



Comments from the Ontario Professional Planners Institute on the Role and Function of the Ontario Municipal Board February 25, 2002

Introduction:

In consultation with its members, the Ontario Professional Planners Institute (OPPI) has conducted a review of the role and function of the Ontario Municipal Board (OMB) in the planning process. While the OMB has undertaken substantial administrative improvements in the past few years, public and media perceptions of the Board have, in some instances, been diminished by the perceived length, cost, and complexity of hearings and, at times, the perceived relevance of the Board itself.

OPPI identified several key areas for review and discussion: role of the OMB; OMB members and appointments; alternative dispute resolution and mediation; and administrative effectiveness. These topic areas cover a broad range of issues with some under the direct purview of the Board and others related to government policy or legislation. This paper focuses primarily on administrative aspects of these topics that are within the Board's scope of responsibility and specifically does not delve into areas that would require legislative modification or policy amendment.

Ontario's community planners have considerable experience and insight into the Board's functions and processes. As the voice of professional planners in Ontario, OPPI is taking this opportunity to share its perspective on the role and function of the OMB and to consider how the Board can better contribute to the objectives of good planning across the Province.

Background on the Ontario Municipal Board:

The OMB is one of the province's oldest institutions. Its history dates back to 1897, when the Office of the Provincial Municipal Auditor was established to supervise account keeping by municipalities. In 1906, the Ontario Railway and Municipal Board was created and given the added responsibility of supervising the then-burgeoning mode of transport between and within municipalities. The Board was

renamed the Ontario Municipal Board in 1932. Most of the powers given to the Board at that time have been retained to this day and have been greatly expanded by ensuing legislation of all types.

The Board obtains jurisdiction under approximately 100 public statutes and more than 400 private statutes. Most of its work, however, arises from the *Planning Act* and the *Assessment Act*¹. Other matters include expropriation/land compensation, development charges, ward boundaries and aggregate resources. As an independent, quasi-judicial administrative tribunal, the OMB's principal function is to resolve appeals from decisions made by Ontario municipalities or other decision makers, either in pre-hearing procedures or by holding public hearings.

Role of the Ontario Municipal Board:

There was broad support from the OPPI membership for retaining the current scope of responsibilities of the OMB within the Ontario planning process but improving, where practical, the process and procedures of the Board.

Planning professionals recognize the Board is frequently called upon to make difficult or sensitive land use decisions that could have and should have been secured through the municipal review and approvals process. Municipal Councils, however, frequently avoid problematic issues with the clear expectation that such applications will be decided by the Board, thus enabling a strategic deflection of responsibility. This provides a place of "political refuge" that allows local politicians to placate constituents, knowing that a further decision-making process is available and that often conflicting public interest(s) can be resolved through the OMB hearing process. Similarly, applicants or objectors may be dissuaded from local attempts at negotiation or dispute resolution based upon an expectation the Board will ultimately settle the matter. In the last decade, for example, the OMB assumed a key role in the implementation of the Province's affordable housing program where community and political opposition were frequently founded in socio-economic stereotypes, as opposed to legitimate land use planning grounds.

Based upon OPPI's consultation, current concern regarding the principle of the Board's role in determining land use planning matters seems to be primarily focused on specific development applications and primarily within the Greater Toronto Area.

OPPI's member consultation indicated general support for the Board continuing to hear the full range of planning matters, from Committee of Adjustment to Official

¹Changes to the latter Act have now eliminated appeals to the Board, but the OMB continues to process outstanding matters that have been placed on hold, or are awaiting court cases or action by the ARB or the parties involved.

Plans. Characterizing Committee of Adjustment matters, for example, as too minor for administrative appeal would ignore both the potential complexities of such matters, particularly in larger urban centres, and the impacts of parochial and local politics in many of these circumstances. OPPI, therefore, is not recommending any amendments to the *Planning Act* that would prescribe a more limited role to the Board in hearing application appeals. OPPI continues to support the adjudicative principle of accessibility and fairness in the resolution of all forms of appeals.

