 related to "information or material" that was before a council at the time it made its original decision, and the effect of new "information and material" at an OMB hearing.

If at an appeal hearing new information or material is presented, the municipal board may, on its own initiative or on motion by the municipality or any party to the hearing, consider if the information and material could have materially affected the council's decision. If it determines it could have, then the information "shall not be admitted into evidence until" the OMB gives council a chance to reconsider its decision in light of the information, and for council to make a written recommendation to the OMB.

If council provides a recommendation within 60 days, the OMB is required to "have regard to" that opinion. If the recommendation is received after the 60 day period, then the OMB need not have regard to it.

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<sup>3</sup> However, the OMB did allow an organization party status where the individuals who created it had participated in the public process before council. See *Wiendels v. Middlesex Centre (Municipality)* (2008), 59 O.M.B.R. 271. Nonetheless, one of our practical tips for citizen groups is to incorporate early and participate in the process through the incorporated entity. While individuals can appeal decisions to the OMB, unincorporated associations cannot. Also, while costs awards are rare at the OMB, they are not unheard of, and for the individuals involved, to protect themselves from costs awards against them personally, a non-profit corporation should be established.

<sup>4</sup> We note here that while this is largely the case, we recall that one member confessed at a conference that he learned never to discount the important information residents bring to the table. He indicated that at one hearing he had presided over, a citizen participant noted that she did not understand how this development could proceed, given that the area in question flooded every year. Apparently, none of the experts who testified were aware of this.

We have found no reported cases on these sections of the Act.

This is a fairly unusual approach to evidence. If something is “material” then it is not to be admitted into evidence until the council has had a chance to consider it. If after a motion the OMB concludes it is not “material”, then presumably the OMB can admit it, but won’t think very much about it in terms of what influence or importance it might have had for the purposes of council’s decision; or whether its “good planning”, which is what the OMB must decide.

If it is “material” and the council fails to provide any recommendations or provides them late, then the OMB is completely free to decide how that information will influence a final decision on “good planning”, and need not consider anything the council has to say about it.<sup>5</sup>

Practically, a question arises for citizens and community groups who have limited financial resources during the consultation stage: should they engage experts during the consultation stage and provide their expert’s opinion to council prior to decisions, or should they wait, in the event they go to an appeal? If they wait, do they risk the OMB considering their evidence “immaterial”, assuming that any of the parties or the OMB brings the relevant motion?

This is a question people need to consider, and it will depend in part what other expert evidence is being generated and by whom leading up to the decision. But generally speaking, it is better to engage your own expert sooner rather than later, rather than risk having the OMB conclude through a motion that your evidence isn’t “material”.

This leads to the question of finding an expert who will work with you at all. Citizens are sometimes encounter planners who simply won’t work for citizens or community groups because it threatens their livelihood – it is seen as a business conflict. Some private planning firms do take on this work, but they may be very hard to find, depending on your jurisdiction or who the planners like to work for. You might have to “leave” your jurisdiction to find a planner who will help you. Another option is to engage planners who work for academic institutions. Alternatively, you may find a planner who has retired from full time practice and is free to choose his or her work.

### **3.3 If you are unhappy with the decision, file an OMB appeal with the approval authority before the deadline. And then, seriously consider settling.**

Opinions abound about whether the OMB favours developers, or is absolutely a necessary body for the purpose of keeping check on NIMBYism (Not in My Backyard). Toronto City Councillor Josh Matlow would like to see the OMB banned. He is not the only one. Earlier this year Globe and Mail columnist Jeffrey Simpson condemned the OMB for being anti-democratic.<sup>6</sup>

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<sup>5</sup> In 2009, the Divisional Court analysed the meaning of “have regard to” in *Minto Communities Inc. v. Ottawa (City)*, 2009 CarswellOnt 7349. The Court has ruled that “have regard to” suggests minimal deference to a decision of council. In the context of the *Planning Act*, and balancing public interests of both board and municipality, the OMB has an obligation to “at least scrutinize and carefully consider” council’s decision and the material before the council. But the board does not have to find that the council’s decision is demonstrably unreasonable to arrive at the opposite conclusion.

<sup>6</sup> <http://www.theglobeandmail.com/news/opinions/opinion/strike-a-blow-for-democracy-scrap-the-omb/article1885494/>

Contrary to that view, Globe and Mail columnist Marcus McGee thought that the OMB was needed more than ever, to combat NIMBYism.<sup>7</sup> There are certainly other models for planning in other jurisdictions in Canada and the U.S., but for now, this is the model we've got.

