Pembina Institute for Appropriate Development

Holistic and practical solutions for a sustainable world.

Comments on *Planning Act* Reform and Implementation Tools

And

Ontario Municipal Board Reform

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Comments on *Planning Act* Reform and Implementation Tools And Ontario Municipal Board Reform

The Pembina Institute

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I. Introduction

The Pembina Institute for Appropriate Development (PIAD) is a national, independent not-for profit environmental research and education organization, with offices in Ottawa, Toronto, Edmonton, Calgary, Vancouver and Drayton Valley, Alberta.

The Institute has taken a strong interest in issues related to the environmental, economic and social sustainability of urban communities in Ontario over the two years, publishing three major reports, *Smart Growth in Ontario: The Promise vs. Provincial Performance* (February 2003); *Building Sustainable Urban Communities in Ontario: Overcoming the Barriers* (December 2003), and *Towards Implementation? Building Sustainable Urban Communities in Ontario* (July 2004).

The Pembina Institute welcomes the Ontario government's initiatives to reform the Ontario Municipal Board (OMB) process and to consider broader reforms to the *Planning Act*.

II. *Planning Act* Reform

1. Bill 26 – *The Strong Communities Act*

The Institute welcomes the introduction of Bill 26 as an important step towards the reform of the land-use planning process in Ontario to curb urban sprawl, promote more sustainable urban communities and strengthen local democracy.

We are particularly encouraged by section 2 of the Bill, which would require that advice and planning decisions by municipal councils and planning bodies, provincial ministries and agencies, and the Ontario Municipal Board (OMB) "be consistent with" the policy statements issued under the *Planning Act* by the Minister of Municipal Affairs (Bill 26, s.2). The adoption of these amendments is essential to the provincial government's ability to provide the policy direction to planning authorities needed to curb urban sprawl and promote more sustainable development patterns.

Bill 26 would also make a number of modifications to the OMB appeal process, including increasing the time period for making decisions before appeals can be made to the board with respect to official plans, official plan amendments, subdivision and condominium approvals, zoning by-laws, holding by-laws and consent applications (Bill 26. ss.3 and 4). The right of appeal to the board with respect to official plan amendments and zoning by-laws would be eliminated if the amendment relates to the alternation of the boundary of an urban settlement area or the creation of such an area (s.4 (7)).

These provisions are a good first step towards the reform of the OMB appeal process, providing planning authorities with a greater period of time to consider decisions before proponents can initiate appeals to the board, and eliminating the right of appeal in situations where municipalities might be compelled to expand urban settlement areas against their wishes.

However, additional steps are needed to limit the ability of appellants to seek to have the board pre-empt the decisions of duly elected municipal councils. Specifically, Bill 26 should be amended such that appeals of official plan amendments are not permitted until the councils involved have made final decisions on these matters. This would have the effect of reinforcing the central role of official plans in the planning process.

"Complete" Applications

In order to fully address the address concerns regarding the impact of the automatic rights of appeal to the OMB introduced through the 1996 Bill 20 amendments to the *Planning Act*, the issue of the triggers for the timeframes for appeals must also be addressed. In many cases proponents have only provided minimal information to municipal councils in support of applications, as required under regulation 198/96,[1] triggering the timeframes for appeal, and then introduced additional information at the OMB appeal stage.

As noted in the government's discussion paper on planning reform,[2] such an approach does not give municipalities an opportunity to obtain information that may be needed to properly assess applications in terms of such things as traffic, hydrogeology, and natural heritage impacts, or their implications for the delivery of public services and infrastructure, before an appeal to the OMB is initiated.

To address this problem Bill 26 should amend the *Planning Act* to provide a definition of a 'complete application" for planning approvals.

A complete application should be defined as:

- Such information as may be prescribed by regulation
- Information identified as required in support of applications through the municipality's official plan, or a by-law regarding application requirements
- Information necessary to meet the requirements of the PPS; and
- Further reasonable information that the municipality deems necessary to assess the application.

Bill 26 should be amended such that the appeal timelines under sections, s.51(34) (subdivision and condominium approvals), 34(11) (zoning by-laws), 53(14) (consent applications) are not triggered until the requirements for a complete application are met.[3]

[1] The regulation requires minimal 'tombstone' information regarding an application (i.e. the name and address of the applicant, the plan that is to be amended, and the text of the requested amendment).
[2] Ministry of Municipal Affairs and Housing, *Planning Act Reform and Implementation Tools* (Toronto: MMAH, June 2004) pg.10.
[3] This assumes that time limit appeals of official plans and official plan amendments will be eliminated via Bill 26. If such appeals are not eliminated, then the time limits for such appeals should not be triggered under applications are deemed complete.

