

## Report PDR-PCD-41-16

**To:** Chair McQueen and Members of the Planning and Community Development Committee  
**From:** Scott Taylor, Senior Planner and Kelly Henderson, Planner  
**Meeting Date:** November 10, 2016  
**Subject:** **Review of the Ontario Municipal Board (OMB)**  
**Status:** Recommendation adopted by Committee as presented per Resolution PCD133-16; Endorsed by County Council November 22, 2016 per Resolution CC150-16;

### Recommendation(s)

1. That Report PDR-PCD-41-16 is hereby received; and
2. That the Report be forwarded to the Ministry of Municipal Affairs (MMA) as the County of Grey comments on the Ontario Municipal Board Review; and
3. That this report be forwarded onto member municipalities within Grey for their information.

### Background

The Ontario Municipal Board (OMB) is an independent tribunal that makes decisions at arm's length from government bodies, and hears matters under a large number of public statutes. When people cannot resolve their differences on community planning matters, or disagree with a planning decision made by their municipal council, the OMB provides an independent forum to settle disputes.

Since 2004, the government has made a series of land use planning reforms that are meant to:

- set out clearer rules for land use planning,
- strengthen policy directions that outline the provincial interest in land use planning,
- give municipalities a stronger voice and more independence in local land use decisions, and

- provide residents more opportunities for involvement and a greater say in land use decisions in their communities.

These changes have also affected the OMB. The goal of this OMB review is to build on past improvements to ensure the Board can contribute within the system to its best effect.

The OMB Review is guided by the following principles;

- protecting long-term public interest,
- maintaining or enhancing access to dispute resolution,
- providing transparency in hearing processes and decision-making, and
- minimizing impacts on the court system.

Recent government initiatives such as the Long-term Affordable Housing Strategy, the Coordinated Provincial Plan Review and the Land Use and Appeal System Review, have helped form discussions around this review.

The review of the OMB has been framed according to the following five themes:

1. OMB's jurisdiction and powers,
2. Citizen participation and local perspective,
3. Clear and predictable decision-making,
4. Modern procedures and faster decisions, and
5. Alternative dispute resolution and fewer hearings

The purpose of this report is to provide a summary of the proposed OMB Review, as well as to provide some staff commentary on the implications of the proposed review. The proposed considerations would not appear to have a major impact on the County; however there are some areas which are worth commenting on.

### *Review of the OMB Summary*

As noted above the OMB Review has been organized according to five themes. These themes are outlined below.

#### **Theme 1: OMB'S Jurisdiction and Powers:**

Since 2004, the province has made a series of land use planning reforms that have also affected the OMB, such as the Strong Communities Act, 2004, the Planning Conservation Land Statute Law Amendment Act, 2006 and the Smart Growth for Our Communities Act, 2015. This has led to changes, such as, limiting the number of matters that can be appealed to the OMB, providing municipalities with a stronger voice,

and giving residents more say in local land use planning decisions.

The province has heard that;

- municipalities and stakeholders would like the OMB's jurisdiction to be limited to matters of provincial interest,
- the OMB deals with too many local matters and does not give enough weight or consideration to decisions made by municipal councils,
- the OMB should change the way hearings take place,
- de novo hearings should be removed, and
- the OMB is needed to provide decisions based on planning evidence when a municipal council makes a decision based on local concerns, that may not reflect the broader public interest.

As a result, the government is considering limiting appeals on provincial land use planning decisions, such that the province could specify which part of its decision on official plans would be subject to appeal. The province's decision on new official plans or proposed official plan amendments, where municipalities are required to implement Provincial Plans, would be final and not subject to appeal. When the Ministry of Municipal Affairs places a zoning provision in place through a Minister's Zoning Order to protect the public interest, the Minister and not the OMB would have the authority to make the final decision.

The government is also considering restricting appeals on development that supports the use of transit.

