



*Sustainable Energy Solutions*

Submission to the Standing Committee on General Government  
Regarding Bill 51: *The Planning and Conservation Land Statute Law  
Amendment Act, 2005*

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## 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 Pembina Institute has taken a strong interest in issues related to the environmental, economic and social sustainability of urban communities in Ontario over the past three years. The Institute has published several major reports on the subject including: *Smart Growth in Ontario: The Promise vs. Provincial Performance* (February 2003); *Building Sustainable Urban Communities in Ontario: Overcoming the Barriers* (December 2003); *Towards Implementation? Building Sustainable Urban Communities in Ontario* (July 2004); *Building Sustainable Urban Communities in Ontario: A Provincial Progress Report* (June 2005) and *Local Implementation of Smart Growth Policies in Ontario: Three Case Studies* (July 2005).

In addition, the Institute has provided detailed comments on the July 2004 and February 2005 draft Growth Plans, Bill 136, the proposed *Places to Grow Act*, Bill 26 — *The Strong Communities Act*, Bill 135 — *The Greenbelt Act*, the Greenbelt Plan and the revised Provincial Policy Statement.

The Institute has closely followed the provincial government's land use planning reform initiatives over the past two years. The Institute regards the provisions of Bill 51 as important elements of the government's overall efforts to promote more sustainable urban development patterns in Ontario. The Institute supports the overall direction of the bill, with the exception of its provisions related to the exemption of energy-related projects from *Planning Act* approvals. The Pembina Institute also recommends amendments to the bill's proposed provisions regarding the establishment of rights of appeal to the OMB and the introduction of new information at OMB hearings.

The Pembina Institute's specific comments on the legislation are as follows.

## **Section 2 — Matters of Provincial Interest**

Section 2 of Bill 51 expands the list of matters of provincial interest under the *Planning Act* to include the promotion of development that is designed to be sustainable, to support public transit and to be oriented to pedestrians. The provision is consistent with the government's overall direction towards the promotion of more sustainable development patterns and "complete communities" and is supported by the Pembina Institute for these reasons.

## **Section 3 – Have Regard to Municipal and Approval Authority Decisions**

Section 3 of Bill 51 would require that the OMB 'have regard to' to municipal decisions in its decision making. The provision is intended to emphasize that the board give weight to the legitimacy of municipal decision when dealing with appeals of such decisions. It is however, essential that such considerations not override the requirement to ensure consistency in decision-making with the Provincial Policy Statement and provincial plans.

## **Section 4 — Planning Decisions Based on Provincial Policies in Place at the Time of Decision**

Section 4 of Bill 51 would amend the *Planning Act* to require that municipal and provincial planning decisions be consistent with the policy statements made under the Act and provincial plans in effect at the time of decision. Comments, submission and advice provided by municipal and provincial councils, boards, ministries, agencies and commissions would also be required to be consistent with the provincial policy statement and provincial plans in effect at the time the comments, submissions and advice were provided.

These provisions of Bill 51 are strongly supported by the Pembina Institute, as they will ensure that planning decisions are made, and planning advice provided, on the basis of current policy. The provisions will also provide clarity to development proponents, planning authorities and the public regarding which policies apply to a given decision.

## **Section 6 — Local Appeal Body**

Section 6 of Bill 51 would permit municipalities to establish local appeal bodies to hear appeals of minor matters (e.g., consents and committee of adjustment matters) as an alternative to the Ontario Municipal Board.

Given that the municipality establishing such local appeal bodies would have to bear the costs of their operations, it is unclear how many municipalities will actually take advantage of these provisions.

### **Section 7 — Contents of Official Plans**

Section 7 of Bill 51 outlines the basic requirements for the content of official plans and provides authority for the provincial government to prescribe other matters to be addressed in official plans in the future.

The Pembina Institute understands that there will be additional consultations on the more detailed matters to be prescribed for inclusion in official plans. The Institute looks forward to participating in these discussions.

### **Section 8 — Official Plan Development and Amendment**

Sections 8(1) - 8(5) deal with public consultation requirements regarding the development of official plans. The provisions include enhanced public consultation requirements.