Under the current legislative framework, all planning applications must “have regard for” the Provincial Policy Statement. The Board’s decisions have provided assistance in the understanding and application of the current Provincial Policy Statement for all involved with the Ontario planning process.

Stakeholder Representation:

Perceptions exist that Board hearings are the exclusive domain of professionals and individuals, unrepresented groups and other key stakeholders are not able to contest matters and/or participate in hearings given the time, cost and complexity of hearings. OPPI notes that despite the resource and technical demands of evidence in hearing, the Board continues to be mindful of the role of ordinary citizens and their right to have access to the process. The Board should carefully consider the participation of unrepresented citizens in organizing Procedural Orders, pre-hearings and the conduct of hearings. The Board generally recognizes that such stakeholders cannot always match the resources of the other side and the Board generally compensates, to some degree, by being more liberal in terms of procedures and questioning.

90-Day Appeal Period:

There is currently an anomaly in the 90-day appeal provisions of the *Planning Act* where applications may be appealed by the applicant to the Board before the municipality has, in some instances, had a reasonable opportunity to evaluate or process the application. In OPPI’s view, the Board can assist in balancing this process through negotiating a schedule that provides a reasonable time period for the municipality to complete its technical and public review, without creating undue time delays to the appellant.

Recommendation No. 1 - Hearing Organization:

OPPI recommends there be a specific case management screening process for appeals based upon the municipality’s failure to meet the 90-day provisions. The purpose of this case management stream is not to specifically expedite or delay the 90-day appeals but to balance the interests of the public and private stakeholders in such matters.

In these circumstances, the Board should immediately schedule a pre-hearing conference (by teleconference, if more convenient) to ascertain the municipality’s

anticipated time requirements to conduct a full technical and public review. The Board should then establish a specific timetable for the hearing and, where required, further pre-hearing processes. This timetable would allow for municipal technical review and would also direct the municipality to complete its technical review process in order for the hearing to go forward.

In this manner, the principle of allowing a municipality to complete its review within a reasonable timeframe is maintained and a fair hearing can proceed and provide an opportunity for all stakeholders, including the public-at-large, to comment on the matter.

OMB Members and Appointments:

A quality level of administrative justice depends on parties perceiving those conducting the hearings as being credible and, therefore, reliable and independent. Recently, public concerns have been raised about the perceived credibility of Board members. As Chief Justice Roy McMurtry stated in 1997:

"... one of the ways they [tribunals] are seen as credible is if their appointments are made in a way which reflects respect for their independence. If appointments are made for short terms and poorly remunerated with no security of tenure, this could invite in the appointees either a passive commitment or create a deterrent to courageous judgment calls."

At this time, it would appear that the OMB exhibits all three criteria identified by the Chief Justice (short terms of appointment, poor remuneration and unpredictability of reappointment) as inviting a loss of credibility with a tribunal. As noted by a former Board Chair; "...conscientious and reliable Board members are the essential ingredient to ensuring both a fair expeditious process and a decision of good quality."

OPPI recognizes that for most provincial tribunals, including the OMB, members are appointed by an Order in Council and, therefore, the process could be perceived as "political". This places a significant onus on the Government to ensure the process is clear, visible and transparent to all stakeholders involved in the Ontario planning system. Clear professional qualifications and performance criteria should be established for all OMB members and remuneration should be evaluated commensurate to the scope and effectiveness of work conducted by the Board. This would allow the Board to maintain the commitment of existing Board members and enhance the attractiveness of the Board as a career alternative for other professionals.

Recommendation No. 2 - Appointment/Reappointment Process:

OPPI recommends to the Government that new procedures be adopted with respect to the appointment and reappointments of Board members.

The Government should clearly identify the professional qualifications and human resources criteria used in the evaluation of OMB appointments and reappointments. This would serve to make the process of OMB member selection more transparent to the public.

There should be a professional application and candidate assessment process that includes interviews and, where appropriate, written examinations. These appointment criteria could also include professional qualifications and/or expertise (e.g. planning, legal, engineering, etc.) in the current and emerging professional disciplines involved in OMB hearings.

The Government should increase the term of appointment from three years to at least five years. In OPPI's view, this longer term of appointment may allow more experienced professionals to consider the Board as a viable career option.