The province is also exploring changes to give local communities a stronger voice. This may be accomplished through the following changes:

- no appeals of a municipality's refusal to amend a new secondary plan for two years,
- no appeal of a municipal interim control by-law,
- expand the authority of local appeal bodies to include appeals related to site plans, and
- to further clarify that the OMB's authority is limited to dealing with matters that are part of the municipal council's decisions, meaning the Board is only able to deal with the same part of an OP as those dealt with by council and require the OMB to send significant new information that arises in a hearing back to the municipal council for re-evaluation of the original decision.

Transition of new planning rules is another question that is arising from the Review of the OMB. Since 2007, the Planning Act has required that, land use decisions must reflect provincial policies in place when the decision is made, not when the application is

made. The government is now seeking input on possible changes that would expand on the 2007 changes by requiring that all planning decisions, not just those after 2007, be based on provincial legislation and planning documents and municipal planning documents in effect at the time of the decision.

## **Theme 2: Citizen Participation and Local Perspective:**

It has come to the attention of the OMB that cost is an issue: the cost to participate in a hearing is high, which can discourage participation. Fairness can also be an issue: a person or community group may not have the same access to subject matter that is available to municipalities and developers. In general, the OMB has heard that procedures need to be more citizen-friendly.

Since 2006, the province has established the Citizen Liaison Office (CLO) at the OMB to help the public understand the OMB procedures and how to participate. In 2015, the government passed the Protection of Public Participation Act, which is designed to ensure people can speak out on matters of public interest without fear of retribution. Furthermore, the Smart Growth for our Communities Act, 2015 has provided citizens with a greater and more meaningful say in the planning process by requiring municipalities to ensure public involvement, including citizen representation on municipal planning advisory committees and enhancing the Community Planning Permit System to help plan for and better address local needs.

In order to ensure meaningful public involvement, the government is considering increasing public education opportunities to provide clear information on OMB practices and procedures, including creating a new user-friendly website.

The following has been proposed to be explored in order to encourage meaningful public participation;

- expanding the CLO, this could mean hiring more staff to provide easier public access to information, or reconfiguring the CLO, which may include in-house planning experts and lawyers who would be available to the public, and
- exploring funding tools to help citizens retain their own planning experts and/or lawyers (e.g. similar to a legal aid type system).

## **Theme 3: Clear and Predictable Decision-Making:**

To date the OMB has heard the need to ensure OMB members are well qualified, possess specific skills and accreditation, and receive appropriate training to do their jobs. Other suggestions include the need for clearer rationale, more plain language in decisions, and for complex hearings to be heard by multi-member panels.

Ontario's Adjudicative Tribunals Accountability, Governance and Appointment Act, 2009 sets out the requirements for appointments to adjudicative tribunals in Ontario, including the OMB. This Act requires that people appointed to the Tribunal go through a competitive, merit-based recruitment process. If required, new members are sent to a one-day course provided by the Society of Ontario Adjudicators and Regulators (SOAR) on decision-writing. OMB hearings are generally conducted by one member, however the OMB does allow for multi-panels, but these have become less common since the 1990's due to cost.

The province is considering increasing the number of OMB adjudicators and ensuring they possess the necessary skills. Training may be increased, this training may include decision-writing, active adjudication, and dealing with parties that have no legal representation.

The government is also considering re-introducing multi-member panels, in order to ensure panel representation of a broad range of skills. The government is considering having these multi-panels only to deal with complex hearings or perhaps deal with all hearings.

#### **Theme 4: Modern Procedures and Faster Decisions:**

The OMB has heard recently that there is a need for faster screening, scheduling of appeals, and more flexibility in how evidence can be represented. There has also been some concern in the process not being simple, predictable and/or transparent.

The OMB does publicly post business plans, with timelines for scheduling hearings and issuing decisions. Deadlines are not always being met; however this seems to be due to having limited adjudicator resources, combined with an increase in the number of complex and lengthy cases.

In 2008, the OMB updated its practice and procedures to require mediation assessment. This has allowed the Board to receive an application, to review the information and decide whether or not it could be dealt with in mediation. Video conferencing is now an option as well.

The changes considered also include allowing the OMB to adopt less complex and more accessible tribunal procedures and allowing active adjudication.