Sections 8(6), 14(5) and (12) and 21 would remove the right of appeal of official plans, official plan amendments and plans of subdivision to the OMB for persons, other than public bodies, who do not make oral submissions at public meetings or written submissions regarding the development of the official plan, amendment to the plan or a plan of subdivision.

Section 8(6) would also remove the right of appeal with respect to official plan provisions and official plan amendments regarding the establishment of second units.

Sections 8(9), 14(13) and 21 would prohibit persons, other than public bodies, from becoming parties to an OMB hearing unless they made written or oral submissions to council regarding an official plan, official plan amendment or plan of subdivision. The OMB would be permitted to add persons as parties to a hearing where there are reasonable grounds for doing so.

Given the limited resources of community based and public interest interveners in council and OMB processes, the provisions of Bill 51 regarding appeal rights and rights to become parties to OMB hearings may be unnecessarily restrictive.

## Recommendation

- *The provisions of Bill 51 regarding rights of appeal to the OMB should be amended such that:*
  - *anyone who has made oral or written submissions to council regarding the matter under appeal has a right of appeal to the OMB, while others seeking to appeal a decision to the OMB would be subject to a leave test.*
  - *any person who made an oral or written submission to council on a matter should have a right to be a party to an OMB hearing on the matter. Others seeking to be parties to a hearing should again be subject to a leave test.*
  - *The leave test in both cases should be defined more precisely than “reasonable” grounds. Bill 51 should be amended such that the specific criteria to be considered in the leave tests include whether the person*
    - *represents a clearly ascertainable interest in the matter under appeal,*
    - *has an established record of concern for and commitment to the matter, or*
    - *is directly affected by the matter under appeal.*

Sections 8(9), 14(13) and 21 would restrict the introduction of evidence at OMB hearings that was not available to the municipal council concerned when it made its decision regarding an official plan, official plan amendment or plan of subdivision. The OMB would be permitted to allow new information if it believes that it was not “reasonably possible” to provide the information or material to the municipality before the council made its decision. Public bodies are permitted to introduce new information and evidence at an OMB hearing. Where new information is permitted to be introduced, the OMB is to permit the municipality to reconsider its decision in light of the new information or make a written recommendation to the board.

The proposed provisions, although well intentioned, may be unnecessarily restrictive. Community and public interest groups may not have adequate time to respond to the detailed information provided by development proponents before council makes decisions. At the same time the “complete application” provisions of Bill 51 may address the problem of development proponents introducing new information at OMB hearings that was not available to a municipal council.

## Recommendation

- *Bill 51 should be amended such that the introduction of new information at the OMB appeal stage by non-public body parties is permitted subject to a leave test. New information should be permitted where the information*
  - *could not have been reasonably provided at the council stage, or*
  - *will inform the decision-making process in a constructive manner.*

*Municipal councils should be permitted to reconsider their decisions in light of any new information admitted by the OMB, prior to the OMB making a final decision on the matter under appeal.*

## **Section 10 — Complete Applications**

Sections 10(5), 14(4) and 21 would permit councils or planning bodies to specify the information that they require in relation to official plan amendments, zoning bylaws and plans of subdivision in their official plans, and to refuse to consider applications until this information is received. The timelines for automatic appeals to the OMB would not be triggered until the information is received. The OMB would resolve disputes over whether the information requirements set out in an official plan have been met.

The Pembina Institute strongly supports the concept of a ‘complete application’ rule. The Institute also supports the concept of municipalities being able to specify in their official plans what information is required to constitute a complete application. However the Institute believes that the provisions should make it clear that municipalities have the ability to request information in addition to the requirements outlined in their official plans, to be better able to understand the implications of specific planning applications, as it is impossible to anticipate all information needs prior to the receipt of a specific application. Such information requests should be made as early as possible in the approval process. Disputes over the ‘reasonableness’ of such requests should also be subject to OMB resolution.

