



Greater Beach Neighbourhood Association

579 Kingston Rd
Suite 111
Toronto ON, M4E 1R3
gbna-toronto.com

Submission to Public Consultation – Ontario Municipal Board Review Ministry of Municipal Affairs December 16, 2016

Greater Beach Neighbourhood Association (“GBNA”) appreciates the opportunity to participate in the Fall 2016 Review of the Ontario Municipal Board (“OMB”) Public Consultation.

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

1. Executive Summary
2. Discussion
 - (a) Perspective of GBNA Submission
 - (b) General Comments on the Consultation Document
 - (c) Response to Questions Posed in Consultation Document
3. About GBNA

1. Executive Summary

- GBNA’s submission addresses the issue of OMB reform from the perspective of a resident association.
- GBNA notes that many of the issues in the current (2016) OMB review consultation were also raised in the 2004 consultation on OMB reform. GBNA hopes that these issues may be resolved through the current consultation process.
- However, GBNA is concerned that the possibility of effective reforms resulting from the consultation will be diminished by the apparent failure to recognize certain key issues regarding the OMB and, in particular, that the Consultation Document:
 - understates the uniqueness of the OMB’s jurisdiction, and the OMB’s influence on land use planning decision making under the *Planning Act*,

- does not explicitly provide a principled basis for the OMB’s current jurisdiction, and for why the OMB is a forum preferable to the courts for resolving land use planning disputes, and
- understates just how significant a barrier to participation of resident associations in OMB proceedings is presented by the extremely high costs of such participation.
- GBNA supports the principle of returning ultimate responsibility for land use planning decisions to the decision makers to whom the authority is delegated under the *Planning Act*, and as a result GBNA supports (subject to certain conditions) the proposals to limit rights to appeal to the OMB and the other proposals related to Questions 1-3 (“OMB’s Jurisdiction and Powers”).
- For the same reason, GBNA strongly supports the proposal to mandate a standard of "reasonableness" for appeals to the OMB of decisions which have been made by a decision maker to whom authority is delegated under the *Planning Act*, thereby precluding the OMB from substituting its decision for that of the decision maker where the original decision was "reasonable", as proposed under Questions 4 and 5 (“OMB’s Jurisdiction and Powers”).

GBNA notes, however, that this proposal can have no application to appeals of a failure of a decision maker to make a decision within statutorily mandated time frames, as there is no "decision" in such cases to evaluate against the “reasonableness” standard.

It is therefore not clear how this proposal can co-exist with continued rights of appeal for failure to make decisions within statutorily mandated time frames.

- GBNA strongly supports (subject to certain conditions) the proposal that planning decisions be governed by municipal policies, and provincial planning rules, in place at the time the decision of the OMB is made, as proposed under Question 6 (“OMB’s Jurisdiction and Powers”).
- GBNA does not believe that the proposals covered by Questions 7-10 and 13-16 (“Citizen Participation and Local Perspective” and “Clear and Predictable Decision Making”) will address the issues of most concern to resident associations; namely, the significant influence which the OMB’s extensive jurisdiction has on the City of Toronto’s decision making in land use planning matters, and the financial barriers to meaningful participation in OMB proceedings.
- GBNA does not have confidence that the proposals covered by Questions 11 and 12 (“Citizen Participation and Local Perspective”) have the potential to make adequate resources available, and to do this within a short enough time frame, to enable resident associations to have meaningful participation as parties in OMB proceedings.

- GBNA supports any measure which would streamline and reduce the formality of OMB proceedings, and accordingly supports the proposals covered by Questions 17-19 (“Modern Procedures and Faster Decisions”) to the extent that they may further this goal.
- GBNA supports mandatory mediation as proposed in Question 22, although such mediation will not benefit resident associations who do not have the financial capacity to engage the necessary legal and expert planning resources to enable the resident association to negotiate in the mediation from an informed position.
- In addition,
 - GBNA supports elimination of the right to appeal the failure to make a decision on an application for a planning permission within time frames mandated under the *Planning Act*; if such rights of appeal must be maintained, GBNA supports a significant increase in the time frames within which decisions must be made.
 - GBNA supports the principles of Bill 20 (*Respect for Municipalities Act (City of Toronto), 2013*): 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.

2. Discussion

(a) Perspective of GBNA Submission

- GBNA’s submission addresses the issue of OMB reform from the perspective of a resident association.
- We feel that this is an important perspective for two reasons.
 - Firstly, as the Consultation Document notes, “... [p]ublic participation is a cornerstone of Ontario’s land use planning system...”, which is “... designed to allow for different viewpoints to be heard and for issues to be resolved fairly”.¹
 - Resident associations are an important means by which one segment of the “public” – local residents – participate in the land use planning system.
 - Secondly, the experience of resident associations does not appear to be adequately reflected in the Consultation Document as, in GBNA’s view, the document does not take adequate account of the significant obstacles to OMB participation which resident associations face.

