

Joint Recommendations on OMB Process & Procedures

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Executive Summary

Over the last year the Ontario Municipal Board has received considerable criticism. The purpose of this document is to address some of the issues that have been raised by the public and media regarding the role and function of the OMB.

The positions proposed below have been developed through discussion amongst the participating organizations of the Association of Municipalities of Ontario (AMO), the Greater Toronto Home Builders' Association (GTHBA), the Ontario Professional Planners Institute (OPPI), the Toronto Board of Trade (TBT), and the Urban Development Institute/ Ontario (UDI).

These joint positions address the following five issues of mutual interest.

- 1) OMB Appointments, Term of Office and Member Training and Compensation**
- 2) Public Involvement**
- 3) OMB Pre-hearing Process**
- 4) Case Management of "Failure to Proceed" appeals**
- 5) Completeness of Development Application Review**

While all participating associations recognize the role performed by the OMB as an appeal body in land use disputes, we do not necessarily agree on the scope of the OMB's role. Despite these differences, the participating organizations were able to agree on positions with respect to OMB process that would support the continued work of the OMB while encouraging early resolution of disputes in a cost effective and timely manner.

The following are a summary of recommendations:

1) OMB Appointments, Term, Training & Compensation

- The Government publicly identify the professional qualifications and human resources criteria used in the evaluation of candidates for OMB appointments and reappointments.
- The term of appointments be extended to 5-7 years.
- Performance measures be developed and OMB members be subject to an annual performance review based on these measures. Appropriate human resource protocols with respect to contract renewals should also be in place.

2) Public Involvement

- An OMB hearings guidebook be developed that clearly explains to the public how the hearings process works and what is expected of participants. It should also explain OMB mediation initiatives. The guidebook should be distributed to the public-at-large and should be posted on the Board's website.
- A senior case manager be designated as a special assistant to members of the public who are participating in hearings. This special assistant would provide to the public information and advice with respect to OMB practices and procedures in advance and during hearings. The special assistant would serve as a resource to the public participants rather than as their advocate.

3) **OMB Pre hearing Process**

- The OMB continue to administer a pre-hearing process for hearings of longer than 5 days in scheduled duration;
- The OMB encourage meetings of like experts to establish such matters as “agreed statements of facts” and “issues list.”

4) **Case Management of “ Failure to Proceed” Appeals**

- Following the filing of a development application, and after a provisional review of the application by municipal staff to determine the nature of the application, and the possible need for additional information, municipal staff and the applicant should negotiate a realistic schedule within which the municipality will process and render a decision to the applicant.

In the event of a failure to agree on a mutually acceptable schedule, the municipality and/or the applicant may request a meeting with a scheduling arbitrator, who is an OMB member, to assist in resolving the disagreement through non-binding arbitration.

If the matter is appealed to the Board notwithstanding the above efforts or in instances where that process did not occur, the OMB create a separate case management screening process for appeals based on the failure of municipalities to meet the 30- and 90-day provisions.

- The first step in this case-management process be to conduct an early pre-hearing to resolve the anticipated time requirements for the municipality and the applicant to complete a reasonable technical and/or public review of the matter.
- Parties would be encouraged to reach a mutually acceptable hearing schedule through the pre-hearing process. Failing that, the OMB would adjudicate on the appropriate hearings schedule.

5) **Completeness of Development Applications Review**

- Recommendation outlined in the **Case Management of “Failure to Proceed” Appeals** apply here as well and further;
- In order to provide guidance to the applicant and to ensure consistency, information and studies required to qualify as complete applications should be laid out in advance, in a municipal policy, through the Official Plan.

PILOT PROJECT

- It is proposed¹ that the Ontario Municipal Board implement an 18-month pilot project for a defined geographic area (part of the GTA/Golden Horseshoe). The pilot project would not involve a legislative change, but would test the effect of such a legislative change. The OMB may require cooperation from the Ministry of Municipal Affairs and Housing and the Ministry of the Attorney General to establish the parameters of the pilot project.
- The purpose of the pilot project is to test the feasibility and utility of changes being recommended to case management of “Failure to Proceed” appeals and completeness of Development Applications review.

