

PUT THE PEOPLE BACK INTO ONTARIO LAND USE PLANNING

Remarks before the Standing Committee on Government Agencies of the Legislative Assembly of Ontario
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Madame Chair, Ladies and Gentlemen of the Standing Committee:

If you speak with those concerned with development or read around the topic in the print media, the community association blogs as well as many of the websites of municipal politicians across this province you will soon be led to conclude that there is something amiss in Ontario's land use planning process.

What's wrong is that a small government agency, some 25 or so unelected and unaccountable appointees, circumvent the will of the citizens of our province, through their elected municipal councils, by acting as the primary decision makers in Ontario's land use planning matters. They are known as the Ontario Municipal Board.

It's now an old story in Ontario, for they have been at this in one form or another for over a century. While it has never been easier to become informed on planning principles; never easier to communicate with and participate in the activities of community planning, the frustration and cynicism that falls from dealings with the OMB create a disengagement in Ontario's public. People feel as though they have been taken out of the planning process due to the intervention of the Board. Calls for the abolition of the OMB are printed in the op ed pieces of local community newspapers and large city dailies. You can hear the call in municipal council chambers across the province, from the smallest settlement areas to the largest, only a few blocks from where we are now.

I accepted the invitation to speak to you -- not to argue for the abolition of the OMB -- but to call for changes to its mandate and other aspects of the province's planning process that I believe will go a long way to elevating meaningful public input and decision making to its rightful place in Ontario land use planning.

OMB reform was contemplated by the present government before it became the present government. The wording of Section 2.1 of Bill 51, introduced over the authorship of the then Minister of Municipal Affairs and Housing, the Hon. John Gerretsen, appears to have fallen short of what is needed to set things right in the world of Ontario land use planning. The wording reads:

"When an approval authority or the Municipal Board makes a decision under this Act that relates to a planning matter, it shall have regard to (a) any decision that is made under this Act by a municipal council or by an approval authority and relates to the same planning matter; and (b) any supporting information and material that the municipal council or approval authority considered in making the decision described in clause (a)."¹

¹ Gerretsen, J. 2nd Session, 38th Legislature, Ontario 55 Elizabeth II, 2006 Bill 51 (Chapter 23 Statutes of Ontario, 2006) An Act to amend the Planning Act and the Conservation Land Act and to make related amendments to other Acts.

Recent OMB rulings suggest that the phrase "shall have regard to" needs legal interpretation and stiffening. This is the basis of a judicial decision to grant leave to the City of Ottawa to appeal the Manotick OMB ruling before Divisional Court of Ontario.

However, my experiences convince me that there is more to this problem. I will try to articulate its breadth using, as a case study, our community association's recent participation in an OMB hearing affecting our village. Finally, I will offer some positive recommendations intended to correct the shortcomings I identify.

The OMB mediates and rules on planning disputes. Critics argue that its rulings reveal a pro-developer bias. Indeed the cynical view of the OMB is as a government-sanctioned mechanism to provide the development industry of Ontario a portage at the whitewater of public concern. These perceptions have been bolstered by many well-publicized rulings throughout the province wherein decisions of elected municipal councils were overridden by the OMB in favour of large-scale developments.

The public's perception of bias in a government agency that describes itself as a "quasi-judicial appeal body" has an important consequence for our democratic way of life -- one that is at the heart of my concerns here today. It threatens the attenuation of public participation in the affairs of planning. Should this extend to its logical conclusion, the role of the public and its elected officials will disappear from planning altogether (save for the ongoing requirement to bear its cost through municipal taxation).

There are those who argue that this might be a good thing. I have heard both developers and city planners opine that municipal councils, not knowing much about planning, are inefficient arbiters in the process and should have no say in it. This is troubling talk as it also disenfranchises citizens from participation in the process by disconnecting their elected representatives from the ability to make planning decisions.

I will now briefly describe the experience of our community association as a party to an OMB hearing. This is a case study that underscores the points I want to make to you today. I know that each of you can find similar examples in your own constituency. Indeed, I have read accounts of examples so similar to ours that their wording could have been pasted from our own community association website.

