

Greater Beach Neighbourhood Association

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Greater Beach Neighbourhood Association (“GBNA”) appreciates the opportunity to participate in the Fall 2013 Land Use Planning and Appeal System Consultations.

The following comments are submitted on behalf of the GBNA, and are organized as follows:

1. Executive Summary
2. Discussion
3. About GBNA

1. Executive Summary

• General Comment – Role and processes of OMB

- The Ontario Municipal Board (“OMB”) plays a significant role in Ontario’s land use planning system, as the OMB may, on appeal, substitute its opinion for that of council, and decisions may be taken out of the hands of councils by appeals to the OMB on expiry of statutory periods for making decisions in respect of development applications.
- Local citizens and resident associations are, in many cases, effectively precluded from participation in OMB appeals because of the significant expense involved in hiring legal counsel to provide representation, and expert witnesses to provide opinion evidence, at appeal hearings.
- As a result, it is difficult to talk meaningfully about increasing citizen participation and engagement in Ontario’s land use planning system without a fundamental examination of the role (including scope of appeals) and processes of the OMB in the system; in other words, the OMB is “the elephant in the corner” of the present consultation process.

- GBNA is greatly disappointed that this topic was largely excluded from the scope of the present consultation, and questions whether meaningful change to the land use planning system can result from any review of the system that excludes consideration of the role (including scope of appeals) and processes of the OMB.
- **Question 4: Promote collaboration between applicants, municipalities and public**
 - See responses to Question 14.
- **Question 9: Promote local collaboration and consensus about land use planning**
 - See responses to Question 14.
- **Question 14: Promote citizen engagement & confidence that input is considered**
 - (a) The role and processes of the OMB create potentially insurmountable barriers to citizen engagement in the land use planning system (see General Comment above on role of and processes of the OMB).
 - (b) Notification of the public by municipalities must be made earlier in the application process, be more broadly communicated and provide more education about the land use planning system, than is currently done.
 - (c) Given the important role which reports of municipal planning staff may play in the decision making process of Council and the OMB in respect of development applications, the public must have engagement with municipal staff (and timely access to any reports produced) during a municipality's consideration of development applications.
 - (d) The *Planning Act* should require, in the case of developer-initiated development applications, that (a) a plan for effective public consultation be a mandatory component of "complete" application requirements for development applications, and (b) municipalities and the OMB may not approve an application where there has been non-compliance with the plan.
 - (e) Given the importance to the community of the decisions made by municipalities in the site plan approval process (including matters of architectural controls), the public should be provided with statutory rights of participation in the process, and there should be a significant increase in the current 30 day period after which an applicant for site plan control may appeal to the OMB the failure of the municipality to make a decision.

- (f) Given that the Development Permit (“DP”) system takes the place of several planning approvals (including zoning and site plan control), the public should be provided with statutory rights of participation in the process, and there should be a significant increase in the current 45 day period after which an applicant for a DP may appeal to the OMB the failure of the municipality to make a decision

- **Question 15: Explanation by municipality of how citizen input is considered**

- Mandatory explanation by municipalities of how citizen input was considered in making land use planning decisions is desirable (perhaps using the model of *Environmental Bill of Rights, 1993*), but must be implemented in addition to, and not in place of, other reforms to promote greater public engagement such as those suggested above.

2. Discussion

- **General Comment – Role and processes of OMB**

- The consultation document appears to understate the role of the Ontario Municipal Board (“OMB”) in, and its influence on, land use planning in Ontario, and the uniqueness of the OMB’s jurisdiction over land use planning matters.¹
- Commentators agree that the scope of the powers of the OMB in respect of land use planning matters exceeds (in most cases significantly) the role and powers of land use appeal bodies in other Canadian and American jurisdictions:

Appellant bodies responsible for appeals of local planning decisions are common in North America. Many of these boards or commissions share traits with the Ontario Municipal Board. However, despite these similarities, the differences between the OMB and other provincial and state bodies demonstrate just how powerful, comparatively, the Board is.²

The board [OMB] is unique in Canada in the breadth of its land use planning appellate jurisdiction. Other provinces have established tribunals to exercise jurisdiction over some elements of planning, but none has given a single body the power to review *all* municipal planning decisions.³

¹ The consultation document states at p. 5 that “Almost all other provinces have boards that hear appeals from land use planning decisions. The types of land use planning matters that come before them may vary.”