¹ Consultation Document at p. 8.

- In particular, the statement in the Consultation Document that “[p]eople ... can challenge most planning decisions by appealing them to the OMB”² does not take account of the reality that effective participation at the OMB requires a lawyer and planning experts, the costs of which are prohibitive for most resident associations.³
- As GBNA’s experience with the land use planning system has been entirely within the City of Toronto, this submission is restricted to the OMB as it relates to land use planning in Toronto.
 - GBNA believes that this is an important perspective, given that 39% of the OMB’s files related to Toronto in 2015-2016.⁴

(b) General Comments on the Consultation Document

(i) OMB Reform, 12 years later ...

- Many of the issues raised, and questions posed, in the Consultation Document for the public consultation on OMB reform that took place in 2004⁵ are raised again in the Consultation Document for the current review of the OMB.⁶
- Given the similarity of issues raised in both the 2004 and 2016 Consultation Documents, it would appear that the OMB reforms enacted under Bill 51,⁷ while welcome, did not have the effect of resolving a number of important concerns about the role and procedures of the OMB that have existed for at least the last 12 years.
- It is GBNA’s hope that effective OMB reforms will result from the current consultation process.
- However, GBNA is concerned that the possibility of effective reforms resulting from the consultation will be diminished by the apparent failure to recognize certain key issues regarding the OMB and, in particular, that the Consultation Document
 - understates the uniqueness of the OMB’s jurisdiction, and the OMB’s influence on land use planning decision making under the *Planning Act*,

² Consultation Document at p. 8.

³ See pages 11-12.

⁴ Consultation Document at p. 9.

⁵ Consultation Document issued in June 2004 on OMB Reform as part of the Planning Reform Initiative undertaken by the Ministry of Municipal Affairs and Housing.

⁶ For example, the issues of *de novo* hearings, the scope of OMB jurisdiction, qualifications of OMB members, communicating OMB decisions, mandatory mediation, and the role of OMB staff in providing information to the public are raised in both the 2004 and 2016 Consultation Documents.

⁷ *Planning and Conservation Land Statute Law Amendment Act, 2006*, S.O. 2006, c. 23.

- does not explicitly provide a principled basis for the OMB’s current jurisdiction, and for why the OMB is a forum preferable to the courts for resolving land use planning disputes, and
 - understates just how effective a barrier to participation of resident associations in OMB proceedings is presented by the extremely high costs of such participation.
- (ii) Consultation Document understates the uniqueness of OMB’s jurisdiction, and OMB’s influence on land use planning decision making
- The statement in the Consultation Document that no other provincial Board has more extensive jurisdiction over land use planning related matters as the OMB, does not acknowledge the significant degree to which the OMB’s jurisdiction and powers exceed those of land use appeal bodies in other Canadian and American jurisdictions.⁸
 - The Consultation Document likewise does not acknowledge the extent to which the extremely wide scope of the OMB’s supervisory jurisdiction over land-use decisions “significantly influences the behaviour of actors and the politics of urban development in [Toronto] ...”⁹
 - Municipal and provincial politicians may use the existence of the OMB to avoid making difficult decisions on planning issues, and/or avoid taking responsibility for decisions made.¹⁰

⁸ “... The OMB is the most powerful Board of its kind in North America.

...

“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. 5).

“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).

“No other tribunal in Canada has a similar breadth of power [as the OMB].” (Ian M. Rogers and Alison S Butler, *Canadian Law of Planning and Zoning*, Toronto: Thomson Carswell at p. 8-15).

⁹ Moore, Note 8 at p. 170.

¹⁰ Moore, Note 8 at p. 155, 170.

“The Ontario Municipal Board is a gift to politicians. Though never designed for this purpose, it now has the role of deciding many of the more difficult planning decisions which elected representatives are glad to shirk.

...

