Proposed submissions to the Ministry of Municipal Affairs in response to the "Review of the Ontario Municipal Board Public Consultation Document"

Theme 1. OMB's Jurisdiction and Powers

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

Comment: The City would support restrictions on the types of appeals that have to do with Provincial interests. Under the current system, the City has spent extensive time and resources defending Provincial policy as well as Ministry-approved Official Plans that implement those Plans.

Recommendation: Implement restrictions on appeals of Provincially-approved Official Plans and Plan Amendments (eg. Conformity exercises).

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

Comment: The proposed change will restrict appeals of provincially funded transit infrastructure. Transportation improvements are an important aspect of continued growth in the City. Restrictions to appeals of plans and zoning that support infrastructure should not be limited to the infrastructure that is funded by the Province, but should include any investments made into transit improvement. Where a municipality has identified a transit corridor in the Official Plan, then the implementing zoning provisions supporting the transit should not be subject to appeal.

Recommendation: Implement restriction on appeals of Official Plans and zoning by-laws that support transit infrastructure, however funded.

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

Comment: There are a number of proposed changes in the consultation document. The following changes are supported.

The first proposed change would restrict appeals on a municipality's refusal to amend a new secondary plan for two years.

The next proposed change would restrict appeals of interim control by-law. This would be appropriate as it would allow the municipality to use their resources to undertake the necessary studies rather than focusing on appeal litigation.

The next change would be to clarify that OMB authority is limited to dealing with matters that are part of a council's decision. This recommendation should go further, limiting the Board's authority to the same proposal that went before

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Council. Too frequently, applicants propose a version to Council and then proceed on a revised version before the Board. This undermines the role of Council in making decisions for its community.

The final proposed change would require the OMB to send significant new information back to Council for re-evaluation. The current permission in the Act to allow material to be sent back to Council is rarely used and often the importance of changes to applications or the material supporting them is minimized. This change, which should also apply to significant new information arising on non-decision appeals, is therefore supported. There would need to be clarity about what is considered "significant".

Recommendation: Implement each of the proposed changes based on the comments above.

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?

Comment: Significant deference should be given to the decisions made by councils in light of their role in bringing together their elected duties in representing their constituencies, as well as their contextual knowledge of their communities. As such, de novo hearings should not continue as de novo hearings strip away that vital role the Council plays.

The OMB should hear matters on the proposed standard of reasonableness, rather than the alternative suggestion that the overturning of a decision only be done if a decision does not follow local or provincial policies. The "reasonableness" recommendation is preferred since it places higher deference on the decision of Council.

Recommendation: The OMB hear matters as appeals on a standard of reasonableness.

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?**

Comment: The City has put considerable money and resources into updating its policies and ensuring that they conform or are consistent with an often-changing

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set of Provincial policies. The importance of those policies is undermined where applicants can rely on long-dated applications that do not adhere or implement modern policies. Relying on policies that are potentially dated by ten years or greater undermines the implementation of important policy objectives.

Recommendation: Require that all planning decisions be based on legislation and policies in effect at the time of the decision.

Theme 2. Citizen Participation and Local Perspective

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?
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?

Comment: Citizen participation in the hearing process is an important part of planning. The public should have a bigger role at the Board and their input should be considered with the same level of inclusion and weight that Councils are required to place on it. Further comments and recommendations are contained in the response to Question 24.

Theme 3. Clear and Predictable Decision-Making

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?

Comment: The minimum qualifications set out in the job description are adequate; however, the remuneration of Board members is out of step with the compensation of the professionals who would be qualified to apply. As a result, it could be a challenge attracting the highest quality candidates.
The decisions that the Board makes have significant and long-term consequences on the creation of a community and involve legal and factual matters as complex as matters adjudicated by Justices of the Peace. Additionally, the three-year term appointment coupled with remuneration places significant obstacles in attracting qualified persons. Therefore, the Members should be compensated at the same levels of Justices of the Peace.

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Recommendation: Improve the remuneration of Members of the Board, similar to Justices of the Peace pursuant to Ontario Regulation 247/94.

Q 14. Do you believe that multi-member panels would increase the consistency of decision-making? What should be the make-up of these panels?

Comment: Currently, multi-member panels are somewhat rare, excepting where a newly-appointed member has been paired with a more senior member of the OMB. For single-member panels, there is a broad range of hearing styles and decisions. Multi-member panels could improve the consistency of the in-hearing and decision-making process, providing consistency to both. Multi-member panels would ideally have both a lawyer and planner member since background in both law and planning would assist the hearing process.

Recommendation: To increase the use of multi-member panels, particularly planner/lawyer pairings.

Q 15. Are there any types of cases that would not need a multi-member panel?

Comment: Although less complex matters may be suited to single-member panels, having multi-member panels for those types of hearings from time to time would assist in ensuring consistency of hearing practices as well as decision-making for those types of matters.

Recommendation: Sporadically use multi-member panels for less-complex matters to ensure consistency of process and decision-making.

Q 16. How can OMB decisions be made easier to understand and be better relayed to the public?