The Government should establish evaluation criteria for Member review and the reappointment process. Member performance reviews should become an administrative and not political process. This would eliminate any potential for Members to be subject to outside pressures during the conduct of hearings ongoing at the time of the Member's reappointment evaluation. These performance criteria should address distinct and clear performance standards, including those characteristic of the Government's personnel/human resource review protocols and directly relate to the performance criteria set out at the Member's initial appointment. Further, members should be subject to an annual performance review and, most importantly, should be given a minimum of a 90-day notice of the outcome of the fifth-year reappointment appraisal process, in order that Members who do not successfully secure reappointment can then realistically evaluate other career alternatives.

Many of the members of the development industry and legal profession who appear before the Board, are active in the local and/or provincial political milieu. OPPI strongly endorses a structured human resources approach to Member appointments and evaluations. This will prevent potential perceptions of political bias arising from the Members' interactions with these stakeholders in the hearing environment.

Alternative Dispute Resolution and Mediation:

At present, all OMB Members are required to take mediation and dispute training and OPPI encourages the continuation of this practice. Given the improvements in administrative efficiencies, there would appear to be an opportunity to use trained Board members as mediators. This, in itself, may improve the effectiveness of the mediation process as the Members are viewed as being sufficiently experienced to understand the particulars of a case and also as having the weight of the Board's authority and mandate in conducting the mediation.

As previously noted, the Board has improved its administrative effectiveness for the administration of full hearings. These improvements, however, should not be seen as a reason to diminish the appropriateness and effectiveness of mediation and alternative dispute resolution. Mediation still provides opportunities to reduce hearing time, cost and decision risks, while maintaining the principles of good planning.

Recommendation No. 3 - Pilot Mediation Project:

Accordingly, OPPI recommends that the OMB organize and implement a Pilot Mediation Project to advance mediation initiatives within its case management framework.

The Board should establish on a pilot basis an internal Mediation Review Committee comprised of a specifically assigned Vice-chair and senior case management personnel. The Board's previous mediation initiative, using contracted, retired planning professionals, illustrates the benefits of utilizing planners in the assessment of mediation opportunities.

OMB caseworkers should sort appeals on a triage basis and quickly identify files with mediation potential. Caseworkers should be free to contact parties to explore an understanding of the respective issues/concerns in undertaking this evaluation. The internal Mediation Review Committee should then review at least on a bi-weekly basis the caseworker assessments of potential mediation cases and, where the Committee agrees, parties would then be immediately contacted for mandatory mediation. Such triage and initial mediation should be conducted within 30-60 days of receipt of the appeal. This mediation triage initiative is similar to the mediation proposals discussed by the Commission on Planning and Development Reform, 1992. Mediation sessions must happen more quickly than the scheduling of a hearing, in order to encourage parties to buy into the potential benefits of this process.

The mediation session should carefully and thoroughly review the appeal issues and the Board Member/mediator should be encouraged to provide a frank appraisal of the merits of the parties' concerns and positions. The mediation sessions could be conducted by teleconference, where appropriate. In very limited circumstances, where a clear abuse of process can be ascertained through the mediation

discussions, the Board could exercise its legislative authority to dismiss an appeal under the stipulated criteria of the *Planning Act*. Should the Board mediator conclude that a dismissal of the appeal is warranted, this conclusion should be vetted through the assigned Vice-chair, who will then co-sign the order of dismissal.

At the mediation sessions, Board members should adopt the power to approve any matter immediately, where mediation is successful, including the power to impose conditions and approve implementing agreements. Should such mediation not be successful, the mediator should be able to identify an "Issues List" for use at the full hearing.

The Board could, for efficiency purposes, consider appointing the same Member to conduct a full hearing where, only in the cases of the pilot mediation project, mediation has been unsuccessful. In this way the full hearing could proceed immediately after the mediation (e.g. in the same scheduled hearing period) and no time would be lost to either party.