... the OMB nicely allows politicians to abrogate responsibilities which properly fall to them ...” (J. Barry Cullingworth, *Urban and Regional Planning in Canada*, New Brunswick, N.J.: Transactions Inc. (1987) at p. 436, 440)

- Municipal planning staff and Councils may make decisions geared toward avoiding OMB hearings because the municipality cannot afford to go to the OMB.¹¹
- Even the threat of an OMB appeal may influence discussions between a proponent and the municipality.¹²
- Finally, the Consultation Document does not acknowledge that the OMB’s extensive jurisdiction makes the OMB the forum for resolving land use planning disputes which have a significant public policy component, and no consideration is given to the implications of the OMB resolving these types of policy issues.
 - Planning policies often have a political aspect that is governed by public policy objectives which, by their very nature, are based on unprovable assumptions.¹³
 - At the OMB, legal concepts of impartiality and “due process” become applied to these matters of political judgment, with the result that major issues of public policy are subjected to an adversarial process with the objective of judging impartially and objectively “what is right and proper”.¹⁴
 - However, given the nature of these matters of political judgment, their assignment to a tribunal (even an independent tribunal, such as the OMB) does not result in the character of these policy issues becoming non-political, or in these policy issues being impartially and objectively resolved.¹⁵
 - The proposition that the OMB is not an appropriate forum to resolve land use planning disputes involving considerations of public policy appears to be the rationale for a number of the proposals in the Consultation Document, and this proposition is, in fact, explicitly recognized in the proposals to limit appeals on “matters of public interest” (Question 1).

This proposition is, in fact, acknowledged in the 2004 Consultation Document (at p. 9): “It must also be recognised that there are instances where a council may defer making a difficult or unpopular decision, and is prepared to have the matter appealed to the OMB.”

“Without [the OMB], there might well be greater pressure placed on provincial politicians to become involved resolving local planning decisions. The board provides security for municipal politicians, who know that making decisions with respect to politically contentious land use disputes will ultimately be the responsibility of someone other than themselves.” (Chipman, Note 8 at p. 207-08)

¹¹ Regional Planning Commissioners of Ontario, *Reforming the Ontario Municipal Board: FINAL REPORT*, August 31, 2016, at p. 13.

¹² “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>). “The threat of a hearing at the OMB may be enough to convince city council to settle ...” (Moore, Note 8 at p. 74.

¹³ Cullingworth, Note 10 at p. 439; Chipman, Note 8 at p. 201, 202, 208; Gordon James Whicher, *Ontario Planning Law & Practice*, Markham ON: Lexis Nexis Canada Inc. (2005) at p. 12-13.

¹⁴ Cullingworth, Note 10 at p. 436.

¹⁵ Cullingworth, Note 10 at p. 436

- GBNA believes that the uniqueness in Canada of the OMB’s powers and jurisdiction, and how large the shadow of the OMB looms over the consideration of development applications by the City of Toronto, should have been expressly acknowledged in the Consultation Document to provide the basis for an informed discussion of OMB reform.
- (iii) Consultation Document does not provide a principled basis for the proposition that the OMB is an appropriate appellate body rather than the courts
- The Consultation Document for the 2004 OMB review posed the following questions: “Should there be some appeal mechanism for land-use planning decisions?” and “Should the Courts be used as the appeal body for land-use planning decisions?”¹⁶
 - The government apparently answered “yes” to the first question, and decided that the OMB is the appropriate appeal mechanism, as the 2016 Consultation document states that “... the Ontario government sees a continuing need for the OMB in Ontario’s land use planning system”.¹⁷
 - The government apparently answered “no” to the question about the role of the Courts, as the 2016 Consultation Document does not propose any role for the courts in land use planning disputes.
 - However, no rationale for these propositions is given in the 2016 Consultation Document, apart from the suggestions that
 - municipal councils are incapable or unwilling to responsibly exercise the powers delegated to them in the *Planning Act*¹⁸ (which rationale would, by extension, seem to equally apply to the exercise of powers by the Ministry of Municipal Affairs, whose decisions are also subject to supervision by the OMB), and
 - without appeals to the OMB the courts would be inundated with land use planning disputes, and these proceedings would be lengthier and costlier than the OMB, and would be adjudicated by persons who may not have expertise to deal with land use planning matters.¹⁹

¹⁶ 2004 Consultation Document at p. 10.

¹⁷ Consultation Document at p. 3.

¹⁸ “However, we’ve also heard that the OMB is needed to provide decisions based on planning evidence when a municipal council makes a decision based on local concerns that may not reflect the broader public interest. We have also heard that the OMB is needed when municipalities are not able to make decisions, to ensure there is a fair, efficient and timely approval process.” (Consultation Document at p. 15)

Commentators have also noted this rationale for the OMB’s existence. For example, Chipman (Note 8 at p. 194, 203) states that “The [OMB] reflects a continuing relationship between the province and ... municipalities, a relationship based on the belief that municipalities cannot be fully trusted to manage their own affairs.”

¹⁹ “... not having an OMB would result in more appeals to the Courts.

- In GBNA’s view, compelling arguments can be made which question these propositions.

