

Greater Beach Neighbourhood Association

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Submission to

Standing Committee on Finance and Economic Affairs

Bill 20, An Act respecting the City of Toronto and the Ontario Municipal Board

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Greater Beach Neighbourhood Association (“GBNA”) appreciates the opportunity to participate in the Committee’s public hearings on Bill 20, An Act respecting the City of Toronto and the Ontario Municipal Board.

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

- GBNA strongly supports the principles of Bill 20:
 - Ensuring accountability for decisions on land use planning matters in the City of Toronto by making City Council the ultimate authority for these decisions, and for determining the appropriate scope of review or appeal of these decisions.
 - The principle of accountability is consistent with the *City of Toronto Act, 2006* which “recognizes that the City is a government that is capable of exercising its powers in a responsible and accountable fashion”.
 - The principle of accountability is furthered by allowing City Council to determine appropriate review and appeal mechanisms of land use planning decisions, as Council in doing so can determine "where the buck stops" in respect of these decisions.

- The City of Toronto is fully capable of carrying out, in a responsible manner, the regulation of land use planning in the City.
 - This principle is consistent with the practice in other Canadian jurisdictions which do not provide for expansive rights of appeal in respect of land use planning decisions of a municipality to an administrative tribunal such as the Ontario Municipal Board (“OMB”).
- GBNA agrees with the views expressed by a number of members of the Legislature during debate on Bill 20 that local residents and community groups have experienced great frustration with the OMB appeal process, and particularly with the high cost of participating in appeals which leads to the perception of the OMB appeal process as an uneven playing field which favours parties with deep pockets.
 - Authorizing the City of Toronto to determine the nature and scope of review or appeal mechanisms for land use planning decisions will allow the City to address the factors which can (as is the case with the OMB) effectively preclude public participation in reviews or appeals because of the significant expense involved in doing so.

2. Discussion

(a) Why GBNA is here

- The experience of GBNA with the approval process for developments in our community (Beach area of Toronto) has led to significant frustration with the role played by the OMB.
 - As the OMB may, on appeal, substitute its opinion for that of municipal councils (and, in fact, decisions may be taken entirely out of the hands of councils in the case of appeals on the expiry of statutory periods for making decisions in respect of development applications), the shadow of the OMB looms large over the consideration by the City of development applications.
 - Regrettably, local residents and community groups are, in many cases, effectively precluded from participation in OMB appeals because of the significant expense involved in doing so (hiring legal counsel to provide representation, and expert witnesses to provide opinion evidence, at OMB appeal hearings).
- As a result, the experience of GBNA and its member resident associations is that the extensive rights of appeal to the OMB of municipal land use planning decisions, combined with the onerous (and correspondingly expensive) procedures of OMB appeals, results in,

- the focus of the approval process effectively shifting to the OMB, rather than City Council, and a corresponding lack of perceived accountability for decisions in the approval process, and
- financial obstacles which in many cases preclude local residents and resident associations in our community from effectively participating in OMB appeals.

(b) Support for the Principles of Bill 20

- GBNA strongly supports the principles of Bill 20:
 - Ensuring accountability for decisions on land use planning matters in the City of Toronto by making City Council the ultimate authority for these decisions and for determining the appropriate scope of review or appeal of these decisions.
 - The City of Toronto is fully capable of carrying out, in a responsible manner, the regulation of land use planning in the City.
- GBNA agrees with the views expressed by a number of members of the Legislature during debate on Bill 20 that local residents and community groups have experienced great frustration with the OMB appeal process, and particularly with the high cost of participating in appeals which leads to the perception of the OMB appeal process as an uneven playing field which favours parties with deep pockets.

(c) Ensuring accountability for land use planning decisions

- The OMB has a very wide supervisory jurisdiction in respect of land use planning decisions of the council of the City of Toronto (and other municipalities): the OMB may, on appeal, substitute its opinion¹ for that of council or an approval authority in

¹ “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) (emphasis added))

“An OMB hearing would judge the planning merits of the proposal, not the legal grounds for a council’s decision.”

(Aaron A. Moore, *Planning Politics in Toronto: The Ontario Municipal Board and Urban Development*, Toronto: University of Toronto Press (2013) at p. 8)

“The OMB has, as a matter of ritual, expressed deference for council decision-making, yet has not hesitated to use the application of its own policies as grounds for overriding council decisions.”

(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. 7.)

respect of official plans,² zoning by-laws,³ site plan control⁴ and development permits,⁵ and other matters.