Our community had a recent battle, culminating in an OMB hearing, to oppose a large local developer who proposed a 1400 unit suburban-style subdivision within the village boundary. In order to accomplish this, the developer submitted an application to the City of Ottawa to amend Manotick's Secondary Plan -- which in its present form does not permit development of the type -- and at the scale and pace -- that they seek.

To say that the developer's plan required an amendment to Manotick's Secondary Plan is inaccurate. They required such a wholesome rewriting of the Secondary Plan that those who read the two documents wouldn't recognize one as an amendment of the other. All of the work of the community in creating Manotick's Secondary Plan was overwritten with wording that the community clearly understood shifted the focus of the Official Plan away from the public good to the developer's business interests.

Wanting to air the issues in a public forum, our village Community Associations organized a Town Hall meeting to discuss the implications of the developer's proposal. Nearly 1800 packed themselves into the village arena. All showed up as an expression of concern and to hear the issues discussed by invited speakers. Many asked questions and weighed in with their concerns regarding the defense of Manotick's Secondary Plan in the question and answer session.

Once the details of the proposal and the issues that surrounded them found their way to the village's collective consciousness, the community was galvanized in opposition -- not opposition to developers or development but opposition to the process that allowed such a radical modification of Manotick's Secondary Plan -- a principled plan that charts the way that our historic rural village should grow into the future. A plan created by its citizenry for its citizenry. A plan that the residents of the village feel belongs to them. In two separate surveys of the village's residents over 95% supported the community association in its efforts to represent their concerns before Ottawa City Council.

Our community association worked to convince Ottawa's City Council that Manotick's Secondary Plan (MSP) represented "good planning", both from the perspective of our rural village and from the perspective of the Provincial Policy Statement (2005). Time after time we detailed before council and committee how the developer's proposal would create stresses in the character and quality of life of the village out of keeping with the primary objectives of the MSP.

We lobbied each of the City's 23 Councilors, as well as the new Mayor, with personal delegations attending at their offices. We publicized our concerns at meeting after meeting of city council's committees, through countless flyers, brochures and presentations to the members of our village and city. Our efforts succeeded. Ottawa City Council vetoed the developer's amendment proposal by an unequivocal vote of 19 to 5.

Within a week following the council's refusal, the developer announced its intention to appeal the City's decision to the Ontario Municipal Board. We all wondered how the Board could contemplate allowing such radical changes to our Secondary Plan. If you read Manotick's Secondary Plan you will be impressed with its wording. Written and adopted by the majority votes of three separate municipal councils (Rideau Township in 2000, Regional Municipality of Ottawa Carleton in 2001 and the Amalgamated City of Ottawa in 2002) it predated the Provincial Policy Statement of 2005. Yet, many of its precepts read as if they were taken from the PPS.

- Continue developing in areas where existing development is already located or where public services already exist rather than developing new areas.
- Discourage growth in natural areas like wetlands, floodplains and stream corridors. Capitalize on but do not harm natural amenities like rivers, forested or wooded areas, wetlands, etc.)
- Provide for source water protection.
- Plan for multifamily developments in parts of the village where streets and sidewalks can handle the increased traffic generated by the project.
- Design neighbourhoods within walking distance of civic spaces and commercial uses and jobs.
- Avoid development in areas that cannot be easily serviced with utilities.

- Promote efficient use of existing infrastructure through the revitalization and intensification of the village core before venturing into greenfields.
- Control the rate of growth so as to allow both physical and social infrastructure to keep pace with the addition of new residents, etc.,

How could such a plan, one that conforms so well to Provincial Policy, be subjected to an amendment that would alter it so completely? Allowing the amendment would result in more than doubling the village's population within the next decade, at an annual growth rate five times the village's growth rate over the past thirty years. Manotick's residents would face the prospect of clogged streets, snarling traffic and lost opportunities for intensification and revitalization of the village's residential and commercial core. The expected increase in the demands on the social, recreational and commercial infrastructure would overwhelm the character and quality of life in the village – ironically celebrating its 150th anniversary this year. Big box developers started sniffing around the edges of the village, worrying the village's merchants.

All of this: not because Manotick's Secondary Plan failed to conform to the Provincial Policy, but because a developer had different ideas from those of the village's citizenry as to how the village would grow into the future.

