

July 17, 2012

Hon. Kathleen Wynne
Minister, Municipal Affairs and Housing
Government of Ontario



Dear Minister Wynne,

Minister's Roundtable on Ontario's Land Use Planning System – Follow up

Thank you again for inviting me, as a ratepayer group representative, to join your June 19 roundtable discussion on the province's land use planning system and reform of the Ontario Municipal Board (OMB). I have taken some time to reflect on the meeting and confer with other citizens, and would like share some observations, conclusions and requests below:

Composition of the Meeting

I was impressed with the diversity of roundtable participants' expertise and opinions and was heartened to see sincerity and good will displayed by everyone throughout the session. The respectful tone of the meeting allowed all participants, including laypeople like myself, who might have been intimidated, to hear and be heard, even when opposing views were aired.

Pre-meeting Preparation

I appreciated the opportunity to review and digest the technical presentations prior to the meeting. This made the discussion more efficient and was useful for post-meeting reflection. The ministry staff presentations were insightful and your experts were generous with their time for follow-up questions during breaks and after the session.

Your Introduction

I thought you began the session with an authentic invitation to share our experiences and advice with you. You made it clear that outright abolition of the OMB is probably impractical since the Board performs some special purposes, particularly in rural parts of Ontario, but it was encouraging to hear you acknowledge that significant, meaningful transformation of the OMB is necessary.

Open Discussion

Opening remarks from everyone helped to frame the larger conversation. Notably, development industry representatives, former politicians and reps from the Association of Municipalities of Ontario (AMO) talked about the need for consistency, market predictability and the evils of NIMBYism. One such participant described circumstances when the OMB might curb corrupt or incompetent city councils. Reps for development interests also said plans need to be flexible to accommodate changes in local circumstances or fresh thinking. Virtually all citizen reps and NGO's identified what they perceive to be a gross imbalance of power, intimidation, lack of transparency and unfair advantages enjoyed by developers in the OMB system. Many participants pressed the point that communities with democratically elected city councils and Official & Secondary Plans that fully conform to your government's provincial planning mandates do not need "adult supervision" from unelected, unaccountable appointees.

My initial comments echoed those of most citizen and NGO reps, and I offered the example that Mississauga's new Strategic, Official and District planning processes not only fully satisfy all provincial requirements, including the need for smart growth, they aim high in terms of public consultation. Residents' groups have been an integral part of the process from the beginning, supporting many of the growth-oriented planning initiatives since 2005 and engaging in close collaboration with the City, developers and professionals through the establishment of Local Advisory Panels and other means of citizen engagement. Now we expect that the City will **stand by its Plan!**

KEY THEMES

While some of the development industry reps and professionals defended the OMB status quo, most other participants listed many serious flaws in the current system and proposed some solutions:

1. Planning by appeal is not planning – Two quotes reflect sentiments expressed by many participants:

“Allowing the OMB to make site-specific amendments to the OP and zoning make a fiction of the Official Plan.”

“The biggest lie in the history of the OMB: ‘This is a unique opportunity and won’t set a precedent’ ”.

Observations included: Over 1,200 site-specific OMB appeals are launched every year. Most are launched by developers against municipalities. OMB decisions consistently ignore and overturn provincially approved Official and Secondary Plans, eroding the original planning principles on which they were based. One developer commented that site-specific OMB decisions which contradict Official Plans actually destabilize real estate markets since developers can’t depend on OP’s to determine fair real estate valuations; if a single OMB appeal can change all the rules in an area. I offered the example that, despite widespread citizen input, and approval by the democratically elected governments of the City of Mississauga, Region of Peel and the province, the unelected OMB is currently reviewing and holds the power to substantially undo much good work through 19 corporate appeals of Mississauga’s new (2010) Official Plan (which is still not in effect pending the OMB main hearing scheduled for 4 weeks starting in February 2013).

2. OMB Chill – Several people commented that developers routinely threaten appeals as a strategy to cow municipal planners and politicians. As a result, thousands of additional OP amendments occur unopposed as cash-strapped municipalities sacrifice good planning principles to avoid unaffordable OMB appeals. This also prevents good Official Plans from being written in the first place, since city planners have been conditioned to write ‘OMB-proof’ OP’s rather than embracing good planning principles expressed in the Planning Act or the province’s smart growth policies.

3. Lack of democratic accountability & transparency – Elected municipal governments aren’t really accountable for local implementation of provincial planning mandates as long as a single unelected, unaccountable OMB appointee can overturn their decisions. Examples were cited during the roundtable of some local politicians choosing to “blame the Board” rather than investing their political capital in good planning. It was noted that rooting out municipal corruption is not the OMB’s job and shouldn’t be used to defend its mandate. A simple test was proposed to determine whether municipalities are incompetent and require OMB supervision, namely: failure to achieve MMAH approval of Official & District Plans and zoning by-laws.

4. Billions of dollars in uncapped, uncontrollable costs to tax payers are incurred by municipalities when developers or wealthy NIMBY residents choose to appeal. No evidence has been produced that the OMB system has ever saved money vs. the courts. The opposite may be true – a roundtable participant explained that OMB appeal costs are commonly priced into new condo, office and other developments, inflating Ontario real estate prices whether applications are appealed or not. This encourages over-intensification of every site and allows developers to reap windfalls if municipalities are persuaded to settle without a hearing.