2. Additional *Planning Act* reform and implementation matters

In addition to the 'complete application' issue, which should be addressed immediately via Bill 26, there are an number of other issues that should be addressed through the longer-term reform of the *Planning Act*. These issues include the following.

Settlement Area Expansions

As recommended in the Pembina Institute's August 2004 submission on the proposed PPS, the *Planning Act* should be amended to require a specific application to the province for settlement area expansions, and an OMB hearing prior to the granting of such applications.

One window for Provincial Appeals

The restriction on the definition of provincial "public bodies" with respect to OMB appeals to the Ministry of Municipal Affairs and Housing[4] should be removed. The removal of this restriction would permit other provincial ministries to initiate appeals of planning decisions to the OMB. The ability to initiate such appeals would be particularly important with respect to the Ministry of the Environment regarding source water protection, Ministry of Natural Resources regarding natural heritage conservation, and the Ministry of Agriculture and Food regarding agricultural land protection.

Energy and Water Efficiency

Consistent with the government's goals regarding the promotion of energy efficiency and the efficient use of water resources, the *Planning Act* should be amended to permit municipalities to incorporate energy efficiency and water conservation requirements into their official plans, and require energy and water efficiency measures as conditions of subdivision, condominium, and site approvals.

Official Plan Contents and Reviews of Official Plans

The *Planning Act* should set more detailed requirements for the contents of official plans, particularly with respect to future land uses and required infrastructure. The act should, for example, require that planning authorities directly address all relevant PPS policies in their official plans. Official plans should also be required to include policies and mechanisms for monitoring local conditions and plan implementation. Provincial funds should be made available to assist municipalities in plan implementation and performance monitoring.

The *Planning Act* should set a specific timeframe for the regular review of official plans to ensure that they reflect current information, trends, environmental and conservation science and the provisions of the prevailing PPS. A five-year timeframe would permit sufficient time for plan implementation, while not permitting an excessive gap to emerge between the information upon which the plan was based, and current conditions and trends

[4] *The Planning Act*, s.1(1).

The Effective Date of Policies

Planning decisions should be made on the basis of the policies applicable on the date that these decisions are made, not when an application was "completed." Decision-making on the basis of the applicable policies at the time of decision will prevent rushes of applications just prior to the implementation of new policies.

Redevelopment, infilling, intensification and compact form; Transferable development rights

The government's discussion paper includes a discussion of the possibility of the amendment of the *Planning Act* to support redevelopment, infilling, intensification and compact development forms. Specific detailed proposals need to be presented by the government on these issues in order to prompt meaningful comment.

Transferable development rights may provide a mechanism through which landowners can be given consideration for forgoing the development of their land. Such arrangements may be particularly useful in relation to the protection of prime agricultural lands at the urban periphery. However, careful consideration would have to be given to how the exercise of such rights might affect planning and community development in the locations where they are used. Again, more specific proposals need to be presented by the government before detailed comments can be made.

Provincial Standards for Matters Related to Land-Use Planning and Development

The province should revise development standards to support infill, intensification, and brownfield redevelopment in appropriate locations. The province should also support the more general use of alternative development standards to promote more compact urban development forms.

III. Ontario Municipal Board Reform

The Ontario Municipal Board (OMB) is an independent adjudicative tribunal that hears appeals on a wide range of municipal and land-related matters. The OMB deals with Official Plans, zoning by-laws, subdivision plans, consents and minor variances, land compensation, development charges, ward boundaries, aggregate resources and a wide range of other matters. The OMB was first established in 1897.[5] The provincial cabinet appoints the board's members. The OMB's decisions are final, although they may be appealed to the provincial cabinet,[6] and points of law can sometimes be appealed through the courts.[7]

The board's role has always been controversial, given its ability to overrule the decisions of elected municipal councils. Concerns over the board's role have become acute in past few years, and the board's current mandate, role and structure are seen as significant barriers to smart

[5] The Board was originally called the Office of the Provincial Municipal Auditor. In 1906, the Ontario Railway and Municipal Board was created, with the added responsibility of supervising the then-burgeoning rail transportation system between and within municipalities. In 1932, it was renamed the Ontario Municipal Board. Ontario Municipal Board, Annual Report 2000-2001 (Toronto: Queen's Printer for Ontario, 2002).
[6] Cabinet appeals are rare, and rarely successful.
[7] See *The Ontario Municipal Board Act* R.S.O. 1990, Ch.O.28, ss.95 and 96.

growth in Ontario. This has led to calls for major reforms to the board's role, mandate and composition,[8] and even for the board's abolition. [9]