- Decisions about land use planning matters may, in fact, be taken entirely out of the hands of councils or approval authorities by appeals to the OMB on the expiry of statutory periods for making decisions in respect of development applications.⁶
- Even the possibility of an OMB appeal may influence discussions between a proponent, the municipality and the local community, about a development proposal.⁷
- The fact that the final decision on land use planning matters may ultimately be made not made by elected Councillors of the City, but rather by a member of a tribunal (or be perceived to be made in the shadow of a possible appeal to the tribunal), leads to a perception that an institution (the OMB) which is not directly accountable to City residents has the ultimate responsibility for land use planning decisions in the City.
- By removing the appellate jurisdiction of the OMB for land use planning decisions of the Council of the City of Toronto, and enabling the Council to determine review or appeal mechanisms for these decisions, Bill 20 makes it clear that “the buck stops” with City Council for these decisions and this, in turn, restores clear accountability (though City Council) for these decisions.

(d) City’s capacity to responsibly exercise land use planning powers

- GBNA is confident that the City of Toronto has full capacity to responsibly exercise the roles proposed for the City under Bill 20 for two reasons:

² Subsections 17 (24), (36) and (50) and 22 (7) and (7.0.2) of the *Planning Act*.

³ Subsection 34 (11) and cl. 34 (26)(b) of the *Planning Act*.

⁴ Subsections 41 (12) and (12.1) of the *Planning Act* and subs. 116 (15) and (16) of the *City of Toronto Act, 2006*.

⁵ Subsection 12 (2) and cl. 14 (1)(b) of O. Reg. 608/06.

⁶ Subsections 17 (40), 22 (7) and (7.0.2), 34 (11) and 41 (12) of the *Planning Act*, subs. 12 (1) of O. Reg. 608/06 and subs. 116 (15) of the *City of Toronto Act, 2006*.

⁷ “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, [City of Mississauga Councillor Jim] Tovey added.” (*National Post*, June 21, 2011, <http://news.nationalpost.com/2011/06/22/mississauga-council-urges-province-to-scrap-omb>)

- as recognized in the *City of Toronto Act, 2006*, the City is a mature level of government capable of meeting its governmental responsibilities, including those relating to land use planning, and
- the successful experience in other Canadian jurisdictions in which rights of appeal of municipal land use planning decisions are much more constrained than the current rights of appeal to the OMB in Ontario.⁸
- The capacity of the City of Toronto to take its place as a “government” that is capable of carrying out its government functions has been recognized by the provincial Legislature in the Preamble to the *City of Toronto Act, 2006*, which states as follows:

The Assembly recognizes the importance of providing the City with a legislative framework within which the City can build a strong, vibrant and sustainable city that is capable of thriving in the global economy. The Assembly recognizes that the City is a government that is capable of exercising its powers in a responsible and accountable fashion.

The Assembly recognizes that it is in the interests of the Province that the City be given these powers.

- GBNA believes that the regulation of land use within the City of Toronto is certainly a power that the City as “a government is capable of exercising ... in a responsible and accountable fashion” without the supervision of the OMB.
- GBNA’s view that the City of Toronto is capable of responsibly regulating land use planning without the supervision of the OMB is reinforced by the facts that that other major Canadian cities successfully make land use planning decisions which are not subject to appeal to an administrative tribunal,⁹ and a number of provinces provide for more limited rights of appeal of land use planning decisions than is the case in Ontario.¹⁰

⁸ For example, during the debate on Bill 20, Hon. Glen R. Murray stated as follows about his experience as Mayor of the City of Winnipeg:

“So, you know, I have to tell you, I lived in, as some of you have teased me about, and been the mayor of the city that is the capital city of the next province over. Miraculously, we don’t have an OMB. We didn’t have an MMB. And the world didn’t fall apart. Development happened. Developers were happy. It wasn’t anti-development, which is a thing I’ve said.”
(Hansard, March 7, 2013)

⁹ For example, it is our understanding that decisions of municipal councils on rezoning applications are not subject to appeal to an administrative tribunal in the cities of Vancouver (under the *Vancouver Charter*, S.B.C. 1953, c. 55) and Winnipeg (under the *City of Winnipeg Charter*, S.M. 2002, c. 39).

¹⁰ For example, it is our understanding that decisions of municipal councils on rezoning applications are not subject to appeal to an administrative tribunal in the provinces of Saskatchewan (*Planning and Development Act, 2007*, S.S. 2007, c. P.13.2, s. 219 (5)) and Alberta (“As Council’s decision [on a proposal for amendment of a land use by-law]

- In this regard, commentators have pointed out that the scope of the powers of the OMB in respect of land use planning matters in Ontario exceeds (in most cases significantly) the role and powers of land use appeal bodies in other Canadian and American jurisdictions.¹¹

(e) Ensuring that review or appeal mechanisms for municipal land use planning decisions facilitate public participation

- A number of members of the Legislature during debate on Bill 20 that local residents and community groups have experienced great frustration with the OMB appeal process, and particularly with the high cost of participating in appeals which leads to the perception of the OMB appeal process as an uneven playing field which favours parties with deep pockets.¹²

is final and binding, there is no appeal process available to the applicant.” (City of Calgary, “A Community Guide to the Planning Process” (4th ed.) at p. 69)), among other provinces.