Capacity of municipal councils to responsibly exercise land use planning powers

- No evidence is presented in the Consultation Document that municipal councillors in Ontario are any less capable of responsibly exercising land use planning powers than their counterparts elsewhere in Canada (and, indeed, in North America).
- The experience in other Canadian jurisdictions indicates that land use planning systems can function well without the need for supervisory jurisdiction as extensive as that exercised by the OMB.²⁰
- Even if the proposition is accepted that municipal councils cannot be trusted to responsibly exercise land use planning powers, the Consultation Document provides no principled reason for departing from this proposition by proposing that some municipal land-use planning decisions (i.e., development that supports transit, interim control by-laws) be removed from the supervisory jurisdiction of the OMB.
- As well, the proposition that the City of Toronto is incapable of responsibly making land-use planning decisions is inconsistent with the Provincial Legislature’s recognition, in the Preamble to the *City of Toronto Act, 2006*, of the City as a "government" that is capable of carrying out its government functions:

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.

...
 “Tribunals are ... designed to be faster and less costly than the courts and their members are subject matter experts.

...
 ” ... without the OMB, appeals could end up in the court system, leading to even greater costs for public participation” (Consultation Document at p. 4, 15).

²⁰ “The experience of other Canadian provinces shows that a tribunal exercising an all-encompassing planning review function is not required to ensure that the interests of all parties receive an equitable hearing.” (Chipman, Note 8 at p. 205)

For example, during the debate on Bill 20 (*Respect for Municipalities Act (City of Toronto), 2013*), 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, Legislative Assembly of Ontario, Second Session, 40th Parliament (March 7, 2013) at p. 499)

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

- Finally, the implication in the Consultation Document that it is somehow improper for elected officials to have regard to the wishes of their constituents when formulating their view of the public interest²¹ is arguably inconsistent with fundamental principles of Canadian democratic institutions.²²

Appropriateness of courts to adjudicate land use planning disputes

- The Consultation Document provides no evidence that courts are incapable of dealing with land use planning disputes, or are overwhelmed with adjudicating these disputes, in jurisdictions which have less (in many cases, far less) rights of appeal to a tribunal than the rights of appeal to the OMB in Ontario.
- While administrative tribunals have the potential to adjudicate disputes in a manner that is faster and less costly than courts, there is considerable evidence that this potential is not realized in the case of the OMB.
- Firstly, the procedures of the OMB result in its proceedings becoming more court-like,²³ thereby nullifying the potential advantages of speed and cost otherwise available to administrative tribunals.²⁴
 - For example, the OMB's Rules of Practice and Procedure comprise 142 Rules over 36 pages, and the OMB "expects compliance" with its Rules.²⁵

²¹ "... we've also heard that the OMB is needed to provide decisions based on planning evidence when a municipal council makes a decision based on local concerns that may not reflect the broader public interest." (Consultation Document at p. 15)

²² "The plaintiff suggests in its statements of claim that the [Ontario] Premier and Minister acted for an improper purpose, namely political and electoral concerns, to reduce the campaigning threatened by the Schads against the government's candidates in the upcoming provincial election with a view to persuading voters to vote against the government's candidates. In reacting to such threats the government was doing nothing more than assessing public opinion, or its potential, and reacting to that assessment. Governments frequently amend laws for these reasons ..." (*Ontario Black Bear/Ontario Sportsmen and Resource Users Assn. v. Ontario*, [2000] O.J. No. 263, 19 Admin. L.R. (3d) 29 at para. 45 (S.C.J.)) (emphasis added)

"That politicians seek to be elected and re-elected is a fundamental element of the liberal democratic order in both the United States and Canada. In this respect, local politicians do not vary from their state, provincial, and federal counterparts." (Moore, Note 8 at p. 152)

²³ The OMB's "Your Guide to the Ontario Municipal Board" (at p. 13) emphasizes the court-like nature of its proceedings: "[OMB] hearings are held in person, in a court-like setting ... The hearing is similar to a court proceeding, but less formal." In a similar vein, the Ministry of Municipal Affairs and Housing's Citizen Guide No. 6 "Ontario Municipal Board" (at p. 4) states that "Hearings usually follow a set pattern of courtroom practice according to the rules of natural justice." Chipman (Note 8 at p. 199) states that "... the OMB's manner of proceeding mirrors that of the courts in many respects."

²⁴ "One of the major complaints that has been expressed over the years in reviews of the board's role and manner of operation has been the cost, in both time and financial resources, of taking part in its hearing processes." (Chipman, Note 88 at p. 200)

- Lawyers are effectively required at OMB hearings.²⁶
- The OMB requires testimony of expert witnesses,²⁷ who must present their evidence in a formal manner,²⁸ and the OMB as a rule accords little weight to evidence of lay witnesses.²⁹
- Secondly, the requirement to have legal representation and engage expert witnesses exponentially increases the costs of OMB proceedings.³⁰

²⁵ OMB Rules of Practice and Procedure, Rule 7.

