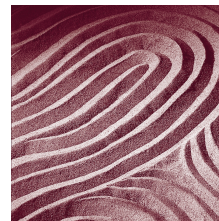
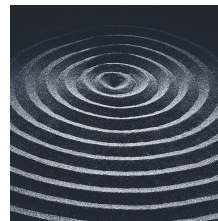


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Changes Planned for the Ontario Municipal Board

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CHANGES PLANNED FOR THE ONTARIO MUNICIPAL BOARD

By Steven O'Melia

The *Planning and Conservation Land Statute Law Amendment Act*, 2005 (Bill 51) was given first reading in the Ontario Legislature on December 12, 2005. The Bill would, if enacted in its current form, bring further change to the land use approval process in Ontario and significantly alter the role of the Ontario Municipal Board (the "OMB").

Bill 51 builds upon changes introduced in last year's *Strong Communities (Planning Amendment) Act*, 2004, S.O. 2004, c. 18, and, on the heels of the recently enacted *Places to Grow Act*, 2005, S.O. 2005, c. 13, and *Greenbelt Act*, 2005, S.O. 2005, c. 1, continues the effort by Ontario's provincial government to exert more control over the planning process. This goal is being pursued directly, by requiring stricter adherence to the more prescriptive Provincial Policy Statement issued under the *Planning Act* and providing for provincially prescribed growth plans, and indirectly, by placing limits on the authority of the OMB.

Background to the Proposed Changes

The OMB has existed in substantially its current form since 1906, when the Ontario Railway and Municipal Board was created (it was renamed in 1932). Its original mandate was to oversee the financial affairs of municipalities, a task that had formerly been carried out by the Office of the Provincial Municipal Auditor, and to supervise the then-important inter-municipal system of rail transportation. The OMB's responsibilities have grown significantly in the past century and, although the bulk of its caseload consists of land use planning matters, it also deals with a myriad of other issues and draws its authority from over 100 provincial statutes.

The OMB possesses an authority that is unique in this country. Most other provinces have planning tribunals, but none of the OMB's provincial counterparts have been granted the breadth and scope of authority that it exercises. It is perhaps for this reason that the OMB has often been a lightning rod for persons and groups dissatisfied with the planning process in Ontario. For years, many municipalities (and more than one provincial opposition party seeking election) have called for significant amendments to the OMB's structure and powers, up to and including its outright abolition. The OMB has persevered in the face of this adversity and has, if anything, become a larger player in making the decisions that control planning and development in Ontario.

It was against this background that the Ontario government undertook a series of consultations on a variety of planning issues, including proposed reforms to the OMB, throughout 2004. These consultations led to the introduction of Bill 51 and the other recent planning statutes that have been enacted or introduced. Bill 51 sets out a number of significant amendments to the *Planning Act* and related statutes, such as the proposed inclusion of exterior design and architectural features within the site plan approval process and the ability to impose conditions upon zoning approvals, both of which are precluded under the existing legislation. The Bill also sets out a number of proposals that would directly affect the role of the OMB, the most prominent of which are set out under separate sub-headings below.

OMB Regard for Municipal Decisions

Bill 51 provides that the OMB shall have regard to decisions that are made under the *Planning Act* by a municipal council or approval authority which relate to the same planning matter. The OMB would also be required to have regard to the supporting information and material that the municipal council or approval authority considered in making its decision. The information releases accompanying Bill 51 state that these changes will return the OMB's role to that of an appellate body rather than the main decision maker.

The OMB currently conducts its hearings on a de novo basis, which means that it examines the applications that are before it as though they had not already been considered and either approved or denied by local elected representatives. Newcomers to Ontario's planning process are often surprised to learn, after convincing a municipal council or committee to refuse a development proposal after an extensive public process, that the entire process is then disregarded at the OMB. Bill 51 proposes to both increase the opportunities for public involvement in the planning process and to increase the importance of that process.

