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ARTICLE

Province Releases Public Consultation Document For OMB Review

On October 5, 2016, the Province released its Public Consultation Document setting out the key themes that will guide its review of the Ontario Municipal Board. The intent of the OMB Review is to consider the scope and effectiveness of the OMB within the land use planning system. The release of the Public Consultation Document responds to the Premier's direction to the Minister of Municipal Affairs in making the OMB Review a top priority, with the intent of introducing legislation to implement reform by spring 2017. [1]

The Province has identified five key themes to the OMB Review in the Public Consultation Document:

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

The purpose of this article is to highlight some of the proposed changes under each of these five themes. We will also examine how each of the themes may respond to certain comments received to date from public and stakeholder consultations.

In addition to the Public Consultation Document, the Province intends to host a series of town hall meetings across the Province. Comments on the OMB Review can be submitted to the Province for consideration until December 19, 2016.[2]

Theme 1: OMB's jurisdiction and powers

One of the most common concerns raised by the public in respect of the OMB relates to the scope of its jurisdiction and powers. The OMB's broad powers, while unusually extensive compared to other jurisdictions, are consistent with the wording of its enabling legislation.[3] The concerns raised generally fall into two categories: the degree of deference to be granted to local-decision making and the scope of planning disputes to be brought before the OMB.

The Province has already limited the scope of appeals that the OMB may consider through changes to the *Planning Act* under Bill 73.[4] However, the Public Consultation Document suggests that the Province will be considering additional measures to further limit the OMB's jurisdiction and powers:

- Limiting appeals on matters which the Province has deemed are of public interest (e.g. prohibiting certain appeals to Provincial decisions on new official plans or proposed official plan amendments) and that support provincially funded transit infrastructure;
- Limiting the type of appeals and nature of evidence that can be considered by the OMB (e.g. by imposing a two-year moratorium to appeals of new secondary plans, prohibiting appeals to interim control by-laws and directing the OMB to send significant new information back to municipal council for re-evaluation);
- Giving more weight to municipal and provincial decisions by requiring the OMB to test such decisions on a standard of reasonableness, or by raising the “threshold test” that must be met before the OMB can overturn such decisions; and
- Providing further direction as to when planning decisions should be based on provincial/municipal planning documents in effect at the time of the decision, as opposed to when the application was made (e.g. abolishing the *Clergy* principle).

The proposed changes appear to respond in part to comments raised by municipalities that have identified the dangers of allowing a single appellant to hold back a comprehensive municipally-initiated planning process. For example, the Final Report issued by the Regional Planning Commissioners of Ontario (RPCO) noted that "considerable weight" should be given to municipal decisions in determining any matters under appeal and that there should be circumstances where appeals to municipally-initiated official plans should not be permitted.[5]

Theme 2: Citizen participation and local perspective

OMB hearings are becoming more complex and costly for its participants. To encourage citizen engagement at the local level, the Province will be considering additional public resources to assist unrepresented parties in land use planning disputes.

Examples being canvassed by the Province include:

- Expanding the Citizen Liaison Office (CLO) with additional staff to respond to public requests for information, or reconfiguring the CLO (*i.e.* moving it out of the Environmental and Land Tribunals Ontario) so that it may include in-house planning experts and lawyers; and
- Exploring funding tools to help citizens retain planning experts and/or lawyers.

The cost of OMB proceedings, particularly the threat of cost orders, is obviously a concern that may cause a "chilling effect" to local participation. However, cost awards are rarely imposed by the OMB.[6] In this author's view, it is the multi-layered and multi-faceted nature of planning law and the lack of readability of planning documents that act as the initial barrier against local participation. Complexity in process demands parties to retain planners, lawyers and other consultants to interpret Provincial policy. To this end, the Province's attempt at making Provincial plans more consistent and readable through the Co-ordinated Land Use Planning Review may arguably serve as a more effective solution in reducing such costs.

Theme 3: Clear and predictable decision-making

Another issue that the Province intends to address is the consistency and predictability of OMB decisions. The potential solutions identified require significantly greater public funding and resources than that currently allocated to the land use planning system. Such examples include:

- Increasing the number of OMB adjudicators and expanding the training required for adjudicators; and
- Requiring multi-member panels to conduct complex hearings, or possibly all hearings.

The need for more OMB adjudicators is echoed in earnest by the municipal law bar. This request is particularly timely given the number of seasoned adjudicators that will be forced to retire due to the ten-year appointment limitation this year.[7] Increased compensation for highly qualified adjudicators is also required to attract top-tier private planning consultants, senior municipal planners and respected legal counsel to serve as future members of the OMB.[8]

Theme 4: Modern procedures and faster decisions

The Province has identified that it intends to shift the focus from adversarial OMB hearings towards adjudication that will be less complex, more accessible to the public and may result in faster decision-making.