¹ *OPPI supports utilization of the Board’s current case management procedures to address these matters, rather than a pilot project.*

OMB PROCESS & PROCEDURES

Joint Recommendations – AMO, GTHBA, OPPI, TBT, UDI

INTRODUCTION

The positions proposed below have been developed and agreed to through discussions among the participating organizations of the Association of Municipalities of Ontario (AMO), the Greater Toronto Home Builders' Association (GTHBA), the Ontario Professional Planners Institute (OPPI), the Toronto Board of Trade (TBT), and the Urban Development Institute/Ontario (UDI).

When the AMO Planning Taskforce undertook its review of the OMB process, it became apparent that there could be considerable common ground on certain issues with UDI, OPPI, TBT, and the GTHBA. These organizations were invited to discuss these issues and this brief is a product of these discussions. **There remain other issues of concern, where party-agreement could not be reached, which may be brought forward independently.**

While all participating associations recognize the role performed by the OMB, they do not necessarily agree to the scope of the Board's role. In order to support the continued work of the OMB while encouraging early resolution of disputes in a cost effective and timely manner, the participants developed a number of positions with respect to the OMB process.

The joint positions address the following five issues of mutual interest.

- 1) OMB Appointments, Term of Office and Member Training and Compensation**
- 2) Public Involvement**
- 3) OMB Pre-hearing Process**
- 4) Case Management of "Failure to Proceed" Appeals**
- 5) Completeness of Development Application Review**

1. OMB APPOINTMENTS, TERM OF OFFICE, MEMBER TRAINING & COMPENSATION

The effectiveness of the OMB as an appeal agency for land disputes is dependent on parties perceiving those conducting the hearings as being credible, reliable, and independent. To this end, the Provincial Government must ensure that the OMB appointment process and term of appointment is perceived as consistent and transparent to all stakeholders. Equally important, OMB members' remuneration and training must appropriately reflect the scope of their responsibilities.

RECOMMENDATIONS:

Appointments and Term

- The Government enunciate the professional qualifications and human resources criteria used in the evaluation of candidates for OMB appointments and reappointments and make those qualifications public;
- The term of appointments be extended to 5-7 years in order to benefit from the expertise of the Board members;
- Performance measures be developed and OMB members be subject to an annual performance review based on these measures. Appropriate human resource protocols with respect to contract renewals should also be in place; and,
- Members who fail to satisfy the requisite performance measures not be reappointed.

Remuneration

- Remuneration be re-evaluated with a view to increasing the level of remuneration to reflect the appropriate professional expertise and performance of members, including incremental cost-of-living increases over time.
- In particular, the evaluation of remuneration should consider the attractiveness of the Board as a career alternative for other professionals.

OMB Member Training

- The OMB continue and expand upon its mandatory member training program to best prepare OMB members for their Board duties and to ensure greater consistency in their decisions and procedural matters. A continuous skills development program should include training in:
 - decision-writing standards;
 - editorial review prior to the issuance of decisions;
 - communications training;
 - mediation and dispute resolution training;
 - public involvement in hearings; and
 - professional development.

2. PUBLIC INVOLVEMENT

The OMB has, and continues to make a substantial effort to hear the concerns of all stakeholders, including the ratepayers, especially in matters where they are not professionally represented.

Notwithstanding the Board's efforts, public involvement in OMB hearings can still be limiting in several ways. First, as some members of the public lack a full understanding of the OMB rules and procedures and/or the nature and scope of municipal planning policy, and the development review process itself, it limits their ability to effectively participate at hearings. In some cases, third party interests have also been known to use this lack of understanding to their advantage and delay the hearing process. Second, public involvement in OMB hearings, particularly those that last more than several days, can be prohibitively expensive with the effect of limiting public access to hearings. Better understanding and increased access by the public to hearings would assist and improve public participation. There may be cases, however, where the appeal process can be abused through chronic appeals by individuals or groups, which too limits timely case management.

RECOMMENDATIONS:

- An OMB Hearing Guidebook be developed that clearly explains to the public how the hearing process works and what is expected of participants. It should also explain OMB mediation initiatives. The guidebook should be distributed to the public-at-large and should be posted on the OMB's website.
- An OMB Senior Case Manager should be designated as a "Public Assistance Officer". This Officer would act as a special assistant to members of the public who wish to participate at a hearing. This individual would provide information and advice on OMB practices and procedures prior to and during a hearing. The special assistant would serve as a resource to the public participants rather than as their advocate, i.e. the special assistant would not speak on behalf of the public participant during the hearing. The designated staff person would require specialized training and resources to undertake this role.