² Aaron A. Moore, *Planning Politics in Toronto: The Ontario Municipal Board and Urban Development*, Toronto: University of Toronto Press (2013) at p. 44.

³ John G. Chipman, *A Law Unto Itself: How the Ontario Municipal Board Has Developed and Applied Land Use Policy*, Toronto: University of Toronto Press (2002) at p. 191 (emphasis in original).

- The OMB plays a significant role in Ontario’s land use planning system.
 - The OMB may, on appeal, substitute its opinion for that of council or an approval authority⁴ in respect of matters relating to official plans,⁵ zoning by-laws,⁶ site plan control⁷ and development permits.⁸
 - Decisions about land use planning matters may be taken out of the hands of councils or approval authorities by appeals to the OMB on expiry of statutory periods for making decisions in respect of development applications.⁹
 - Even the threat of an OMB appeal may influence discussions between a proponent, the municipality and the local community, about a development proposal.¹⁰
- Given the formality of the OMB’s processes, and the requirement for parties to provide evidence from experts on planning matters, parties to hearings are required to engage, at significant expense, legal counsel and expert witnesses, and the cost of doing so is usually beyond the capacity of local citizens and resident associations.
 - Legal counsel is effectively required to represent parties in OMB appeals due to the formality of OMB proceedings.¹¹

⁴ “When hearing an appeal on the merits of a municipal decision, the Board’s proceedings are de novo, meaning that it is like beginning the process anew ... in a sense, the Board becomes a substitute for the original decision-maker, charged with the task of defining what is good and desirable planning under the circumstances.” (Decision of OMB in *Brayman v. Kawartha Lakes (City)*, (M. Denhez, Member, August 3, 2004, at para. 16)). “An OMB hearing would judge the planning merits of the proposal, not the legal grounds for the council’s decision.” (Moore, *op. cit.*, at p. 8). Chipman (*op. cit.*, at p. 71) expressed the view that, while the OMB has expressed deference for council decision-making “... it has not hesitated to use the application of its own policies as grounds for overriding the decisions of council.”

⁵ Subsection 17 (50) of the *Planning Act*.

⁶ Clause 34 (26)(b) of the *Planning Act*.

⁷ Subsection 41(21.1) of the *Planning Act*.

⁸ Clause 14 (1)(b) of O. Reg. 608/06.

⁹ Subsections 17 (40), 22 (7) and (7.0.2), 34 (11) and 41 (12) of the *Planning Act* and subs. 12 (1) of O. Reg. 608/06.

¹⁰ “Developers sometimes use the threat of the OMB as a negotiating tactic, knowing they may be able to get more concessions by appealing to the board, [Mississauga Councillor Jim] Tovey added.” (*National Post*, June 21, 2011, <http://news.nationalpost.com/2011/06/22/mississauga-council-urges-province-to-scrap-omb>).

¹¹ “Because the board limits itself to the evidence placed before it, those parties who cannot afford lawyers ... to support their positions have generally been at a distinct disadvantage to those who can afford such support.” (Chipman, *op. cit.*, at p. 199). While legal assistance is not formally required for an appearance before the OMB, lawyers will have the knowledge and skill to advise potential parties about the strength of their case and to conduct

- The OMB requires that opinion evidence relating to the planning merits of an application (such as conformance with the Official Plan and relevant provincial and municipal policies, servicing issues, appropriateness of development, etc.) be given by experts in the field.¹²
- Engaging legal counsel and expert witnesses can be very expensive¹³ and the costs of doing so are in most cases beyond the capacity of local citizens and resident associations.¹⁴
- As the OMB makes many important decisions in land use planning matters, and local residents and resident associations are, as a practical matter, precluded from meaningful participation in OMB appeals, the result is that the public is effectively precluded from engagement in all land use planning matters which are appealed to the OMB.