These concerns regarding the board flow from a number of sources. These include:[10]

- The quality of appointments in terms of their knowledge and experience in land-use planning and environmental issues, and their vulnerability to political considerations due to the short term (three years before renewal) of the members. The board has also been consistently criticized for a pro-development bias.
- The difficulties faced by community and other public interest groups in gathering the financial resources and legal and technical advice and expertise needed to challenge development proposals before the board.
- The ability, flowing from the 1996 amendments to the *Planning Act*, of developers to initiate appeals where municipal councils to do not consider development applications within 90 days. This has the effect of greatly limiting the ability of municipal governments to assess the likely impacts of development proposals before being forced to consider decisions.

In addition, in absense of strong provincial policy statement and infrequent provincial interventions in OMB hearings, the board has been left to fill the resulting policy vacuum, substituting its own decisions for municipal ones that it has found to be "faulty." This is seen to be particularly problematic in the context of the board's mandate to look at each development proposal on a one-off basis. As a result, it does not consider the cumulative effects of multiple developments in its decision-making, or how different development proposals might impact each other.

1. The impact of Bill 26 on OMB issues

Bill 26, if adopted, would have a significant impact on a number of areas of concern regarding the current OMB process. The extension of the timelines before automatic appeals to the OMB are permitted, and the removal of automatic rights of appeal for unwanted expansions of settlement areas or the establishment of new settlement areas, as proposed in Bill 26, are important initiatives in this regard.

As noted above, in order to be fully effective, these provisions need to be combined with the incorporation of a definition of a "complete application" for planning approvals into the bill, and provisions making it clear that the timelines for automatic appeals to the board if a planning authority does not address a planning application within the required timeframe are not triggered until an application is deemed complete. In addition, as noted in section II.1, appeals of official plans and official plan amendments should not be permitted until the councils involved have made final decisions on these matters. This would have the effect of reinforcing the central role of official plans in the planning process.

The provisions of Bill 26 requiring that the decisions of the OMB "be consistent" with the PPS issued under the *Planning Act* (s.2) would have the effect of reducing the board's discretion in the substitution of its own decisions for local planning decisions that it finds to be "faulty." Bill

[8] L.Pim and J.Ornoy, *A Smart Future for Ontario* (Toronto: Federation of Ontario Naturalists, 2002), pg.31
[9] See, for example, J.G.Chipman, *A Law Unto Itself: How the Ontario Municipal Board has Developed and Applied Land Use Planning Policy* (Toronto: University of Toronto Press, 2002), pg.192.
[10] Discussion drawn from Pim and Ornoy, *A Smart Future for Ontario*, pg.31.

26 would also restrict the powers of the OMB to make decisions in appeals respecting official plans, amendments to official plans, zoning by-laws or holding by-laws, if the Minister is of the opinion that all or any part of the proposed amendment, plan or by-law adversely affects a matter of provincial interest. The Lieutenant-Governor in Council would be able to confirm, vary or rescind decisions of the OMB in such situations.

While Bill 26, if adopted, may address a number of issues related to the role of the OMB, there are a number of concerns that extend beyond those addressed by the Bill.

2. Remedies

As noted above, the provisions of Bill 26, if adopted, should have the effect of limiting the board's discretion to substitute its own decisions for local decisions that it finds to be "faulty." Additional direction could be added via the *Ontario Municipal Board Act* that, in addition to compliance with the PPS as required via the Bill 26 amendments to the *Planning Act*, the board is generally to make decisions in the public interest. Neither act current provides any guidance or direction to the board in its decision-making.

The board should be encouraged to make greater use of the option, where it has found that a council has made errors of law or policy, or acted contrary to the public interest, of setting the council's decision aside, and returning the matter to the council concerned for reconsideration, with an explanation of why the council's decision erred or was contrary to the public interest, and making a recommendation with respect to how to correct the decision. The OMB could, upon further appeal, make a final decision on the planning matter in question where the council has continued to fail to address the board's findings and recommendations.

3. Evidence in OMB hearings

The OMB has the authority to call expert witnesses of its own, to assist it in its deliberations. However, in practice little use is made of this authority. The more extensive use of this authority would enable to board to access independent expert opinions on the matters before it. The use of independent witnesses may also be of assistance in situations where only one side in a hearing has had the resources to access expert evidence. The board should be provided with a budget for the specific purpose of enabling it to call expert witnesses of its own.

The board's processes should be made more open to the acceptance of traditional and lay knowledge, in addition to the testimony of expert witnesses.