²⁶ The Ministry of Municipal Affairs and Housing Citizen Guide No. 6 “Ontario Municipal Board” (at p. 5) acknowledges that “most municipalities and people making appeals do” have representation by a representative or a lawyer. As well, because the OMB 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, Note 8, at p. 199).

While legal assistance may not formally be 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).

The legal profession, for its part, “naturally views planning as a process which is concerned with conflicts of interests which can best be resolved through an adversary process guided, and decided, by independent arbiters.” (Cullingworth, Note 10 at p. 436)

²⁷ “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 ...” (364808 *Ontario Ltd. v. Toronto (City) Committee of Adjustment*, [2004] O.M.B.R. No. 1240, 49 O.M.B.R. 243 at para 10 (O.M.B.)) (emphasis added)

“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 ... [and] requires parties to hire their own planning experts if they are to have any chance of winning.” (Moore, Note 8, at p. 14, 172) (emphasis added)

“In contrast to the Courts, the leading of expert evidence before the Board represents the rule rather than the exception ... Board hearings often represent a contest among duelling experts, and in exercising its jurisdiction, the Board must frequently make a choice between conflicting expert opinions.

...
 “... even in the simplest of matters, it is important for parties before the Board to retain the appropriate expert to address the issues which require special knowledge or skill.” (Michael H.D. Bowman, “Working With Expert Witnesses”, in *Planning for Success at the Ontario Municipal Board*, CBAO – CLE, June 4, 2001 at p. 3, 4) (emphasis added)

²⁸ OMB Rules of Practice and Procedure, Rule 21 (Prefiling of Witness Statements and Reports), s. 8-10, 12 and 13 of Sample Procedural Order.

²⁹ “... the admissibility of testimony [of lay witnesses] or the weight given to their answers is affected by the proven level of expertise.” (Bruce Krushelnicki, “The Planner as Expert Witness at the OMB and the relationship of the Expert to the Advocate”, in *Planning and Building on Professionalism: Dos and Don’ts for the Municipal Law Specialist*, OBA – CPD December 4, 2014 at p. 1).

“An expert’s opinion on a technical matter does not always trump the concerns of local residents, but must be given due weight and credibility.” (Krushelnicki, Note 26 at p. 222)

³⁰ “For most large RPCO municipalities, OMB hearings occasion direct annual costs of between \$500,000 and \$4 million on external consultants and lawyers. This is over and above the considerable cost of internal staff

- In any event, the issue of whether the OMB is a faster and less expensive forum than the courts is largely moot, as the cost of OMB proceedings may well be beyond the reach of some municipalities³¹ and is certainly beyond the reach of most resident associations.³²

(iv) Consultation Document does not recognize that the cost of OMB proceedings effectively precludes resident associations from participation

- The Consultation Document in stating that the high cost of participating in OMB proceedings “can discourage” participation³³ greatly understates the significant barrier to participation which these costs pose for resident associations.
- As noted above, given the court-like formality of the OMB’s processes, and the necessity of legal counsel and 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 most resident associations.
- The cost of OMB proceedings therefore effectively precludes most resident associations from effectively participating in OMB proceedings, or puts them at a distinct disadvantage when they do participate.³⁴

time and resources. Halton Region, as an example, has spent \$3.5 million at the OMB over the past four years while the Region of Waterloo spent \$1.7 million defending its regional official plan.” (Regional Planning Commissioners of Ontario, Note 11 at p. 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, Note 26 at p. 306)

³¹ For example, the Regional Planning Commissioners of Ontario has expressed concern that “... staff planners and Councils must sometimes make decisions geared toward avoiding OMB hearings because the municipality cannot afford to go to the Board.” (Regional Planning Commissioners of Ontario, Note 11 at p. 13)

³² 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”. (Moore, Note 8 at p. 53, 57-58) These comments reflect the experience of GBNA and other local resident associations.

³³ Consultation Document at p. 21.

³⁴ “Because the board limits itself to the evidence placed before it, those parties who cannot afford lawyers and expert witnesses to shape the issues to support their positions have generally been at a distinct disadvantage to those who can afford such support.” (Chipman, Note 8 at p. 199).

“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.” 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

- Unfortunately, none of the OMB reforms proposed in the Consultation Document address this financial barrier in a meaningful way, apart from the vague proposal to “explore” funding for residents to hire lawyers and experts.

(c) Response to Questions Posed in Consultation Document

Q 1. What is your perspective on the changes being considered to limit appeals on matters of public interest?

Q 2. What is your perspective on the changes being considered to restrict appeals of development that supports the use of transit?