## **Recommendation**

- *Bill 51 should be amended to permit municipalities to request information in addition that outlined in the Official Plans in relation to specific applications. The timelines for decision-making prior to OMB appeal should not begin until these requests have been met. The ‘reasonableness’ of such requests should be subject to OMB resolution.*

Given the restrictions on the introduction of new information at OMB appeals proposed in Bill 51, it is essential that members of the public have access to the materials constituting a complete application as early in the planning process as possible.

## **Recommendation**

- *Bill 51 should be amended such that all information contained in a complete application should be made available to the public at the time the application is declared “complete.”*

## **Section 10 – Appeal Restrictions**

Sections 9(6), and 14(5)) of Bill 51 would remove the right of appeal to the OMB for non-municipally initiated official plan amendments and zoning bylaws regarding settlement area boundaries, new areas of settlement, challenging official plan policies permitting second units and removing land from areas of employment.

The Institute supports these provisions but would not support any additional restrictions on the conversion of employment lands, as such restrictions may be a barrier to brownfield and greyfield redevelopment, and creative mixed-use redevelopment of existing employment areas that retain employment uses while producing more transit- and pedestrian-oriented complete communities.<sup>1</sup>

## **Section 11 — Zoning Bylaws**

Section 11 of Bill 51 would permit municipalities to adopt zoning bylaws that conform to official plan amendments before the amendments come into force.

## **Section 12 — Official Plan Updates**

Section 12 of Bill 51 would require that municipalities revise their official plans at least every five years to ensure that they conform with the relevant provincial plans, have regard to matters of provincial interest and are consistent with the Provincial Policy Statement. The need for a specific provision concerning revisions regarding areas of employment is unclear as it is captured in the requirement to ensure conformity with provincial plans and policies.

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<sup>1</sup> See generally Mark Winfield, *Comments on the Proposed GGH Growth Plan (November 2005)* (Toronto: Pembina Institute, 2006) on employment land issues.

Zoning bylaws would be required to be updated within three years of a revised official plan coming into effect.

The updating of zoning bylaws is appealing in theory. However, in practice it may not be worth the required effort in light of other priorities. The question of the conformity of zoning bylaws with an approved official plan can be addressed on an as-needed basis as specific development proposals are brought forward.

### **Section 14 — Minimum and Maximum Height and Density**

Section 14 of Bill 51 would permit planning authorities to establish minimum and maximum density and height requirements in relation to specific parcels of land. These provisions are consistent with the government's overall direction on the promotion of intensification and redevelopment, while also permitting redevelopment and intensification projects to be scaled to complement existing communities.

### **Section 14 — Conditional Zoning**

Section 14(9) would permit municipalities to attach conditions to zoning bylaws. The provision could be employed to require energy efficient building or area design, and achieve other public policy goals. Municipalities may require additional guidance on the possible or appropriate use of these provisions.

### **Section 15 — Exterior and Sustainable Design of Buildings**

Section 15 of Bill 51 would permit municipalities to adopt bylaws dealing with matters of the exterior design of buildings. The design provision may provide a mechanism for reinforcing the need to pay attention to details of design to enhance the acceptability/appeal of redevelopment and intensification projects.

The Pembina Institute also strongly supports the proposal to permit municipalities to require sustainable design elements in buildings. The provision is an important contribution to the province's efforts to establish a "conservation culture" in Ontario.

### **Recommendation**

- *Bill 51 should be amended to clarify that exterior and sustainable design elements must be consistent with the Ontario Building Code, rather than more generally not dealing with "the manner of construction and standards for construction (section 15(3))."*



## **Section 16 — Reduction of Payment in Lieu of Parks or Recreational Purposes for Redevelopment Projects**

Section 16 would permit reductions in payments in lieu of parks or recreational purposes for redevelopment projects, where the part of the payment reduction meets sustainability criteria. Presumably this is intended to promote investments in green design or amenities. "Sustainability criteria" should be clearly defined if this is the case.

## **Sections 17 and 18 — Restrictions on Repeat Appeals to OMB**

Sections 17 and 18 (1) of Bill 51 contain provisions restricting appeals to the OMB, where an appellant has persistently and without reasonable grounds commenced appeals (e.g., presumably repeat appeals of the same application without change).