Furthermore, the government is also considering other ways to modernize procedures and promote faster decisions. These options can include; setting appropriate timelines for decisions, increasing flexibility for how evidence can be heard, conducting more hearings in writing in appropriate cases, establishing clear rules for issues lists to ensure that hearings are focused and conducted in the most cost-effective and efficient

way possible, and introducing maximum lengths allowed for hearings.

## **Theme 5: Alternative Dispute Resolution and Fewer Hearings:**

The Smart Growth for Our Communities Act enables local municipalities the ability to resolve disputes locally. For example, now municipalities are given time to engage in alternative dispute resolution (ADR) before an appeal is forwarded to the Board. Furthermore, if an appeal does reach the OMB, it is reviewed to determine whether or not it can be resolved via mediation, scoped at a pre-hearing, or if it requires a full hearing.

The government wants to encourage more land use disputes to be resolved using alternative dispute resolution. This would hopefully make the OMB experience more comfortable and also lead to fewer and/or shorter OMB hearings. To achieve this goal, the government is considering;

- actively promoting mediation,
- requiring all appeals to be considered by a mediator before scheduling a hearing,
- allowing government mediators to be available at all times during an application process, including before an application arrives at municipal council, to help reduce the number of appeals that go to the OMB,
- strengthening the case management at the OMB to better stream, scope issues in dispute,
- identifying areas that can be resolved at pre-hearing to further support OMB members during hearings, and
- creating timelines and targets for scheduling cases, including mediation.

### *Commentary on the Review of the OMB*

In general County staff are supportive of the OMB Review. It appears the majority of the review will provide positive changes to the OMB. By examining the considerations, it appears the majority of the changes stem from Bill 73, which is intended to; help municipalities fund growth, give residents a greater, more meaningful say in how their communities grow, protect and promote green spaces, make the development charges system more predictable, transparent and accountable, make the planning and appeals process more predictable, give municipalities more independence, and make it easier to resolve disputes.

County staff would also note that County's OMB caseload is minimal, and that County staff and Council always attempt to resolve concerns prior to a decision, such that an OMB process can be avoided. Where decisions do get appealed to the Board,

mediation, minutes of settlement, or scoping the issues under appeal, all work well to negate the need to protracted, costly hearings. The additional powers provided through Bill 73 also help in this regard. Notwithstanding the above, there is certainly still merit in having the OMB oversee land use planning matters within the province, and sometimes an OMB hearing is the best course of action to resolve a dispute.

Some further comments, questions, or improvements County staff could recommend for the Review would be as follows.

### **Theme 1: OMB's Jurisdiction and Powers:**

County staff would support the restriction on appeals related to official plans, approved by the province, which are implementing Provincial Plans. However it would be beneficial to receive clarification in regards to how the province would determine which parts of its decisions on official plans are subject to appeals. Furthermore the province should also consider allowing for similar status to upper tier municipalities when approving lower tier official plans and amendments, which are required to implement the upper tier policies. For example, when the County has made a decision on a new official plan, or proposed official plan amendment, where a municipality is required to implement the County's policy objectives; the County should then have the ability to scope matters which are appealable to the Board.

Encouraging transit supportive densities in our communities is a laudable objective, and supported by staff. Limiting appeals on density which supports transit would appear to be a good idea; however staff are unclear on how this would be implemented. It can be tough to define what densities are transit supportive i.e. there is no exact science or threshold on when development is dense enough to support transit. These densities also vary based on the type of transit being considered i.e. subway, bus, light rail, etc. As a result, it may be tough to say which density thresholds should be appealable, versus which should not.

Expanding the authority of local appeal bodies is also supported, but perhaps the biggest impediment to a municipality setting up a local appeal body remains the administration and funding of such a body.

The consideration of a municipal council's decision on a planning matter is also important. County staff see the need to attach appropriate weight to the local decision, while also giving councils, and the public, the ability to consider new information, should it come forward after the appeal. However, it must also be clear that a municipal decision is not binding on the OMB; otherwise the OMB would serve no purpose.