➤ **GBNA Recommendations**

- i. The province should conduct a thorough review of the role and process of the OMB with a view to (a) ending or restricting appeals of land use planning matters, and (b) providing for effective participation by members of the public in any appeals to the OMB which may be retained following the review.
- ii. The review should include consideration of the experiences of other provinces and territories which provide for more restricted rights of

the case in an orderly and effective manner, and “[r]etaining a lawyer removes a lot of the headaches associated with an appeal to the board ...” (Bruce W. Krushelnicki, *A Practical Guide to the Ontario Municipal Board*, Markham, ON: LexisNexis Canada Inc. (2007) at p. 306).

¹² “The Appellant’s lawyer maintains that her client is not required to hire experts to testify before the Board. This is, of course, true. However, the Board must rely on experts to come to its conclusions ...” (Decision of OMB in *364808 Ontario Ltd. v. Toronto (City) Committee of Adjustment*, (M.A.F. Stockton (Member) December 7, 2004, at para. 10)). Moore (*op. cit.*, at p. 14, 172) notes that “The OMB, in rendering its decisions, focuses heavily on expert testimony”, and “The board’s focus on planning experts and the strength of their evidence affects OMB hearings ... requires parties to hire their own planning experts if they are to have any chance of winning.”

¹³ “... legal assistance [for an OMB appeal] can be costly. Filing, preparation and attendance at a one-day hearing on a fairly simple matter can run into thousands of dollars, especially if other experts are obtained. Important and complicated hearings involving weeks of attendance with many lawyers can collectively cost millions of dollars.” (Krushelnicki, *op. cit.*, at p. 306). “The cost of hiring experts, not only to testify but to conduct the required testing and research, can be high” and the OMB’s reliance on expert testimony “hurts neighbourhood associations and lone citizens who cannot afford the same expertise available to the City and developers.” (Moore, *op. cit.*, at p. 53, 172).

¹⁴ Moore (*op. cit.*, at p. 53, 57-58) notes that, while municipalities and major developers have their own staff and can afford to hire additional experts when needed, “Neighbourhood associations, by contrast, often lack the funds necessary to hire such expert witnesses ...”, and “... a number of factors make appealing to the OMB untenable for many neighbourhood associations ... most of these factors derive from the board’s emphasis on expert testimony ... the cost associated with retaining such experts is high, and may be prohibitive”.

appeal of land use planning decisions than the current rights of appeal to the OMB under the *Planning Act*.

- iii. The province should conduct a thorough review of the role and process of the OMB with a view to (a) ending or restricting appeals of land use planning matters, and (b) providing for effective participation by members of the public in any appeals to the OMB which may be retained following the review.
- iv. The review should include consideration of the experiences of other provinces and territories which provide for more restricted rights of appeal of land use planning decisions than the current right of appeal to the OMB under the *Planning Act*.

- **Question 4: Promote collaboration between applicant, municipality and public**

- See responses to Question 14.

- **Question 9: Promote local collaboration and consensus in land use planning**

- See responses to Question 14.

- **Question 14: Promote citizen engagement & confidence that input is considered**

(a) The role (including scope of appeals) and processes of the OMB create potentially insurmountable barriers to citizen engagement in the land use planning system (see General Comment above on role of OMB).

- **GBNA Recommendations**

- See General Comment above on role and processes of the OMB.

(b) Notification of the public by municipalities must be made earlier in the application process, be more broadly communicated and provide more education about the land use planning system, in the context of the particular application, than is currently the case.

➤ **GBNA Recommendations**

- i. Public notice of development applications should be made as soon as possible after an application is made to the municipality
- ii. The public notice should be disseminated more broadly than to owners of land within 120 m of the proposed development, and must also require, at a minimum, advertisement in local news media.
- iii. Statutory public meetings in respect of development applications should take place well before the application is considered by Council or a committee of council.
- iv. Sufficient educational material about the land use planning system, and the place in this system of the development application at issue, should be provided to the public with public notice of the application, to enable the public to participate in an informed manner in the process.