All this; in spite of the fact that the present residential land inventory in Ottawa is sufficient to supply the projected housing needs of the rural areas of the entire city for about 30 more years.

All this; though the development would necessitate the extension of city-centred services -- increasing sprawl and with it the city's financial burden -- stressing its ability to provide and maintain infrastructure such as roads and emergency services.

After much discussion and consultation with the community the WMCA Board decided to seek party status at the OMB hearing on the developer's appeal. Information from community associations right across the province confirmed my suspicions -- our Community Association would be in for an expensive and time-consuming fall and winter of 2008-2009.

We learned a lot about the process in a short time. For example, to our naive surprise we learned how difficult it is to convince local planners and engineers to serve as expert witnesses our behalf before the OMB. Many were candid and said that they received a significant amount of income from the development industry (including the appellant in this case) and, although they were very sympathetic to our cause, the financial penalties imposed by the developer for supporting us (in terms of lost work) would be too much for them to bear.

We learned how to navigate through the bureaucracy of Ottawa City Hall. It was daunting that the developer's staff was on a first-name basis with everyone there -- from the janitor to the Mayor. What I would have given for a telephone directory from one of their Blackberries! It took us months to accumulate our list of useful phone numbers -- and even longer to connect the dots so that we knew who to call for what purpose.

To our dismay we learned that in Ontario the business of modifying official plans is tax deductible whereas the business of providing public input to creating and defending them is not. From those in our community who supported the cause financially to those

who attended the seven weeks of the hearing -- many taking unpaid days off from work to do so -- it was galling to find yourself sitting beside the developer's lawyers, employees and expert witnesses all of whom were paid to be there by the developer (and all fully deductible as pretax business expenses, right down to the cost of their parking) while all of ours were being paid for in after-tax dollars.

We also learned how few resources the OMB actually provided to deal with a case of this size. For example, there was no court reporter, no video or audio recording apparatus -- no independent method of verifying testimony. The lone Board member presiding over the hearing had to keep his own notes in addition to following the testimony and ebb and flow of the proceedings; the hours of sworn testimony, opinion, flip charts, posters, photographs, calculations and a documentation set that would take down a small forest to print. He seemed overwhelmed at times; his questioning indicating more interest in the more concrete aspects of the appeal than in the many good, but more abstract, planning principles that the developer's amendment proposal offended.

We reminded ourselves that our Community Association was a party to the hearing to argue for the defense of our Secondary Plan. Professional planning consultants, economists, engineers and lawyers had been involved in its creation, as had many of the community's residents. We were convinced that Manotick's Secondary Plan remained as the best prescription for the village's future and fully consistent with Provincial Policy. Surely The Board would find a middle ground to serve all concerned. We retained our resolve to resist amending it solely for the purposes of a developer's business plan.

In the end, our exercise in planning arbitration, Ontario-style, cost the Community Association nearly \$180,000 in after-tax dollars, not counting the uncountable and priceless volunteer hours. In the process we had participated in nearly 70 meetings relating to the issues before the Board. We had retained three lawyers with municipal expertise along with consultants and experts in rural planning matters and in traffic engineering.²

It beggars the imagination as to how much more any community could have done in defense of its own Secondary Plan. Even people on the developer's own staff grudgingly admitted they had never encountered anything like the level of effort that was expended by the WMCA over a local planning issue. My guess is that they are right. If things don't change to make it possible for meaningful public input without the level of effort we expended -- my guess is that they never will again. Not many communities have the resources of Manotick -- human or financial -- but even so, the sheer weight of the thing can be borne by any community volunteer only about once in a lifetime.

Some months later the OMB ruling appeared. It favored the developer's position over that of the City and the Community Association on every point. Incredulous, I poured over the pages of the ruling to try to understand where we had gone wrong. What I read offered no reference to precedent or law or planning principles. The developer's amendment details were simply asserting to be "good planning" and that was that. If the Board was sending us a message I heard it loud and clear: "Leave the public out of the

² We were unable to obtain expert witnesses to address our environmental issues in this case. We attempted to raise these issues through participant statements.

planning process and leave it up to the developers and planning professionals, who know best."