3. OMB PRE HEARING PROCESS

The OMB's pre-hearing practices must continue to support its three-fold purpose:

- i) To identify the full range of issues to be addressed before the commencement of a hearing;
- ii) To level the playing field so that all parties have equal access to reports and other information provided through the municipal review/approval process prior to a hearing; and,
- iii) To expedite the hearing process.

RECOMMENDATIONS:

- The OMB continue to administer a pre-hearing process for hearings longer than 5 days;
- The OMB encourage meetings of like experts to establish such matters as “agreed statement of facts” and “issues list”;
- The OMB ensure the careful and consistent application of any agreed statements or issues lists during the hearing;
- Where pre-filing of materials and witness statements is required, the OMB members be given sufficient time to review agreed statement of facts and issues lists prior to the commencement of the hearing; and,
- A new protocol should be established for those parties who intend to invite an expert to provide evidence at the pre-hearing meeting. The parties be required to give notice of their intention to call this expert testimony, and to explain why this expert and evidence is necessary.

4. CASE MANAGEMENT OF “FAILURE TO PROCEED” APPEALS

Currently, the set time period, which may trigger a “failure to proceed” appeal to the OMB for most development applications is 90 days (or 30 days for site plan applications). Given the variety and/or complexity of development applications submitted to municipalities, it is difficult to pre-determine an appropriate fixed time period within which municipalities must assess and process development applications. In situations where two parties are unable to agree on a schedule, the applicant has the option of appealing to the OMB on the grounds of “failure to proceed” at the prescribed 30- or 90-day time limits.

It is also recognized that many of the “failure to proceed” appeals are filed well after the set 30- or 90-day periods. However, in a small number cases, some applicants immediately launch “failure to proceed” appeals to the OMB if a municipal decision has not been rendered within the prescribed period. In these instances, the application is being appealed before a municipality has had a reasonable opportunity to evaluate or process the application. These situations appear to occur mainly in the GTA/Golden Horseshoe regions and while comparatively few, nevertheless they are critical.

When applications are appealed to the OMB based on a municipality’s failure to reach a decision in 90 days, that application may not have been subject to a complete technical and/or public review at the municipal level. This may be due to the complexity of development application, inadequate information and/or the two-tier municipal review and approval process. Considering the reasons for these appeals, the OMB’s case management and hearing scheduling of hearings should be subject to a separate process to reasonably balance the needs of the municipality to complete its review of the matter, while not generating unreasonable delays for the applicant.

It is suggested that the Board can assist in providing a reasonable balance between the public and private sector interests without undue time delays both prior to an appeal and after a “failure to proceed” appeal has been launched.

RECOMMENDATIONS:

- Following the filing of a development application, and after a provisional review of the application by municipal staff to determine the nature of the application, and the possible need for additional information, municipal staff and the applicant should negotiate a realistic schedule within which the municipality will process and render a decision to the applicant.
- In the event of a failure to agree on mutually acceptable schedule, but prior to the 90 day trigger of an appeal, the municipality and/or the applicant may request a meeting with a scheduling arbitrator, who is a Board member, to assist in resolving the disagreement through non-binding arbitration.

If the matter is appealed to the Board notwithstanding the above efforts or in instances where that process did not occur, it is recommended the OMB create a separate case management screening process for appeals based on the failure of municipalities to meet the 30- and 90-day provisions.

- The first step in this case-management process should be to conduct an early pre-hearing to resolve the anticipated time requirements for the municipality and the applicant to complete a reasonable technical and/or public review of the matter.
- Parties would be encouraged to reach a mutually acceptable hearing schedule through the pre-hearing process. Failing that, the OMB would adjudicate on the appropriate hearing schedule.

5. COMPLETENESS OF DEVELOPMENT APPLICATION REVIEWS

Delays in the processing of development application are often due to municipal requests for additional information or studies to support the review of the application, or are due to a failure on the part of the applicant to provide sufficient information. Greater clarity on the type of information or studies required in support of development applications would assist both municipal staff and applicants, and would reduce delays in the processing of development applications. A reasonable and consistent approach of informing applicants and the public of the information and study requirements would be through the Official Plan policies.