The Pembina Institute supports the direction of the provisions. However, they may be excessively narrow in terms of the restrictions on repeat appeals that they would impose.

### **Recommendation**

- *Bill 51 should be amended to make it clear that appeals of an application that has already been rejected by the OMB are not permitted unless the application or circumstances are substantially altered.*

## **Section 18**

Section 18(2) clarifies the Lieutenant Governor in Council's power to confirm, vary or rescind OMB decisions where the Minister of Municipal Affairs has declared provincial interest in the matter.

## **Section 23**

Section 23 of Bill 51 would allow the Lieutenant Governor in Council to exempt from all *Planning Act* requirements any energy project that is approved under or exempted from *The Environmental Assessment Act* or subject to an order or declaration order under the Act. The provisions expand the current provisions of the *Planning Act*, excepting Hydro One and Ontario Power Generation projects that have received *Environmental Assessment Act* approvals from the requirements of the *Planning Act*.<sup>2</sup>

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<sup>2</sup> S.62(1).

The effect of these provisions would be to potentially exempt from the *Planning Act* virtually all energy related projects, as it would apply to projects either approved or exempted from the *Environmental Assessment Act*. Such an approach would be inconsistent with good planning practice. The location of such facilities has to be considered taking into account their compatibility with surrounding land uses, the presence of natural heritage features and hazard lands, and other factors. In fact, the proposed provision could create a situation where a project subject to no planning oversight or approval at all if exempted from *Environmental Assessment Act*.

The provision is presumably intended to facilitate approval of energy related projects. However, it could actually have the opposite effect. The provision has the potential to create a situation where the establishment or approvals of energy related projects would be regarded as illegitimate by host communities and municipalities, as they would be provided no opportunity to voice concerns or influence siting decisions. The likely result would be to engender a high level of ongoing conflict between the facility and host community.

### **Recommendation**

- *Section 23 of Bill 51 should be deleted.*

### **Part II — Conservation Lands Act Amendments**

The Pembina Institute strongly supports the proposed amendments to the *Conservation Land Act* to permit conservation easements in relation to water quality and quantity and watershed protection and management, and to strengthen the status of conservation easements.

### **Outstanding Issues**

Bill 51 includes a number of important provisions. However, it does not address several long-standing issues related to the *Planning Act* and OMB processes. These outstanding issues include the following.

#### **The Definition of “Public Body” for the Purposes of the *Planning Act***

Amendments made to the *Planning Act* in 1996 excluded all ministries of the Government of Ontario except Municipal Affairs from the definition of “public body” for comment and appeal purposes (*Planning Act* section 1(2, 3 and 4)). The provision has the effect of preventing provincial agencies from commenting or initiating appeals in relation to planning issues without the concurrence and participation of the Ministry of Municipal Affairs. The

arrangement may prevent timely interventions by provincial agencies with expertise relevant to local planning decisions.

The ability to file comments and initiate appeals independently is particularly important in the context of source water and natural heritage protection. The Ministries of the Environment and of Natural Resources should be designated separately as “public bodies” for the purposes of the Act for these reasons.

### **Intervener Funding**

Non-governmental organizations have consistently highlighted the need to establish an intervener funding mechanism for bona fide public interest interveners in the OMB appeal process.<sup>3</sup> A separate consultative process to specifically investigate possible mechanisms and criteria for the provision of intervener funding in OMB hearings should be established.

### **OMB Appointment Process Reform**

Non-governmental organizations have also consistently highlighted the need for reform of the OMB appointments process.<sup>4</sup> The Pembina Institute is disappointed at the lack of movement on this issue in Bill 51.

### **For more information Contact**

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<sup>3</sup> See, for example, the Pembina Institute’s response to the Ministry of Municipal Affairs’ October 2005 discussion paper on OMB reform.

<sup>4</sup> See, most recently, the Pembina Institute’s response to the Ministry of Municipal Affairs’ October 2005 discussion paper on OMB reform.