Throughout the Manotick hearing issues were addressed in the context of the developer's amendment application -- comparing it to the village's existing Secondary Plan. In the ruling, however, the OMB seemed to have viewed the developer's amendment to Manotick's Secondary Plan as an original planning document unto itself -- as if hadn't been deliberated upon by municipal council in the context of the village's existing Secondary Plan.

In effect, the OMB member had no regard to the decision-making activity of the elected representatives of our city and community. The OMB acted as the "primary" decision maker in this matter and not as an appeal board.

As it is currently constituted, the OMB apparently has the authority to overturn decisions of City Council as long as it claims to have had "regard" to their decision. In the Manotick OMB ruling it states in a sentence near the very end of the document that the Board did have regard to Council's decision. The OMB's regard, however, did not extend to giving serious weight to it in coming to its own conclusions and ruling.

This case is not only a lesson to the taxpayer but also a cautionary tale that every elected public official in this province should heed. If this situation is allowed to continue I suspect that the taxpayer will react first by vacating the process of contributing public input to planning, followed by a more general vacation from involvement in the governance of our province altogether.

I think it is appropriate to ask of you at this place today:

- In this case, what more could have been done to defend an Official Plan? If this level of effort cannot provide an adequate defense, what can?
- What is the value of public input into the planning process if there is no deference to the community's wishes and careful planning work and no regard to decisions of its elected officials?
- Finally, why should the public spend time involving ourselves in the planning of our communities only to be subjected to such treatment? Would you?

We need your help to right this situation.

In conclusion Ladies and Gentlemen: I believe land use planning belongs firmly in the public domain -- as a public process, controlled by accountable, elected officials. Meaningful public input to the planning process is only possible where the elected representatives of the people are the primary decision makers in planning matters.

This is not the case in Ontario today. A big box developer in Ottawa has recently bypassed the public consultation process altogether and appealed its development proposal directly to the OMB -- in advance of any opportunity for the Ottawa City Council or its committees to vote on the matter. If the Board decides to, it can apparently rule on the appeal de novo, without a prior decision by the elected representatives of Ottawa's

citizenry. Neither the developer nor the OMB should be allowed to do an "end run" like this.

In summary, Ladies and Gentlemen: Manotick's case is a microcosm of what the OMB has visited upon communities across Ontario who face off against development pressures. The OMB has now elevated itself to the role of primary decision maker and has assumed the power to override decisions made by municipal councils. This does not serve the public good and is, in my view, antithetic to the fundamental purpose of government. It should be corrected.

I believe this can be achieved by clarifying the OMB's role to ensure that it remains an appeal body, with power to overturn decisions of municipal councils only if they are illegal -- that is, do not conform to provincial policy.

This limitation needn't be seen as a diminution of the OMB's role in Ontario planning. For example, the expertise of the Board would be invaluable in the "front end" process of creation and periodic review of municipal official plans. Informed by the active participation of all of community's stakeholders an Official Plan could be subjected to analysis by the OMB in advance of votes of adoption by municipal councils. This analysis would determine if the Plan is legal -- that is, if it conforms to provincial policy. Such a determination before a municipal council's adoption decision would, in my view, create stronger planning documents and render them more resistant to costly amendment actions between five-year reviews.

I would further recommend that consideration be given to how the province can support and enhance the role that community associations play in planning matters. In my view they are a valuable but underutilized resource in matters of local planning. Communities often find themselves placed into an adversarial position against either their municipal council or the developer as a result of Ontario's present land use planning process. It needn't be that way. Cooperative models must be found that will also elevate the opinions brought forward by communities through their community associations. Finding ways to encourage citizen participation, such as ways to finance their participation in planning deliberations, would also be worthwhile. A form of community association "legal aid for planning" might be considered, along with a provincial ombudsperson to assist community associations work their way through the maze of Ontario's land use planning process.

An amendment to the Planning Act effecting changes to the mandate of the OMB may not require the creation of new law and might well be implemented retroactively so as to apply to the point in time when the most recent version received royal assent. Whatever way such a change is effected, however, the primary purpose and goal must be to return the power and responsibility for land use planning back to where it rightly belongs in our democratic society -- with the people and their accountable, elected representatives.