OPPI notes that currently, the majority of OMB caseworkers are professional planners and the use of caseworkers in the evaluation of appeals in this pilot mediation process would provide opportunities for these professionals to more actively apply their professional expertise towards enhancing the Board's effectiveness. With the adoption of a more proactive mediation process, OPPI believes that fewer, more tightly focused hearings would be achieved. In addition, OPPI would be pleased to volunteer to assist in the organization of this program, as appropriate.

Administrative Effectiveness:

OPPI provides the following observations and recommendations on certain administrative practices on the Board.

Caseload Management:

From 1998 to 2000, the total number of appeals processed annually by the OMB has dropped from 2,567 to 1,751 cases. The total number of planning cases, however, remains consistent at approximately 1,500 cases per year. Of the planning appeals, more than 75% of these cases are conducted in hearings with duration of one day or less.²

The Board has established its own performance targets for all types/lengths of hearings which includes: preparing 65% of appeals/cases for scheduling within 60 days of their receipt at the Board; conducting the actual hearings for 85% of all cases within 90 days (including notice periods) of the cases being prepared and ready for scheduling; and, issuing decisions for 80% of all cases within 30 days of the completion of the hearing.

² Approximately 15-20% of all planning cases are 2 to 5 days long, 1-2% are 5-10 days long, 1-2% are 10-20 days long, and less than 1% are more than 20 days long.

The Board advises that its effectiveness is just slightly below these targets³. Hearing costs, excluding case preparation, are averaging \$1,200 to \$1,500 per day. Accordingly, it would appear that substantial improvements in administrative effectiveness (e.g. cost, timeliness and accessibility) have been and continue to be achieved, consistent with the conclusions of the 1997 Agency Reform Commission.

Independent Research:

OPPI considered whether the OMB should conduct explicit, independent research on matters raised during hearings, in order to inform the Board's decision-making. OMB hearings are "hearings de novo", wherein decisions are intended to be based solely on the evidence advanced at the hearing. OPPI supports this adjudicative principle. Accordingly, to allow the Board to do independent research would eliminate the objectivity and fairness of this process, as such independent research would not be subject to the same level of review, through cross-examination of its source(s), as evidence presented at a hearing. It could also lead to the perception that such research reflects the political or individual interests of a particular Member, as opposed to the broader public interest.

Hearing Costs:

The current appeal cost (\$125 per matter), while appearing low in quantitative terms, ensures that all stakeholders and community members have access to the Board and therefore, a significant revision to this fee, such as one that might reflect the true administrative costs of a hearing, is not recommended by OPPI.

Cost awards continue to be an area where the Board can, through its considerable experience, clearly identify where a party has acted inappropriately and caused unnecessary expenditures of time and resources by the parties and the Board. OPPI supports the Board's current criteria for such cost awards, as set out in the "Rules of Practice and Procedure". In this matter, the Board should initiate the consideration of cost awards, where the traditional test of "clearly unreasonable conduct" is apparent, when a party has not done so itself. It must be kept in mind that certain stakeholders, such as residents, may not be aware that such cost awards may be available to them.

Decisions:

The final product of the planning appeals process is ultimately the final decision rendered by the Board. OPPI supports the principle that decisions should be transparent, clearly understandable in their logic, well organized, include a description of the issues and the matters to be decided and an intelligible reasoning of the final decision. In particular, where non-professional parties or participants were involved in the hearing process, the Board should be disciplined in its treatment of their evidence in their decisions so that the public has a better

³ For example, 83% of hearings conducted within 90 days, and 78% of decisions issued within 30 days.

understanding of how their issues and concerns were understood by the Board and directed the final decision.

Continuing skills development, consistent decision-writing standards or protocols, and careful editorial review prior to issuance will assist in continuing improvements to the Board's written decisions.

Effective Implementation and Inter-Relationship with Other Legislation:

Implementation of development decisions are often effected through other mandates where the Board does not have direct jurisdiction. For example, where approvals under the Conservation Authorities Act (such as fill permits) are required, the appeals are adjudicated through the Mining and Lands Commissioner. In matters where such approvals are clearly related to the comprehensive consideration of a development proposal, it would be more effective and efficient to have such approvals determined, and implemented, through the Ontario Municipal Board decision and order.