(c) Where a land owner has requested a development approval, the responsibility for engagement with the community is arguably one that the proponent shares with the municipality; it is, after all, the proponent who has initiated and is driving the development proposal.

➤ **GBNA Recommendations**

- i. The *Planning Act* should require that, in the case of developer-initiated development applications, a plan for effective public consultation be a mandatory component of “complete” application requirements for development applications.
- ii. Municipalities and the OMB should be obliged to reject development applications which have not complied with a consultation plan.

(d) Reports of municipal planning staff play an important role in the decision making process of Council or the OMB in respect of development applications,¹⁵ and

¹⁵Moore (*op. cit.*, at p. 14-15, 174) makes the following observations.

“The support of City planners is an important safety net for developers in Toronto. With City planners’ support, developers have significantly greater success at the OMB, should the city council decide against them, and more often than not, council will support the recommendations of City Planning.”

“...in most instances, local politicians will rely on City Planning’s advice when rendering decisions on planning policy. This suggests that the bureaucracy, in the form of planning experts, plays a significant role in the politics of urban development in Toronto.”

proponents (and their representatives) interact with planning staff concerning issues which municipal staff may have in respect of an application.¹⁶ Local residents and resident associations, by contrast, have much less opportunity to engage with municipal planning staff.¹⁷

➤ **GBNA Recommendations**

- i. The consultation process in respect of development applications should provide for engagement of local residents and resident associations with municipal planning staff so that the community may understand the views and concerns of municipal staff with respect to the application, and have timely access to reports prepared by municipal staff that may be relevant to the application.
- (e) The site plan approval process addresses matters of importance to the community (including matters of architectural controls) yet, unlike the situation in respect of official plans and zoning by-laws, the *Planning Act* makes no provision for mandatory public engagement in the site plan approval process.
- For example, s. 41 of the *Planning Act* does not provide for a statutory right of notification of, or access to, applications for site plan approval, nor does the legislation provide for public meetings/open houses in respect of these applications, or rights of third parties to appeal site plan approvals granted by municipalities.
 - As well, proponents may appeal to the OMB a non-decision by a municipality on an application for site plan approval 30 days after submitting the application. This is an unrealistically short time frame, which could result in:
 - decisions on such applications being made by the OMB on appeals, or being considered by municipalities under the threat of an OMB appeal (see General Comment above on role and processes of the OMB), and

“... developers will shape their development proposals to conform to City Planning’s desires, even if city council, neighbourhood associations, or individuals oppose the development, because the support of City Planning almost assures a victory at the OMB ... the OMB shifts much of developers’ focus away from local politicians and towards City Planning.”

¹⁶ The *Planning Act* specifically encourages consultation between proponents and the municipality (i.e., s. 34 (10.0.1)). Moore, (*op. cit.*, at p. 14, 172) notes that “... developers will shift some of their attention away from winning the support of local politicians towards gaining the support of the City’s planners” and “... often the developers approach [City] planning[staff] before apprising local politicians or residents of their intent” respecting development proposals.

¹⁷ ... residents have fewer opportunities to influence the City’s planning experts, in contrast to the private-sector planners developers may retain. It is the latter planning experts who have the most direct influence on city planners ...” (Moore, *op. cit.*, at p. 172).

- insufficient time for the community to become engaged in the application in a meaningful way before an appeal of a non-decision is commenced.

➤ **GBNA Recommendations**

- i. The *Planning Act* should provide rights of participation of the community in the site plan approval process, such as those provided in respect of zoning by-laws.
- ii. The time frame for appeal to the OMB of a municipality's failure to make a decision in respect of an application for a site plan should be significantly increased.