Comment: Improving the use of subheadings in decisions would assist the public in understanding OMB decisions, which are at times lengthy and detailed. Breaking the decision down would assist lay persons in following the logic of the decision and order.

Ensuring that where references are made to exhibits, particularly where they form part of the order, are attached to the decision would allow the public to better understand outcomes without needing to obtain copies of the hearing record.

Further, the current practice is to send decision by ordinary mail to parties and participants, with a digital copy being posted to the OMB's website in due course. This can be improved by providing digital copies rather than mailed ones to the parties and participants and ensuring that the appeals page of each matter is

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updated concurrently to allow the broader public to access the decision in a timely way.

Recommendation: In written decisions, encourage the use of subheadings and require attachments of relevant exhibits. In providing the decisions, provide the decisions digitally to all parties and participants as well as concurrently on an improved appeal information page.

Theme 4. Modern Procedures and Faster Decisions

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

Comment: The timelines shown do not show the length of time between the appeal being made and the scheduling of a hearing event that is not a pre-hearing. There is significant concern about the number of pre-hearing events, and the delay between the filing of the appeal and the first pre-hearing event as a result of the procedures and practices of the OMB. Improving the practices and procedures to reduce both the time delay to the first prehearing event and the number of pre-hearing events would ultimately reduce the time between the filing of the appeals and the resolution of the matters.

Recommendation: The timelines in the chart are suitable. However, improve OMB practices and procedures to reduce the time between the filing of an appeal and the first contested prehearing event (non-prehearing event). Also, reduce the number of pre-hearing events needed by improving the use of standardized rules instead of procedural orders.

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

Comment: The first proposed measure is to set timelines for decisions. It appears that the OMB has done so, however, care should be taken to measure the time between the filing of the appeal and the first day of a contested hearing as opposed to pre-hearing events in order to better assess the timelines of more complex matters.

The second proposed measure, to increase the flexibility of how evidence heard may assist to encourage the timeliness of hearing events, however, reducing the number of repetitious expert evidence or of unnecessary witnesses would better reduce the length of hearing time needed for a matter.

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The third measure, to conduct more hearings in writing may be appropriate for specific types of matters such as contesting expert qualifications or motions for party or participant status.

The fourth measure, to set clear rules for issues lists, may only serve to lengthen the hearing process. The current use of issues lists only serves to further layer complexity on the hearing in a manner is not typical in other tribunals or courts. Creating more rules around them could result in more litigation around setting "proper" issues, rather than shortening the hearing process. Instead, consider improving the process by requiring an automatic staggered exchange of evidence as seen in other tribunals and courts. For example, by requiring that the parties not in favour of the proposal serve their evidence first, the concerns held by those parties become obvious and the evidentiary case to meet in favour of the matter becomes clear for the parties in favour without the need for pre-hearing events or contested motions regarding issues lists. Similarly, the rules could be improved to have a standard procedure for adding parties or participants when the other parties consent. By making these types of changes, the need for procedural orders and prehearing events is reduced.

The final measure, introducing a maximum number of days for hearings, would assist in achieving a timely process assuming that the length of time set is appropriate for the specific matter. However, this would be further improved with the Board placing a stronger emphasis on the deadline requirements leading up to the hearing.

Recommendation: The five following items are specifically recommended to modernize the process and make it more efficient:

- Set timelines for the time between the appeal being made and the first day of a hearing event that is not a pre-hearing.
- Implement better controls for the number of expert witnesses with repetitious evidence.
- Increase the use of written hearings in appropriate circumstances.
- Update rules and procedures to stagger the exchange of evidence, eliminating the need for issues lists or procedural orders.
- Discontinue the use of issues lists and procedural orders to frame hearing events.
- Amend the Board's rules to provide for standardized procedures for the process leading to appeal, rather than leaving those to a procedural order.
- Set a maximum hearing length where appropriate, with more emphasis on the deadlines

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

Comment: The types of cases or situations most appropriate to a written hearing are those that do not rely heavily on the interpretation of visual exhibits such as aerial photography, mapping, or graphs. Specific examples include: motions for direction, contesting the qualifications of a proposed expert, motions for party/participant status, motions for costs, uncontested settlements, etc.

Recommendation: Increase the use of written hearings where appropriate.

Theme 5. Alternative Dispute Resolution and Fewer Hearings

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

Comment: It is difficult to bring a matter for mediation at the OMB. There is a lack of mediators available to ensure timely resolution. A common concern raised by proponents against using mediation is that the time, scheduling and cost associated with a mediation process that may not resolve is a disincentive to going through that type process.

Recommendation: Provide additional expedited mediator availability and reduce the amount of required pre-filing material.

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

Comment: For there to be a better chance at settling, both parties need to be agreeable to mediation and the nature of the appeal must lend itself to negotiation. These are important factors in determining whether something can be mediated. However, there are some types of matters that cannot be resolved through mediation; forcing mediation in these types of circumstances can lead to wasted resources for the parties and the Board.

Recommendation: None.

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

Comment: No. Parties should not be forced to engage in a process where one or multiple parties do not have the ability or willingness to compromise. The role of counsel in the mediation process is to ensure that their client is willing and able to compromise for the purposes of settlement, and to ensure that the parties only enter into mediation discussions where there is a good faith desire to do so.