The Board may wish to review with the Government the efficiency of separate tribunals effectively dealing with the same matter twice and consider administrative processes which would allow for consolidated hearings, decisions and orders.

Enhanced Use of the Board's Web Site:

OPPI applauds the Board's recent expansion and enhancement of its web site to provide more readily accessible information. It is hoped that ongoing updates and improvements will occur, as the need arises.

User-Friendliness:

While it is evident that experienced professionals have an enhanced understanding of Board procedures and protocols, the Board should be encouraged to continue its open door policy for all stakeholders in the planning process. While the Board currently produces a document entitled "Your Guide to the Ontario Municipal Board", these efforts should be expanded to provide further user-friendly information on the details of the hearing process. For example, the Board's web site provides a copy of the "Rules of Practice and Procedure". Although this material was re-written in 2000, it remains a predominantly legalistic document and may be difficult for non-professional participants to understand. The recent revisions to the Board's "Rules of Practice and Procedure" did not, in OPPI's view, completely achieve the objective of a user-friendly and non-legalistic document.

Recommendation No. 4 - Hearing Guidebook:

The Board should prepare a plain language hearing guide for the broader community.

In this regard, OPPI recommends that an OMB hearings guidebook be provided that offers clear explanations of the process and what is expected of participants and parties far in advance of the hearing being conducted. Where caseworkers can

clearly identify the involvement of the public-at-large in an appeal, that is, there is no initial correspondence from a professional, a standardized information package, including the guidebook, should be distributed to those individuals as soon as the appeal is received to allow adequate time for these individuals to understand and prepare themselves for the hearing.

Identification of mediation initiatives should be clearly identified and explained in the guidebook. Finally, this information package and guidebook should also be posted on the Board's web site.

Pre-Hearing Processes:

OPPI has previously commented to the Board on the need for administrative improvements to existing procedural tools. The Board has instituted a number of practices to assist the organization of certain complex or lengthy hearings, such as "Issues Lists", witness statements, meetings of experts and evidence exchange protocols. The effectiveness, however, of these practices is currently not being fully achieved. For example, the practice of pre-hearings, pre-filed witness statements and other evidence has a three-fold purpose: to identify the full range of issues to be addressed before the commencement of a hearing; to "level the playing field" with the public sector whose case was fully available through reports provided through the municipal review/approval process; and, to expedite the hearing process. While these practices have actually increased hearing preparation costs overall, these costs could be justified if the original objectives were being achieved.

Recommendation No. 5 - Pre-Hearing Practices and Objectives: The Board should undertake a review to ensure that its own practices support the preceding initiatives.

The Board should conduct an internal discussion regarding pre-hearing practices and objectives amongst its members, as well as, discussion with relevant stakeholders, including professional associations such as OPPI and Ontario Bar Association. This will help to ensure the objectives of the pre-hearing process are being fully achieved and to consider other improvements that could be implemented. These include: providing scheduled time prior to the hearing to allow the Board member(s) to read and review the pre-filed materials; confining pre-hearing meetings of expert witnesses to those experts (and directing that lawyers not participate to eliminate the advocacy positions that lawyers advance); and considering a more careful application of an approved "Issues List" through restrictions on evidence at the hearing.

Final Comments:

As the voice of professional planners in Ontario, OPPI has considerable experience and insight into Board functions and processes. OPPI's members, both internal and external to the Board, have a considerable depth of experience that can be made available, where appropriate, to advance the recommendations identified above. OPPI believes that it is both possible and desirable to make continued

improvements to the present administrative system. In reaching this conclusion, OPPI's consideration has attempted to balance the always diverse perspectives that the broad range of stakeholders in the planning and development process have of the OMB and to respond to their particular concerns. Often, a stakeholder's perception is founded simply in whether or not its position prevailed in a particular decision of the Board. As professional planners we have come to the conclusion that, on balance, the Board continues to play a critical role in the planning and development process.

OPPI is dedicated to supporting the continued accessibility of all stakeholders to the OMB's independent decision-making function and to ensuring the Board continues to uphold the principles of good planning throughout the Province.