To address this theme, the Province has identified the following potential measures:

- Promoting "active adjudication" to encourage adjudicators to scope issues, question witnesses and in cases address inequalities between parties;
- Allowing hearings (and not just motions) to be conducted in writing;[9] and
- Setting clear rules for both the hearing process and the decision-making itself (e.g. limiting the maximum days for hearing, setting clear rules for issues lists and time limits for when decisions must be issued).

Both the public and private sectors have called for more effective case management tools and faster decision making. The OMB has responded in part by requiring appellants to scope appeals and requiring non-appellants to shelter under a valid appeal. However, such concepts are not based on legislative requirements but case law. Accordingly, they may be subject to challenge and interpretation on a case-by-case basis. To respond to the request for faster decisions, the OMB must also be provided with (or encouraged to include in its *Rules of Practice and Procedure*) robust procedural tools to achieve timely results.

Theme 5: Alternative dispute resolution and fewer hearings

Finally, the Province intends on avoiding a formal appeal process where possible. Bill 73 already permits municipalities to initiate a mediation process for certain appeals in advance of forwarding the record to the OMB; likewise, mediation is championed by the Province as an alternative approach to resolve land use planning disputes.

To this end, the Province will be considering the following changes:

- Requiring mandatory mediation prior to scheduling a hearing;
- Allowing government mediators to be available at all times during an application process (e.g. even before an application arrives at municipal council); and
- Setting timelines and targets for case management including mediation.

Mandatory mediation is a concept that has been requested by both the public and private sectors, although the recommended implementation measures may differ.[10] From this author's perspective, the promotion of mediation and alternative dispute resolution must not undermine (or replace) the OMB's ability to adjudicate effectively and arrive at timely decisions. As noted by Associate Chair Wilson Lee, "the mediation and adjudicative wings of the Board are the two wings of a healthy eagle. If the adjudicative wing is broken, such a bird will not be able to soar above the surly bonds of earth."[11]

From a practical perspective, and recognizing that OMB hearings are becoming more litigious, the requirement for mandatory mediation brings this practice in line with the *Rules of Civil Procedure* as they apply to most civil actions in Toronto, Ottawa and Windsor. However, the mandatory mediation process is highly structured under the *Rules* and is implemented through the local mediation coordinator and the Mandatory Mediation Program.[12] It is important to note that such measures, if implemented at the OMB level, are not without cost (both in time and money) to the land use planning system and its participants.

Note: This article was originally published in the Ontario Bar Association's Municipal Law Section Newsletter on October 12, 2016.

Please contact a member of our Municipal Planning Law Group for more information about the Province's OMB Review.

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[1] Premier Kathleen Wynne, "*September 2016 Mandate letter: Municipal Affairs*" issued to Minister Bill Mauro on September 23, 2016.

[2] For details see the Province's webpage on the OMB Review.

[3] See Sections 34 to 38 of the *Ontario Municipal Board Act*. Also refer to the numerous appeal rights for various planning instruments under the provisions of the *Planning Act*.

[4] See p. 16 of the Public Consultation Document for a brief summary of matters that cannot be appealed to the OMB, including those matters that can no longer be appealed following Bill 73.

[5] The RPCO have requested that the Province remove the right to appeal all municipal-initiated official plans or official plan amendments in defined circumstances — for example, a land owner should not be permitted to appeal policies as they apply to the full geographical area of the municipality (or a substantial area of the municipality for a secondary plan). See the Final Report issued by the Regional Planning Commissioners of Ontario, "*Reforming the Ontario Municipal Board: Five Actions for Change*" dated August 31, 2016 ("RPCO Final Report") at p. 14 and 20.

[6] See *Kimvar Enterprises Inc. v. Innisfil (Town)*, [2009] O.M.B.D. No. 33, 55 M.P.L.R. (4th) 305 at para 43.

[7] Section 3.2.2 of the Province's Agencies & Appointments Directive (effective September 1, 2006) limits the term of appointment for an adjudicative tribunal to a maximum of ten years in total. Re-appointment to a further additional term beyond the maximum of ten years in total may only be made in "exceptional circumstances in the public interest."

[8] As noted in the RPCO Final Report, "the current remuneration offered to Board members does not reflect the impact that Board decisions have on the planning system in the Province." See the RPCO Final Report at p. 25.

[9] Rule 36 of the OMB Rules of Practice and Procedure (last amended September 3, 2013) permit parties to bring a motion before a hearing in writing and the OMB to direct certain motions to be held in writing.

[10] See the RPCO Final Report at p. 27 and the Ontario Home Builders' Association, "*Land Use Planning and Appeals System: Response to the Consultation Document*" dated January 2014 at p. 24.

[11] Associate Chair S. Wilson Lee, "*Mediation and the OMB*", The Six Minute Municipal Lawyer 2016 as presented on May 4, 2016.

[12] See Rule 24.1 of the *Rules of Civil Procedure*.

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