- GBNA supports returning the ultimate responsibility for land use planning decisions to the decision makers to whom authority is delegated under the *Planning Act*, and as a result GBNA supports the following proposals to exclude the right to appeal the following land use planning decisions to the OMB:
 - parts of an Official Plan (“OP”) specified by the Province,
 - OPs and Official Plan Amendments (“OPAs”) approved by the Province, which implement Provincial Plans,
 - Minister’s Zoning Orders, and
 - municipal OPs, OPAs and zoning by-laws (“ZBLs”) for development that supports provincially funded transit infrastructure.

Comments

- GBNA believes that most, if not all, land use planning decisions which come before the OMB involve a consideration of the public interest.³⁵

As a result, to the extent that the reason for the proposed exclusions from OMB appeal is that the decisions involve consideration of the public interest, it is not clear why all land use planning decisions should not, for the same reason, also be exempt from OMB appeal.³⁶

- The above proposals to limit rights of appeal to the OMB do not address what the Consultation Document implies is the rationale for the OMB’s existence:
 - why municipal and provincial decision makers are capable of making these decisions responsibly such that OMB oversight is not required, but are apparently not capable of responsibly making other land use planning decisions which will still be subject to OMB appeals, and

the board’s emphasis on expert testimony ... the cost associated with retaining such experts is high, and may be prohibitive”. (Moore, Note 8 at p. 53, 57, 58, 172).

³⁵ See Note 13 regarding the public interest component in land use planning matters.

³⁶ See Note 13 regarding the public interest component in land use planning matters.

- the lack of concern that removal of OMB appeal rights for these decisions will result in appeals to the courts.

Q 3. What is your perspective on the changes being considered to give communities a stronger voice?

- GBNA supports returning ultimate responsibility for land use planning decisions to City council, and as a result GBNA supports the proposals to exclude the right to appeal the following land use planning decisions to the OMB:
 - a refusal to amend a secondary plan for two years (conditional support – see Comments below), and
 - a municipal interim control by-law.
- GBNA also conditionally supports the following proposals (see Comments below):
 - expanding the authority of local appeal bodies (“LABs”) to appeals related to site plans,
 - OMB may only deal with the same parts of an OP that were parts of a municipal council’s decision, and
 - require significant new information that arises in an OMB hearing to be sent back to municipal council for re-evaluation of the original decision.

Comments

- *Secondary Plans*
 - GBNA believes that the proposed 2 year period in which OMB appeals for secondary plans would be precluded is too short.
 - A secondary plan takes a significant amount of time to develop, and should represent the vision for the community for a period much longer than 2 years (arguably until the next statutorily mandated review of the City’s OP).
- *Expanded authority of LABs*
 - The expanded authority of LABs will not have a significant effect unless it is clear that the City of Toronto has the authority to determine procedural rules, and the scope of appeals, which may differ from those of the OMB.³⁷
 - If this is not the case, LABs will simply replicate the OMB, albeit with LAB members who are municipally appointed.

³⁷ Currently, cl. 115 (6)(a) of the *City of Toronto Act, 2006* provides that a LAB “has all the powers and duties of the Ontario Municipal Board under this section and the relevant provisions of the *Planning Act*”. It is therefore not clear whether the City may establish its own limits on the LAB’s jurisdiction to hear appeals and establish procedures, including any reforms proposed in the current consultation (such as precluding *de novo* hearings) which may not be adopted at the provincial level for the OMB.

- *Restrict parts of OP that OMB may deal with on appeal*
 - It is not clear whether this proposal applies to OPAs as well as OPs.
 - If this proposal applies to OPAs, it appears to require a decision to have been made by City council (“part of the municipal council’s decision”), and so can have no application to an appeal of a non-decision by council within the statutorily mandated time frame.
 - It would be untenable to have different rules for the scope of an appeal depending on whether the appeal was in respect of a decision made by council or in respect of the failure of council to make a decision.
- *New information arising during an OMB hearing:*
 - This proposal requires a decision to have been made by City council (“re-evaluation of the original decision”), and so can have no application to an appeal of a non-decision by council within the statutorily mandated time frame.
 - It would be untenable to have different rules for the treatment of new information presented at an OMB appeal depending on whether the appeal was in respect a decision made by council or in respect of the failure of council to make a decision.

Q 4. What is your view on whether the OMB should continue to conduct *de novo* hearings?

Q 5. If the OMB were to move away from *de novo* hearings, what do you believe is the most appropriate approach and why?

- GBNA strongly supports establishing a standard of “reasonableness” for OMB appeals of land use planning decisions, and precluding the OMB from substituting its decision for that of the decision maker where the decision at issue was “reasonable” (according to the standard enunciated in the Consultation Document).