RECOMMENDATIONS:

- The recommendations to the Board, outlined in the **Case Management of “Failure to Proceed”** appeals, apply here as well and further;
- In order to provide guidance to the applicant and to ensure consistency, information and studies required to qualify as complete applications should be laid out in advance, in a municipal policy, through the Official Plan.

PILOT PROJECT

It is proposed¹ that the Ontario Municipal Board implement an 18-month pilot project for a defined geographic area (part of the GTA/Golden Horseshoe). The pilot project would not involve a legislative change, but would test the effect of such a legislative change. The OMB may require cooperation from the Ministry of Municipal Affairs and Housing and the Ministry of the Attorney General to establish the parameters of the pilot project.

The purpose of the pilot project is to test the feasibility and utility of changes being recommended to:

- a. Case management of “Failure to Proceed” appeals; and,
- b. Completeness of Development Applications.

The proposed elements of the pilot project are as follows:

- a) Establishment of a non-binding arbitration process to assist parties in reaching a mutually acceptable decision on the scheduling of development application reviews.
 - Either party may request the meeting at any time after the application is filed, and before the appeals deadline (90 days) is reached. However, it should be understood that the municipality needs a reasonable period of time to undertake a preliminary review.
 - Only the municipality and the applicant may request such a meeting, as it is simply a matter of agreeing on process, not the substance of the application.
 - The scheduling assistance process involves a quickly scheduled, informal meeting where the scheduling arbitrator (an OMB member) hears both sides of the issue over scheduling and makes a recommendation with respect to timing and completeness of the application to the two parties. If one or both parties reject this, the scheduling arbitrator writes a report detailing the dispute and the recommendation.
 - During the scheduling meeting, and in the written report, the scheduling arbitrator would not comment on the substance of the application, but rather the timing and process, and the willingness of the parties to resolve the dispute.
 - If the applicant is not satisfied with the outcome of the non-binding arbitration, an appeal may be filed to the OMB under the existing legislative provisions.
 - The recommendation of the scheduling arbitrator is non-binding on both parties.
 - If the matter is not settled through non-binding arbitration, the OMB member serving as scheduling arbitrator writes a report and is filed for future reference if the applicant proceeds with an appeal to the OMB.

² *OPPI supports utilization of the Board's current case management procedures to address these matters, rather than a pilot project.*

- If appealed, the OMB member considers the report. It would only affect the outcome of the hearing as it pertains to scheduling to the extent that the OMB member determines that the appeal is based solely on application review timing, and the OMB member concurs with the report. At this point, the OMB member could choose to dismiss the appeal or Order the matter to proceed to a hearing.
 - Although the non-binding arbitration process for scheduling disputes is meant to deal only with questions of process, such as timing and completeness of an application, it will inevitably touch on issues of substance. Therefore, the process should allow for ratepayer and other third party stakeholder participation. This would require some notification beyond a posting of the application on-site. One option would be to require municipalities to prepare a preliminary report on the application as soon as possible after the application is received. This would be considered by Council.
- b) Establishment of rules to guide completeness of applications:
- At the municipal level, information and studies required to qualify as complete applications are laid out in advance in a municipal policy through the Official Plan.
 - In this way, the process would meet the test of natural justice, that is, stakeholders would have an opportunity to influence the 'application completeness' provisions in the Official Plan through the regular consultation process.
 - Applicants would then be guided by this 'complete applications policy' when submitting an application. The applicant would not be able to launch an appeal to the OMB until all requirements for a complete application as outlined in the policy are fulfilled.
 - Additional requests for information beyond what is stipulated in the Official Plan may be necessary, for example, in cases where new information about the sensitivity of an area or new provincial requirements are introduced, that have not yet been integrated into the Official Plan. In these situations, the scheduling arbitrator could make a recommendation on the issue of additional requests for information. However, this recommendation would be non-binding to both parties.

PILOT PROJECT DESIRED OUTCOMES

The desired outcomes of the pilot project should include, but not be limited to, answering the following questions:

- How should third party interests be handled with respect to the non-binding scheduling arbitration process?
- Is the 90-day rule reasonable in all instances?
- On balance, does the non-binding arbitration process add value or create more work for municipal staff?
- Should the non-binding arbitration process and separate case management stream be made a statutory requirement?
- What authority should the OMB member/non-binding arbiter have regarding scheduling? If it is concluded that one party is being unacceptably uncooperative, can the parties be compelled to agree on a schedule or can a schedule be imposed?