¹¹ “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.” (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)

“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.”

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

¹² Mr. Rosario Marchese: “It’s the people with money who tend to win. It’s just the way the system works. It’s not a level playing field. It can never be a level playing field.”

Hon. David Zimmer: “Since I was elected in 2003, every week, every Friday when I’m in my constituency office and at other times during the week and in the summer, I receive calls, I do meetings—and I do lots of them on all of the frustrations that the citizens of Willowdale are experiencing with the OMB.”

Mrs. Jane McKenna: “There is no doubt that the OMB has its flaws. There is no doubt that it regularly creates considerable friction and frustration for municipalities, developers and residents alike.”

Mr. Michael Prue: “I have seen what the OMB has done to the people in the Beach, who are struggling to try to find the money and the wherewithal to take on big development money.”

Hon. Glen R. Murray: “I’m tired of my constituents having to give up their Sundays to fight local development.”

Ms. Cheri DiNovo: “... I’ve been to the OMB too many times with community groups. You have a community group that took a day off work with absolutely no resources and no lawyer up against developers with lawyers and planners at their beck and call who are paid to be there. This is not a fair fight.” (Hansard, March 7, 2013)

- These views are shared by commentators on the OMB appeal process, who have observed that given the formality of the OMB's processes, and the requirement for parties to provide evidence from experts on planning matters, it is necessary for parties at hearings to engage, at significant expense, legal counsel and expert witnesses, and the cost of doing so is usually beyond the capacity of local residents and community groups.
 - Legal counsel is effectively required to represent parties in OMB appeals due to the formality of OMB proceedings.¹³
 - The OMB in evaluating 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.) relies heavily on evidence given by experts in the field.¹⁴
 - Engaging legal counsel and expert witnesses can be very expensive¹⁵ and the costs of doing so are in most cases beyond the capacity of local residents and community groups.¹⁶

¹³ “Because the board limits itself to the evidence placed before it, those parties who cannot afford lawyers and expert witnesses to shape the issues and submit evidence and argument to support their positions have generally been at a distinct disadvantage to those who can afford such support.”
 (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. 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 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)

¹⁴ “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)

“The OMB, in rendering its decisions, focuses heavily on expert testimony.

...

“The board’s focus on planning experts and the strength of their evidence affects OMB hearings ... requires all parties to hire their own planning experts if they are to have any chance of winning.”
 (Aaron A. Moore, *Planning Politics in Toronto: The Ontario Municipal Board and Urban Development*, Toronto: University of Toronto Press (2013) at p. 14, 172)

¹⁵ “... 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.”
 (Bruce W. Krushelnicki, *A Practical Guide to the Ontario Municipal Board*, Markham, ON: LexisNexis Canada Inc. (2007) at p. 306)

“The cost of hiring experts, not only to testify but to conduct the required testing and research, can be high.

...

- As the OMB makes many important decisions in land use planning matters, and local residents and community groups are, as a practical matter, often precluded for financial reasons from meaningful participation in OMB appeals, the result is that the public may be effectively precluded from engagement in all land use planning matters which are appealed to the OMB. This has certainly been the experience of GBNA and its member resident associations.
- Authorizing the City to determine the nature and scope of review or appeal mechanisms for land use planning decisions will allow the City to address the factors which can effectively preclude public participation in reviews or appeals because of the significant expense involved in doing so.

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 Avenue 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

“The board’s focus on planning experts and the strength of their evidence ... hurts neighbourhood associations and lone citizens who cannot afford the same expertise available to the City and developers.”

(Aaron A. Moore, *Planning Politics in Toronto: The Ontario Municipal Board and Urban Development*, Toronto: University of Toronto Press (2013) at p. 53, 172)

¹⁶ While municipalities and major developers have their own staff and can afford to hire additional experts when needed, “[n]eighbourhood 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”. (Aaron A. Moore, *Planning Politics in Toronto: The Ontario Municipal Board and Urban Development*, Toronto: University of Toronto Press (2013) at p. 53, 57-58)

- 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 concerning Bill 20.

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

Greater Beach Neighbourhood Association

per: Jan Hykamp, President