GBNA notes that this proposal can have no application to appeals of a failure of the decision maker to make a decision within the statutorily mandated time frame as, in such cases, there is no “decision” to evaluate against the “reasonableness” standard.

Comments

- This proposal would arguably provide the same protection to the City’s land use planning by-laws made under the *Planning Act* as is accorded to other City by-laws under s. 213 of the *City of Toronto Act, 2006*:

Restriction on quashing by-law

213. A by-law of the City ... passed in good faith under any Act shall not be quashed or open to review in whole or in part by any court because of the unreasonableness or supposed unreasonableness of the by-law.

- However, as the proposal requires a decision to have been made by the decision maker, it can have no application to an appeal of the failure of the decision maker to make a decision within the statutorily mandated time frame.
- It is therefore not clear how the proposal can co-exist with continued rights of appeal for non-decisions within statutorily mandated time frames.
 - The concurrent application of one standard of review for appeals of decisions which are made (“reasonableness”) and a different standard of review for appeals of the failure to make a decision (*de novo* hearings) would be untenable.
 - As well, the continued application of the *de novo* standard of review to appeals of non-decisions could provide proponents with an incentive to appeal to the OMB if they feared a negative decision from the City, or to use the threat of an appeal to obtain a settlement from the City (which may want to manage the risk of a *de novo* hearing in which the OMB could substitute its decision for that of the City).
- As legal counsel and expert witnesses would almost certainly be required to establish at the OMB the reasonableness of the decision maker’s decision, the proposal would not address the cost issues which present such a significant barrier to participation by resident associations in OMB proceedings.

Q 6. From your perspective, should the government be looking at changes related to transition and the use of new planning rules? If so:

- **what is your perspective on basing planning decisions on municipal policies in place at the time the decision is made?**
- **what is your perspective on having updated provincial planning rules apply at the time of decision for applications before 2007?**
- It is assumed that the proposal is intended to modify the OMB’s Clergy Principle, and require the OMB to apply municipal policies and provincial planning rules in place at the time the decision is made. If this is the case, GBNA strongly supports the proposals (subject to clarification of the proposal – see Comments below).

Comments

- Following the 2004 consultation on OMB reform, the Province legislated a transition rule to require that municipal and provincial planning decisions and

documents be consistent with, and conform with, the provincial policy statements and provincial plans that are in existence when the decisions are made or the documents are issued.³⁸

- For the same reasons which motivated the Province to apply this rule in respect of provincial planning policy documents (provincial Policy Statements and Provincial Plans), GBNA believes that this rule should also be applied to municipal planning policy documents.
- However, in order to be effective, the proposal must include as municipal “policies” not only policies of an OP, but also ZBLs and planning instruments such as urban design guidelines and precinct plans and secondary plans.
 - Such guideline documents are increasingly being developed by municipalities with a substantial amount of public consultation with the expectation that they will be upheld by Council, staff, applicants and the OMB. However, OMB members frequently disregard these documents in their decisions.³⁹

Q 7. If you have had experience with the Citizen Liaison Office, describe what it was like — did it meet your expectations?

Q 8. Was there information you needed, but were unable to get?

Q 9. Would the above changes support greater citizen participation at the OMB?

Q 10. Given that it would be inappropriate for the OMB to provide legal advice to any party or participant, what type of information about the OMB’s processes would help citizens to participate in mediations and hearings?

- GBNA has no experience with the Citizens Liaison Office.
- GBNA does not believe that the proposals to which Questions 7 - 10 relate will address the issues of most concern to resident associations: namely, the significant influence which the OMB’s extensive jurisdiction has on the City of Toronto’s decision making in land use planning matters, and the financial barriers to meaningful participation of resident associations in OMB proceedings.⁴⁰

³⁸ *Planning and Conservation Land Statute Law Amendment Act, 2006*, S.O. 2006, c. 23, s. 5.

³⁹ Regional Planning Commissioners of Ontario, Note 11 at p. 14.

⁴⁰ See p. 5-7, 11-12.