5. Unfair access to technical and professional resources – Municipalities or residents’ groups are no match for large development corporations at the OMB. Comments shared by some roundtable participants with experience inside the development industry indicated that it outspends municipalities on OMB matters by a factor of 5 to 1 or more.

6. **An intimidating court-style system** of lawyers, paid consultants and restrictive hearing rules pushes residents to the margins of the OMB process. One roundtable participant with many years of OMB experience described how even small claims court is more welcoming and easier to navigate than OMB hearings for members of the public.

7. **OMB members lack the neutrality** that the courts provide. Unlike judges, most OMB members come from a single industry sector (real estate & development), and return to it for employment after their 3-year terms on the Board, as development corporation executives, real estate lawyers, planners, engineers, surveyors and paid OMB witnesses. Currently, ten members are lawyers (most with real estate backgrounds); eleven are planners/consultants; two are former mayors and several have backgrounds as advocates for specific planning-related interest groups. Planning expertise may be of value if the OMB's role is to support municipalities that lack it; however that same expertise represents an incurable bias if the Board's role is to settle disputes.

8. **Perceptions that wealthy developers always get their way**, cause fatalism and discourage genuine commitment to good planning among many city councils, planning staffs and residents. Rather than being regarded as the minimum standard and a springboard to inspire the kind of innovative planning described in provincial documents like the Planning Act, Places To Grow, Greater Golden Horseshoe Plan, Provincial Policy Statement (PPS) etc, Official Plans are systematically degraded from the day they are proclaimed by never-ending, site-specific amendments under the OMB appeal system. Section 37 payments for OP exceedances amount to legitimized bribes, making cash-strapped municipalities complicit in bad planning and beholden to powerful developers for public infrastructure. Who wouldn't be discouraged?

During a break in the session, two additional worries circulated over coffee:

9. That word of this consultation by the Minister could **accelerate applications by opportunistic developers** trying to win some form of grandfathered status under current rules.

10. That some members of the development industry may be motivated to use the **influence** they wield during municipal and provincial elections against a minority government **to delay and dilute meaningful OMB reform**.

SOLUTION

At the end of the day, few participants demanded total abolition of the OMB, and many supported its continuation in parts of rural and northern Ontario, but most working group summaries described variations of a simple amendment to the terms of reference for the Ontario Municipal Board:

The OMB shall not review or impose amendments to provincially approved Official Plans, Secondary Plans or zoning by-laws.

As in other North American jurisdictions, recourse to the courts will be limited to appealing constitutionality or to set damages.

Two practical suggestions emerged from group discussions to make the solution work:

1. **Make city councils accountable and prevent NIMBY behavior by residents** – It was noted that city councils (Toronto was cited as an especially bad offender) have allowed policies and zoning by-laws to fall out of alignment with their Official Plan for fear of voter backlash. Currently, a lack of provincial enforcement essentially allows municipal politicians to duck the risk by “blaming the Board”.

The group noted this could be easily fixed if the MMAH mandates all municipalities to align zoning by-laws and policies with the provincially approved OP or District Plan within a prescribed (short) time period following each 5-year planning cycle or city-initiated OP amendment.

“Or else” — If a council fails to align the zoning by-law and policies as required, provincial approval of the OP will lapse and all development applications will revert to site-by-site appeal to the OMB (as we have today). Several roundtable participants including a former city councillor agreed that this simple measure will eliminate procrastination by city councils and effectively protect ward councillors from NIMBY voter groups.

NOTE: Following the roundtable, I conducted an informal, unscientific survey of a few city planners from different municipalities for comment. They confirmed, on condition of anonymity, that for most cities, the one-time alignment of zoning by-laws and policies with the OP would take less work than the current, daily burden of OMB-related tasks. A bridge period may be needed for a handful of cities where zoning has fallen far out of alignment. Each planner welcomed the possibility of returning to the original forward-looking purpose of their profession.

2. Allow flexibility to realize new opportunities of community-wide value – Municipal councils can initiate OP or District Plan amendments, subject to public consultation and provincial approval, to accommodate unforeseen changes in local circumstances (such as newly available brownfields, Pan Am Games etc) or to take advantage of inspired ideas that may benefit the whole community between 5-year OP renewal cycles. But this option is only available to the municipality.

CONCLUSION

So, while the current OMB causes many complex and expensive problems for the people of Ontario and erodes the autonomy of the municipal planning process, I believe a practical remedy has been identified and needs to be implemented as soon as possible.

Closing Requests

1. Please share the notes transcribed from flip charts during the general meeting and the break-out groups.
2. Please poll roundtable participants for permission to share our contact information; You have my permission to share my contact information with any attendees who would like it.

Minister Wynne, thank you again for seeking input. I will look forward to your response and continued consultation.

Sincerely,

Jim Danahy
Executive Member
Town of Port Credit Association (TOPCA)
<http://www.topca.net>

cc: Hon Charles Sousa, MPP, Mississauga South