(f) While the Development Permit ("DP") system has many potentially positive features, it also has significant potential barriers to citizen engagement: as in the case of site plan control, the legislation governing DP systems makes no provision for mandatory community engagement in applications for a DP. This is a serious omission, as the DP system regulates several planning issues, including zoning issues which provide for mandatory engagement of the public.

- For example, there is no requirement for mandatory public notification given, or a public meeting or open house held, in respect of applications for a DP; no right to public access to the DP application; and, no right of third parties to appeal the issuance of a DP to the OMB.
- As well, proponents may appeal to the OMB a non-decision by a municipality on an application for a DP 45 days after submission of a complete application. This is an unrealistically short time frame, which could result in
 - decisions on such applications being made by the OMB on appeals, or being considered by municipalities under the threat of an OMB appeal (see General Comment above on role and processes of the OMB), and
 - insufficient time for the community to become engaged in the application in a meaningful way before an appeal of a non-decision is commenced.

➤ **GBNA Recommendations**

- i. The *Planning Act* should provide rights of participation of the community in the DP system, such as those provided in respect of zoning by-laws.
- ii. The time frame for appeal to the OMB of a municipality's failure to make a decision in respect of an application for a DP should be significantly increased.

- **Question 15: Explanation by municipality of how citizen engagement considered**
 - Mandatory explanation by the municipality of how citizen input was considered in making land use planning decisions is desirable, but must be implemented in addition to, and not in place of, other reforms to promote greater public engagement, such as those suggested above.
 - For example, any requirement for the municipality to explain how it considered citizen input in making a decision would have no practical effect where the decision is taken out of the hands of the municipality because an appeal is made to the OMB of a non-decision within the statutory time frame.
 - As well, the local community may not, by the time an appeal to the OMB is made, have even provided all of its input in respect of the proposal.
 - To the extent that a municipality (and not the OMB) actually makes a decision in respect of a development application, the requirements of Part I of the *Environmental Bill of Rights, 1993* appear to be a useful model for a municipal duty to report on how it considered public comment in making the decision.
 - **GBNA Recommendations**
 - i. Mandatory explanation by the municipality of how citizen input was considered in decision making about land use planning matters (similar to the model of Part I of the *Environmental Bill of Rights, 1993*) is desirable but must be implemented in addition to, and not in place of, other reforms to promote greater public engagement, such as those suggested above.

3. About GBNA

- Greater Beach Neighbourhood Association (GBNA) is an umbrella group of multiple resident associations in the Greater Beach area of the City of Toronto. GBNA believes in responsible property development policies and practices.
- In 2012 a number of resident associations in Ward 32 in the City of Toronto covering the greater Beach area from Coxwell Avenue to Victoria Park and from Lake Ontario to the railway corridor south of Danforth Avenue came together to form GBNA. GBNA is a non-profit umbrella organization representing our community in matters related to the land-use planning policies that influence development in our neighbourhoods, including their administration and impact on infrastructure and services.

- GBNA`s member groups include:
 - Beach Triangle Residents Association
 - Kew Beach Neighbourhood Association
 - Toronto Beach East Residents Association
 - Friends of Glen Davis Ravine
 - Norwood Park Residents Association
 - Beach Waterfront Community Association
 - Balmy Beach Neighbourhood Association

- GBNA`s objectives include:
 1. working with elected and non-elected members of the City and Provincial government as well as the media to ensure that public policies are compatible with our neighbourhoods and the needs of our residents,
 2. standing together as a group to ensure that any property development and redevelopment is in keeping with the Official Plan, Zoning By-Laws and other applicable legislation, policies or guidelines irrespective of the local association area in which an application is made,
 3. working together to ensure genuine participation by our residents in the review of the City`s Official Plan and in the formulation of other development policies and practices affecting our area, and
 4. working with other like organizations across Toronto and the Province to coordinate residents` viewpoints and positions across City and Provincial levels of government.

Thank you again for the opportunity to provide our views in response to the Land Use Planning and Appeal System Consultations.

Please feel free to contact me at info@gbna-toronto.com if further information is required.

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