You have until 20 days after the date the approval authority's decision is released to file your appeal. Don't miss the deadline.

If someone else appeals a decision, you can seek party status in that appeal. But you will have to apply for that status and it is not automatic that you will be granted it. The board will consider the nature of the hearing, the applicant's interest, and the absence or presence of prejudice or delay to the municipality.<sup>8</sup> In one case, the OMB decided not to add a proposed party, on the basis that the prospective party was raising issues unrelated to those properly under appeal to the OMB.<sup>9</sup>

In any event, it goes without saying that developers and other parties who hire lawyers and experts usually are better equipped to present their cases, and this at least partly explains why citizens and organizations find it is an uphill battle to promote better local planning and win their cases at the OMB.

Hearings at the OMB can be won on quite technical issues, making it worthwhile to solicit legal advice at early stages in many cases. In *Manotick*,<sup>10</sup> the developer won its case partly by relying on arguments based on the proper interpretation of the *Planning Act's* planning time frame requirements.

Ultimately, for citizens, we have found that the best indicator of success is if they are aligned with the municipality or other government agency at a hearing.<sup>11</sup> Standing alone against a municipality, the province, and/or a developer means there is a better than even chance of losing at the OMB, even with your own experts and a lawyer, and a decent legal and planning case.

So, what to do if your odds look slim (or even if they don't)? Unless you have a sure fire case (and even then), given how hard it is for citizen groups to win at the OMB, and how expensive and time consuming it is, if a settlement is possible, seriously consider it.

In 2007, Ontario resident Ken McRae appealed to the OMB to protect wetlands from a large residential development in Eastern Ontario that had been approved by the United Counties of Stormont, Dundas and Glengarry. Instead of days of long, complex hearings, the OMB reduced the process, by consent of both parties, to a one-day mediation that produced a compromise settlement.

In our own practice, we have frequently encouraged clients and assisted in the development of settlements which resulted in significant improvements and likely obtained a far better result than fighting it out at the OMB, for significantly fewer dollars and time for those involved.

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<sup>7</sup> <http://spon.ca/why-we-need-the-omb-more-than-ever/2011/03/14/>

<sup>8</sup> *Gulen v. Etobicoke (City)* (1987), 22 O.M.B.R. 328

<sup>9</sup> *Ottawa (City) By-law No. 2008-250 (Re)* (2008), 60 O.M.B.R. 271

<sup>10</sup> <http://www.emcmanotick.ca/20110616/News/City%27s+urban+boundary+loss+at+OMB+a+technicality>

<sup>11</sup> For example, *Spellman v. Essex (Town)*, 2002 CarswellOnt 5112, where citizens, the local conservation authority and the provincial Ministry of Municipal Affairs and Housing actively opposed a municipal decision which allowed amendments to create a golf course.

A significant example of this was Regional Official Plan (OP) Amendment 15, an amendment of the Region of Peel, and its companion OP amendment in Brampton, which allowed the last remaining 2,430 ha of prime agricultural lands to be redesignated “urban boundary” in Brampton.

As part of a comprehensive settlement reached with the Region and Brampton, Sierra Club sought amendments to the Brampton OPA that explicitly referenced intensification as part of Brampton’s phasing strategy for development.

The settlement resulted in significant amendments to the Brampton OPA to more fully address compact urban form, public transit, pedestrian friendly development, and the protection of natural heritage features. The settlement also removed language that unduly subjected planning decisions to market conditions.

If you leave it to the OMB, then at the end of the day, there will be a winner and a loser. A settlement will at least ensure some success where you may get none out of the OMB.

#### **4. Conclusion**

If you’re an individual or a community group, and you want to be heard on municipal planning decisions in Ontario, these are our suggestions:

1. Participate in the consultation stage to ensure your voice is heard and your ideas are considered. This will also secure your right to appeal once a decision is made, if you decide to appeal.
2. Consult with planning experts, and possibly a lawyer, as soon as possible and ensure their opinions, on your behalf, are presented during the consultation stage.
3. If you are unhappy with the approval authority’s decision, file an appeal to the Ontario Municipal Board before the deadline. Obtain good legal advice *before* you launch your appeal, since if you don’t appeal properly, it can be dismissed on a motion.
4. Use your solid groundwork to push for a good settlement at the OMB to maximize the results and minimize the costs.

Paula Boutis and Charles Campbell work with citizens and non-profit groups to assist them in planning disputes. Please call Paula Boutis at 416-598-0103 x 117 to set up an appointment.