If the Bill's provisions on this point survive final reading, it will be interesting to see how the requirement for the OMB to "have regard to" municipal planning decisions will work in practice. Ontario's *Planning Act* contains a lengthy shopping list of matters that the OMB must have regard to, including such things as the conservation of natural areas and agricultural resources, the adequate provision of housing and employment opportunities, and the appropriate location of growth and development. These worthwhile goals often conflict with each other and it is unclear how a municipal council decision, as yet another item on the list of matters to be regarded, will be factored into an OMB decision if it conflicts with one or more of the other issues that the Board must have regard to. Nonetheless, a requirement to give municipal decisions any regard at all will be giving them more weight than is currently required.

Restrictions on Evidence at the OMB

In a further nod to the local decision-making process, Bill 51 provides that information and material that was not provided to the municipal decision maker should not be admitted into evidence at the hearing of an appeal unless the OMB is of the opinion that it was not reasonably possible to provide that information and material to the municipal council or committee before the decision was made. Public bodies are excluded from this restriction.

In cases where the OMB determines that late-produced information or material should be admitted into evidence, it must then determine if that information and material could have materially affected the original decision and, if so, must notify the municipal decision maker and provide it with an opportunity to reconsider its decision in light of the new information or material and to make a recommendation to the OMB. If the council or approval authority responds in writing with its recommendation within the prescribed time period (which is still to be set), the OMB must consider that recommendation in arriving at its decision. The OMB may, but is not required to, consider recommendations received after the prescribed time period has expired. In either case, the municipal recommendation is not binding and it is unclear if the requirement to "consider" a municipal recommendation is a higher or lower standard than the requirement to "have regard to" the original municipal decision.

The prospect of having a hearing adjourned and a matter sent back to a local municipal council for comment by the OMB will presumably cause planning applicants to more closely examine their initial applications to ensure that all relevant information has been included. It is often the case that the planning applications and supporting materials and reports considered by the OMB bear little resemblance to the applications and materials that were placed before a municipal council. This provision would discourage that practice, or in the alternative result in a form of dialogue between the OMB and local councils which would further inject a local perspective into the Board's decision-making process.

Determining the Completeness of Applications

Ontario's *Planning Act* sets out time frames after which a party may appeal a planning application to the OMB if a decision has not been made by a municipality. Those time periods commence upon the receipt of a complete planning application as prescribed by provincial regulation. In some larger municipalities, it has become a common practice to avoid the local municipal decision makers altogether by submitting the minimal application and then filing an appeal to the OMB at the earliest possible date.

In an apparent response to case law that has strictly construed what constitutes a complete planning application for the purposes of crystallizing the right of appeal to the OMB, Bill 51 proposes to grant municipalities the power to amend their official plans to require information or material to accompany planning applications that the council considers it may need to properly consider such applications. A council could refuse to accept or consider a planning application that did not contain that additional material and the time periods for the establishment of a right of appeal would not begin to run until it was received. In the event that a dispute arose over whether or not a complete application had been submitted, a party would be entitled to refer the matter to the OMB for determination and the Board's decision would not be subject to appeal or review.

Local Appeal Bodies

Bill 51 would permit municipalities to appoint "local appeal bodies" to hear planning appeals on minor variance and severance matters, except where those decisions were made in conjunction with other planning applications. The members of such local appeal bodies could not be employees of the municipality or members of the municipal council or local committees. A local appeal body would have all of the powers and duties of the OMB for the purposes of the matter before it and would presumably be required to carry out a similar type of hearing. The rules governing the practice and procedure before local appeal bodies would be prescribed by regulation. Appeals from local appeal bodies could be made solely to the Ontario Divisional Court on a question of law, although the Minister could, by order accompanied by a written explanation, withdraw the power given to a local appeal body in a specific instance or for all appeals. It is unclear what would cause the Minister to exercise this authority, since there is no requirement that the Minister be notified of appeals to a local appeal body.