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If parties are forced to enter a mediation process, it could use time and resources in a process that has a lowered likelihood of success.

Recommendation: Do not require mediation; instead, promote expedited mediation as an incentive.

Q 23. What role should OMB staff play in mediation, pre-screening applications and in not scheduling cases that are out of the OMB's scope?

Comment: The OMB should be taking a more proactive approach to pre-screening applications and dismissing obviously deficient or frivolous appeals, or matters that are outside of the OMB's jurisdiction. Although the OMB has existing powers under the Act to do so, it is rarely and inconsistently used. In many cases, the City is then forced to exert time and resources bringing motions to the same result.

Recommendation: Require the OMB to take a more active role in pre-screening appeals, dismissing matters where appropriate.

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:

Appeals of Non-Decision - Ensuring Deference to Council Decisions

One of the current routes of appeal is to file an appeal for a "non-decision". This type of appeal occurs where the statutory time limit has passed, giving the applicant a mechanism to have their matter dealt with by the OMB in the event the municipality does not or refuses to render a decision on a matter.

Unfortunately, the non-decision means that when a staff report is written and a Council date has been set, an applicant who does not like the recommendation of staff or has concerns that Council will not look upon their application favourably, can file an appeal despite an imminent decision of Council. As a result, this strips the public input that would come from the meeting, and interferes with the deference usually given to the Council decision. It would be appropriate to limit an appeal for non-decision where the Council decision is imminent (i.e. when a staff report has been issued and a Committee/Council date set). This would ensure the ability for the public to participate in the process and allow Council to make a decision.

Processes and Procedures

The procedural matters that occur between the filing of the appeal and the first day of a contested hearing event present the greatest opportunity to make the

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OMB hearing process more efficient. The current practice of using procedural orders and issues lists creates and additional layer of unnecessary complexity in the process.

Matters that come before the Board are unique to other tribunals in that they sometimes represent appeals of non-decisions or denials. In those circumstances, the appellant's grounds of appeal are essentially that the appealed matter represents good planning with no "issues" or concerns with the proposal. Currently, the procedural order and issues list process is the mechanism used to determine with the concerns of the parties who are not in favour of the proposal are. Unfortunately, this process is often lengthy and contested, with conflicts arising from it that often need intervention by the Board. Also, this is a procedural process that is difficult for the public to understand or follow. For those reasons, the Province should look at modernizing the Board's rules and procedures, with a view to eliminating this unnecessary level of complexity. The mechanism proposed in response to Question 18 would remove the procedural order and issues list generation process, making the procedures more transparent, improving the ability for the public to participate, and freeing up currently constrained Board member availability.

The rules and processes for pre-hearing exchange of information should equally apply to non-complex matters, such as Committee of Adjustment appeals. Those types of hearings, which currently have no such requirements, often result in "trial by ambush" litigation which raises concerns about procedural fairness – particularly to unrepresented persons appearing at the Board.

The Province could also consider allowing the "docketing" of shorter-length hearing events, such as motions, settlements, etc. This would involve providing a mechanism in the rules to have multiple short hearings scheduled on the same date. By doing so, there would be an obvious increase in efficiency in the use of Members traveling to other municipalities for short hearings.

To provide further efficiency of hearing resources, and encourage the parties to resolve their concerns, the Province could provide a mechanism to re-vest Councils with jurisdiction to make final decisions on revised settlement proposals on matters under appeal before the Board.

Early Neutral Evaluation

Similar to judicial pre-trials, the Board could implement a more active pre-hearing process wherein the Board takes an active role in determining the conflict between the parties, asking probing questions as to the basis of those conflicts, the evidence intended to be relied upon, and the Board's views on a preliminary basis. Appropriately used, this early neutral evaluation could assist in narrowing

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the areas of conflict, encouraging mediation or settlement, or refining the amount of evidence prepared for a hearing.

Modernization of OMB Website

Improving the Board's website could further many of the objectives of this review. There are significant opportunities to update the website, for example: improving navigation, updating materials to assist the public, providing appeal-specific webpages containing contact information for the parties as well as all relevant documents (exhibits, studies, statements, decisions, etc.), providing cloud/ftp service for parties to serve/exchange documents. These changes would assist the public, by providing a readily accessible source of general and specific information. This would also provide for efficient use of resources for the parties and the Board, reducing the need for paper exchange of materials.

Mediation

While improvements to the availability of mediation are important, there is a concern that these processes are closed to the public and confidential. The current planning regime emphasises public involvement and participation, and the mediation process can sometimes represent the antithesis to that approach. Improvement of the availability of mediation resources is important, but proposals like "mandatory" mediation should be viewed with caution in this context.

Other Considerations

There are a number of provisions of the Planning Act which raise issues that often result in unnecessary litigation before the Board. For example, there is uncertainty in process due to timing games of the coming into force zoning versus official plan policy. The retroactive effect of zoning by-laws under appeal has also led to problems at the time of issuance of building permits, resulting in duplicative zoning or minor variance appeals. Resolving these quirks in the Act could reduce some unnecessary hearings reaching the Board.