More broadly, an intervener funding mechanism, as discussed in the following section, should be established to address the problem of the resource imbalance that often occurs between development proponents and community and public interest participants in OMB hearings.

4. Intervener funding in OMB hearings

The government's discussion paper notes a number of barriers to effective public participation in the OMB process. These barriers include the growth in the complexity and length of time needed for OMB appeals and the weight given to professional and technical evidence vs. the

public's views. The government's discussion paper also highlights the delays and misunderstandings that can arise when unrepresentative parties are involved in hearings.[11]

The establishment of an intervener funding mechanism for the OMB process would help to address all of these concerns. Intervener funding would provide a mechanism through which unrepresented parties could access counsel and expert witnesses.

An intervener funding mechanism for OMB hearings should follow the basic model of the *Intervener Funding Project Act, 1989*. Under such a model funding be awarded by a panel of the OMB separate from the panel that will hear the appeal.

Awards under should only be made in relation to matters that:

- affect a significant segment of the public; and
- affect the public interest and not just private interests (e.g. consistency of a decision with the PPS).

In deciding whether to made an award the Board could consider whether:

- the person represents a clearly ascertainable interest that should be represented in a proceeding or process
- adequate representation of the interest would assist the board and contribute substantially to the proceeding or process;
- the person does not have sufficient financial resources to enable it to adequately represent the interest;
- the person has made reasonable efforts to raise funding from other sources;
- the person has an established record of concern for and commitment to the interest;
- the person has attempted to bring related interests of which it was aware into an umbrella group to represent the related interests at the hearing;
- the person has a clear proposal for its use of any funds which might be awarded; and
- the person has appropriate financial controls to ensure that the funds, if awarded, are spent for the purposes of the award.

Funding could be provided from a common pool. This might be financed via a small surcharge on development charges. Such an approach would recognize that some proponents (e.g. low income housing co-ops, and individuals) may not be in a position to provide intervener funding as per the IFPA model. The level of funding could be based on a tariff system, where the size of the award would be tied to the scale of the proposal under review.

In addition to helping *bona fide* public interest interveners make their cases more effectively before the board, such funding would have the advantage of helping with the efficiency and quality of OMB hearings, by ensuring representation by counsel on more complex cases.

Consideration should be given to the establishment of a separate consultative process to specifically investigate possible mechanisms and criteria for the provision of intervener funding in OMB hearings.

[11] Ministry of Municipal Affairs, *Ontario Municipal Board Reform* (Toronto: MMAH, June 2004) pg.16.

5. Reducing the number of matters before the OMB

Consideration should be given to limiting OMB appeals to appeals of official plans and official plan amendments, and other types of planning decision that raise policy or public interest issues. Appeals of more minor matters, such as minor variances that conform to the relevant official plan should be resolved through an alternative mechanism, such as arbitration. A mechanism would need to be established so that such matters could be "bumped-up" to the OMB where they raise significant planning or public interest issues.

Consideration should also be given the strengthening the board's ability to resolve appeals through mediation, rather than proceeding to a full hearing. Among other things, this would require that all board members be fully trained in mediation.

6. The OMB appointment process

The OMB appointments process should be reformed following the model established by former Attorney-General Ian Scott regarding provincial court appointments. In particular, there should be an open call for qualified applicants when there are openings on the board, as is the case with provincial court judges. A non-partisan, lay advisory committee should be established to review applications and present a short list of qualified candidates for the Attorney-General to choose from.

OMB appointments should be for a fixed term of five years, with removal only for incapacity or demonstrated cause. Under a reformed appointment process, a probationary period would not be necessary. Requirements should be established for the ongoing training and professional development of OMB members and staff. The levels of compensation for OMB members should be sufficient to attract candidates with the appropriate professional qualifications and bases of knowledge and experience.

7. Additional OMB reforms

The adoption of Bill 26, particularly as amended per the recommendations outlined in this submission, the reform of the OMB appointment process, and the establishment of an intervener funding mechanism in relation to OMB appeals would constitute significant changes to the OMB process as it currently exists. The impact of these changes, once implemented, should be evaluated within not more than four years.

IV. Conclusions

The Pembina Institute highlights the importance of the government proceeding with the Bill 26 amendments to the *Planning Act*, including a definition of a "complete application," and the revision of the PPS as immediate priorities for planning reform.

Further consultations on *Planning Act* and OMB reform should take place once Bill 26 has been adopted. Steps to reform the OMB appointments process should proceed immediately, and a separate specific consultation process on the issue intervener funding initiated.

The Pembina Institute would be pleased to respond to questions or comments regarding is proposals regarding the reform of the OMB and the *Planning Act*.

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