- Q 11. Are there funding tools the province could explore to enable citizens to retain their own planning experts and lawyers?**
- Q 12. What kind of financial or other eligibility criteria need to be considered when increasing access to subject matter experts like planners and lawyers?**
- Given the current financial situation of the Province, and the very high cost of being a party to an OMB hearing, GBNA lacks confidence that the Province will be able to make adequate resources available, and to do this within a short enough time frame,⁴¹ to enable resident associations to have meaningful participation as parties in OMB proceedings.
- Q 13. Qualifications for adjudicators are identified in the job description posted on the OMB website (Ontario.ca/cxjf). What additional qualifications and experiences are important for an OMB member?**
- Q 14. Do you believe that multi-member panels would increase consistency of decision-making? What should be the make-up of these panels?**
- Q 15. Are there any types of cases that would not need a multi-member panel?**
- Q 16. How can OMB decisions be made easier to understand and be better relayed to the public?**
- GBNA does not believe that the proposals to which Questions 13 - 16 relate will address the issues of most concern to resident associations: namely, the significant influence which the OMB's extensive jurisdiction has on the City of Toronto's decision making in land use planning matters, and the financial barriers to meaningful participation in OMB proceedings.⁴²

⁴¹ A resident association must be confident, before deciding to commence an appeal to the OMB, that it has sufficient financial resources available to fund legal counsel and such experts as may be required. This decision must be made within the time period for commencing an appeal to the OMB of a decision, which is generally 20 days.

⁴² See p. 5-7, 11-12.

Q 17. Are the timelines in the chart above appropriate, given the nature of appeals to the OMB? What would be appropriate timelines?

Q 18. Would the above measures help to modernize OMB hearing procedures and practices? Would they help encourage timely processes and decisions?

Q 19. What types of cases/situations would be most appropriate to a written hearing?

- GBNA supports any measure which would streamline, and reduce the formality of, OMB proceedings.

Comments

- It is not clear how the proposed measures would make a material change to OMB proceedings as long as the OMB continues its reliance on expert testimony with the opportunity for cross examination.
- The OMB would appear to have sufficient authority under the *Ontario Municipal Board Act* and *Statutory Powers and Procedures Act* to adopt procedural rules which can make its proceedings more efficient. If new procedural rules could make OMB proceedings more efficient and cost effective, it is not clear why such rules have not already been adopted by the OMB.

Q 20. Why do you think more OMB cases don't settle at mediation?

Q 21. What types of cases/situations have a greater chance of settling at mediation?

- GBNA has not had experience with mediation at the OMB.
- GBNA believes that cases don't settle at mediation because mediation is not mandatory and, as is noted in the Consultation Document, most cases proceed directly to a hearing.⁴³

Q 22. Should mediation be required, even if it has the potential to lengthen the process?

- GBNA believes that mediation should be required by the OMB.

However, mediation will not benefit resident associations that do not have the financial capacity to engage the necessary legal and expert planning resources to enable the resident association to negotiate in the mediation from an informed position.

⁴³ Consultation Document at p. 12, 28.

Q 23. What role should OMB staff play in mediation, pre-screening applications?

- Section 4.5 of the *Statutory Powers and Procedures Act* appears to address the issue of the role which OMB staff may play in pre-screening applications.

Q 24. Do you have other comments or points you want to make about the scope and effectiveness of the OMB with regards to its role in land use planning?

- Please see the General Comments at pages 4-12 above.

Appeals of failure to make a decision

- **GBNA supports elimination of the right to appeal the failure to make a decision on an application for a planning permission within the time frames mandated under the *Planning Act*.**
 - Certain of the proposals contained in the Consultation Document (see Questions 3 and 4) appear to be predicated on removing appeals of the failure to make a decision, as they suggest restricting the jurisdiction of the OMB in respect of appeals of a decision made, and are thus inapplicable to appeals in respect of non-decisions.
- If rights of appeal of the failure to make a decision must be maintained, GBNA supports a significant increase in the time frames for making decisions.
 - In the experience of GBNA, the time frames for decisions mandated in the *Planning Act* are in many cases insufficient for the City of Toronto to conduct a considered analysis of an application (including adequate public consultation), particularly where the applications relate to large and complex projects.
 - GBNA supports realistic time frames for decision making, based on data from the City of Toronto about the time necessary to process development applications.
 - Such an approach should adopt graduated time frames for the period of time in which land use planning decisions must be made, and such time frames should be based on the size and complexity of the proposed development.
- As noted above, even the threat of an OMB appeal (either before or after the expiry of the time frame for a decision) may influence discussions between a proponent and the municipality.⁴⁴

⁴⁴ See Note 12.

Bill 20 (Respect for Municipalities Act (City of Toronto), 2013)

- Bill 20 proposed to eliminate the rights of appeal to the OMB of land use planning decisions made by the City of Toronto, and to authorize the City to establish appeal bodies to hear appeals of land use planning decisions.
- **GBNA 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.
- 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 inherent in the OMB’s proceedings which 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 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 Ontario Municipal Board Review Consultation. GBNA would be pleased to further discuss its views on reform of the OMB.

Please contact the undersigned at info@gbna-toronto.com if further information is required.

Greater Beach Neighbourhood Association

Uwe Sehmrau
Uwe Sehmrau, President

Jeffrey Levitt
Jeffrey Levitt, Vice-President