Limitations on Rights of Appeal

Bill 51 provides that a person, other than a public body, who did not make oral submissions at a public meeting or written submissions to a council in respect of a planning application would not be entitled to appeal to the OMB. The OMB currently has the authority, either of its own accord

or on the motion of any party, to dismiss an appeal without holding a hearing for similar reasons. This proposed provision strengthens that concept by removing the right of appeal entirely and by preventing such persons from being added as a party to a hearing unless the OMB determines that there are reasonable grounds to do so.

The Bill also proposes to eliminate entirely the right to appeal refusals of official plan or zoning by-law amendments that would alter the boundary of a municipal settlement area, remove land from an area of employment, or change second residential unit policies.

Administrative Changes to the OMB

In addition to the changes to the OMB's role set out in Bill 51, the provincial government has proposed reforms to the OMB member appointment process and administrative structure that it says will produce "a more effective, transparent, accountable and user-friendly OMB." These proposals include the following:

The creation of a citizen liaison function: The stated purpose of this proposal is to help members of the public navigate the OMB process and make it more accessible. The OMB currently has an excellent website (www.omb.gov.on.ca) and a staff of qualified planners and administrators who act as case managers and assist persons to deal with the OMB and understand its processes. It is unclear whether the proposed citizen liaison function will be a separate position or whether it will be incorporated within the existing case management function

Encouraging qualified applicants to become OMB members by posting an employment description: Those individuals whose educational or professional backgrounds make them well suited to sit as OMB members are (or should be) already aware of the Board's existence and the nature of the duties assigned to it. It is not clear that posting an employment description, on a website or otherwise, will encourage more applications from qualified people.

Extending the length of tenure for OMB members: Although it is not provided for in the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, appointments to the OMB have been limited to three years in duration since the late 1980s. Prior to that time, OMB members were generally appointed "at pleasure" for undefined terms and the tenure of those appointments often extended for many years. During that earlier period, the political nature of OMB appointments was less significant because the party making those appointments did not change from 1943 to 1985. In sharp contrast to that post-war era of political stability, the period from 1987 to 1995 saw three successive majority governments of three different political stripes, which had a corresponding effect on the appointments that were made (and the re-appointments that were not made) to the OMB. It has been suggested that appointing OMB members for longer terms would ensure that they could act independently and free from any perception of political interference, which is particularly important since the province itself is often a party at OMB hearings.

Conducting a review of board member compensation to allow the OMB to attract and retain the most qualified professionals: It is not clear that the calibre of board members has been affected by member compensation levels. Even opponents of the OMB do not generally contend that its members are not qualified; their objections more often lie with the nature of the appointment process and the OMB's ability to overrule the decisions of local councils. However, it seems fair that OMB members, who exercise powers that are at least as important as many of the matters dealt with by Ontario's lower courts, should receive a salary that reflects the

importance of the duties assigned to them. Increased compensation may also help the OMB to retain the members that do get appointed.

Providing formal training on land use planning issues to all new OMB members at the start of their term and on an ongoing basis throughout their tenure: The OMB already provides formal and informal training to its members, including training in mediation and dispute resolution. Although additional training is likely welcome, training takes time and costs money and the OMB's resources would need to be appropriately augmented to allow for training to occur without putting undue strain on either the Board's hearing schedule or its individual members. Consideration would also have to be given as to whether members of the newly created local appeal bodies should receive training.

Conclusion

It is an interesting time to be a land use planner or a planning lawyer in Ontario. It seems that the only constant is change, and that change is not yet nearly completed. Bill 51 is a further step in the implementation of the current Ontario government's initiative to place its stamp on the provincial planning process and it remains to be seen how, or if, the Bill's provisions will be amended through the legislative committee process. The proposed changes may be unsettling to those that are accustomed to the current process, but they will likely not go far enough for those who are opposed to it. Although the Bill's proposed changes to the role of the OMB are significant, it does not appear that they will usurp the Board's continued role as a central figure in land use planning in Ontario.