There are both pros and cons to the proposed transition provisions which require a

decision to meet all current planning policies, rather than the policies in place at the time of the application. County staff see merit in this approach, and on the positive side it could mean that developers proceed towards build-out of their developments (e.g. plans of subdivision) more quickly, rather than asking for extensions. In addition, the new provisions would avoid applications submitted immediately prior to a policy change which attempt to 'beat the buzzer' on new changes to be put in place.

With respect to some challenges to the proposed transition provisions, at the municipal level it may mean that new official plans, or five year reviews, become more contested, and municipalities may see more appeals on these matters. One of the key questions raised during an official plan or five year review process is always 'how will this affect my current development application'. Under the current system staff can respond by noting that the application will be tried under the policies which were in place at the time it was deemed complete. If landowners or developers perceive new plans as a threat to their current applications, or in some cases historical draft approvals, then municipalities may see more appeals on official plans or five year reviews. The Province is encouraged to consider these matters in the implementation of any transition changes.

## **Theme 2: Citizen Participation and Local Perspective:**

County staff feel that it is important for citizens to be able to participate in OMB hearings. Therefore it is important for the province to examine ways in which it can promote citizen participation, as well as ensuring citizens can retain their own planning experts and/or lawyers. County staff often hear complaints from both the public and developers on the cost and complexity of the OMB process. In some cases staff have heard that it is an impediment to the public appealing a file. In other cases staff have heard that it is an impediment to a smaller developer or landowner wishing to file a planning application, and in that sense can be an impediment to economic development. Anything which can be done to improve these situations, in a fair and equitable fashion, would be supported by County staff.

## **Theme 3: Clear and Predictable Decision-Making:**

With an increase in the number of OMB adjudicators and ensuring they possess the necessary skills, this may lead to more hearing dates available and therefore becoming more efficient. In looking at new adjudicators, there should be a focus on new members with mediation skills, to further encourage the use of mediation versus a contested hearing.

On complex issues, or larger files, County staff would support the use of multi-member panels. When using multi-member panels for complex hearings, it may be beneficial to



have panels comprised of members with a broad range of skills and backgrounds. On smaller issues such as consents or minor variances it would not likely be necessary to use multi-member panels.

#### **Theme 4: Modern Procedures and Faster Decisions:**

Next to cost, the biggest complaint the County hears about the OMB is the length of time it takes to get pre-hearings, mediation, hearings, and decisions. From County staffs' experience, on larger files it is not uncommon to wait 6 – 12 months from the time a matter is appealed, until a decision is rendered. In some cases the timeframes can be even longer. Anything that can be done to reduce these timeframes would be beneficial.

With the government considering less formal and a less adversarial culture at the OMB, as well as considering ways to modernize procedures, this may lead to decisions being made in a timely manner. In modernizing the process, other technologies such as video or on-line conferencing should also be explored.

County staff would be interested in knowing more about how written hearings would be conducted and what matters could be dealt with on a written hearing basis.

#### **Theme 5: Alternative Dispute Resolution and Fewer Hearings:**

Overall, it would be beneficial for all parties involved, if appeals were to be dealt with through mediation prior to a hearing in order to ensure more efficient and timely hearings, if hearings cannot be avoided all together. County staff would however encourage the Board to consider conducting mediation in the host municipality, rather than forcing parties and participants to travel to Toronto to participate in mediation. The added travel and hotel cost, including paying for time/travel costs of experts/lawyers, is an impediment to mediation. If a mediation session could be conducted in a neutral environment in the host community, then it would appear to be more beneficial.

### Financial/Staffing/Legal/Information Technology Considerations

There are no financial, staffing, legal or information technology (IT) considerations arising from this report. Depending on the nature of the changes, staffing and legal needs could change with respect to future OMB matters, but at this point it is too early to make any predictions in that regard.

### Link to Strategic Goals/Priorities

Action 2.10, under Goal 2 of the County's Strategic Plan, requires the continued management of growth and the application of sound land use planning principles. Keeping up to date with changes in Provincial policy assist with managing growth and is a sound land use planning principle.

## Attachments

### [Ontario Municipal Board Review](#)

Respectfully submitted by,

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Director Sign Off: *Randy Scherzer*