

Halton Area Planning Directors' Submission:

Review of the Ontario Municipal Board: Public Consultation Document, October 2016

November 9, 2016



Introduction

Halton Region and its member municipalities and conservation authorities (collectively known as the Halton Area Planning Directors), provide this response to the Government of Ontario's consultation document, "Review of the Ontario Municipal Board Public Consultation Document" that was released on October 6, 2016.

Previously, the Region, through the Halton Area Planning Partnership (HAPP), submitted comments to the Province in February, 2014 on the "Provincial Land Use Planning and Appeal System Consultation Document," which was the first stage of public consultation on reforms to the land use planning and appeals system in Ontario. At that time, the Government of Ontario made it clear that this consultation was not a comprehensive review of the Ontario Municipal Board, and limited municipal responses on changes to the OMB's operations, practices and procedures.

The Halton Area Planning Directors' recommendations pertaining to this first stage of reforms to the planning and appeals system included:

- Dismissing appeals that are broad and without basis;
- Scoping appeals to be specific and substantiated; and
- Re-evaluating the mediation process to require it at the front end of the appeal process and the OMB to increase mediation resources.

Building on feedback received from the first stage of consultation, the Province subsequently released and later enacted Bill 73, *Smart Growth for Our Communities Act, 2015* which amended the *Planning Act* to enable municipally-led alternative dispute resolution processes and to broaden restrictions on matters that are not appealable to the OMB. This Bill partially addressed the Region's concerns, particularly in regards to:

- Restricting certain appeals related to provincial policies and placing moratoriums on private amendments to new official plans and comprehensive zoning by-laws
- Requiring appellants to provide justification for appeals pertaining to inconsistencies with Provincial Policy Statements or non-conformity with an upper-tier Official Plan or Provincial Plan; and
- Introducing dispute resolution as a choice for Council to provide an appellant an opportunity to resolve a potential appeal prior to it being filed at the OMB.

The recently released OMB Review consultation document has proposed several changes to improve the Board's operations, practices and procedures: giving communities a stronger voice; transitioning and use of new planning rules; creating public education opportunities; modernizing procedures and promoting faster decisions; and encouraging more land use disputes to be resolved using a dispute resolution process.

The Halton Area Planning Directors commend the Province for releasing the OMB Review consultation document and support the proposed changes with respect to reforming the



Board's practices, procedures and operations. This submission provides key recommendations that the Halton Area Planning Directors consider to be critical to improve the planning and appeal system in the Province and also offers specific responses to the Province's consultation questions.

KEY RECOMMENDATIONS

While the Halton Area Planning Directors support the proposed changes in the Province's OMB Review consultation document, the Halton Area Planning Directors have identified three key changes that are of foremost importance and that must be made quickly to improve the efficiency of the Province's land use planning and appeal system:

1. SCOPING

Scoping of appeals so that they are specific and substantiated has been a continuous recommendation made to the Province over the past few years. Concurrently, the recommendation to dismiss appeals that are broad and without basis represents another frequently reiterated position from the Halton Area Planning Directors. Although Bill 73 amended the *Planning Act* in support of many previously submitted recommendations, further quality controls that further scope appeals are critical to improving OMB service delivery.

Recommendations:

In addition to supporting the Province's recommendations, the following revisions are proposed that would:

Limit appeals to:

- parts of its decisions on official plans and new official plans
- proposed amendments pertaining to implementation of Provincial Plans

Not allow appeals to:

- a municipality's refusal to amend a new secondary plan for two years;
- a municipal interim control by-law

Expand:

- the authority of local appeal bodies to include appeals related to site plans

Further clarify:

- that the OMB's authority is limited to dealing with matters that are part of the municipal council's decision (e.g. same parts of an official plan)

Require:

- the OMB to send significant new information that arises in a hearing back to the municipal council for re-evaluation of the original decision;

Dismiss:

- appeals on applications requiring concurrent approvals (e.g. local zoning and Conservation Authority permitting) where the decision of the Board will not



solely determine the final outcome of an application due to the lack of inevitability of approval for a concurrent application.

The following recommendations are provided as solutions to further improve and limit the number and length of appeals:

a. Specific and Substantiated Appeals

As stated in previous submissions, appellants must be required to submit appeals that are based on specific land use matters rather than on broad, unsubstantiated concepts. Appeal submissions should note the specific land use policy or zoning by-law that is being referenced in combination with specific solutions.

Specific actions include:

- Amending the *Planning Act* to restrict the scope of matters that can be appealed to the Ontario Municipal Board (e.g. municipally-initiated comprehensive and area wide official plan amendment).
- Amending the *Planning Act* and OMB procedures to effectively scope matters under dispute to restrict appeals that are broad and without basis (e.g. require appeal letters to provide a sound planning rationale for the appeal and include specific policy wording and mapping changes being requested).
- Restricting appeals (especially third party appeals) that implement municipal comprehensive reviews establishing urban structure.

b. Right to dismiss an appeal

The OMB should increase the practice of its right to dismiss appeals that are broad and unsubstantiated. Although this right is pre-existing within the *Planning Act*, the OMB should actively pursue this without the requirement for parties to bring motions.

c. Merit Based Appeal

The OMB should triage all appeals to establish merit for the appeal based on good planning. Appeal should be reviewed and triaged on the basis of: no hearing/dismissal; mediation; formal hearing.

2. MEDIATION

In 2014 HAPP recommended that the Province re-evaluate the mediation process given its potential for appellants to avoid costly and litigious hearings.

The Halton Area Planning Directors support the Province's proposed changes to scope and streamline OMB procedures and operations to:

- More actively promote mediation;
- Require all appeals to be considered by a mediator prior to scheduling a hearing;
- Allow government mediators to be available at all times during an application process, including before an application arrives at municipal council;



- Strengthen the case management at the OMB to better stream, scope issues in dispute and identify areas that can be resolved at pre-hearing; and to further support OMB members during hearings; and
- Create timelines and targets for scheduling cases, including mediation.

Recommendation

The Halton Area Planning Directors support the Province in reviewing and improving its service delivery model for Alternate Dispute Resolution (ADR) by providing timelines and deadlines to resolve disputes expeditiously and by increasing the number of mediators in the dispute resolution roster.

To address this, the Halton Area Planning Directors recommend specific legislative and procedural actions including:

- Amending the *Planning Act* and OMB procedures to ADR as a ‘first’ solution to resolve land use disputes rather than OMB hearings;
- Improving service delivery of mediation – improving timelines to expedite resolution of appeals;
- Ensuring a mechanism is in place to deter appellants from misappropriating the mediation process for the purposes of delaying a hearing in situations where substantive progress is not occurring and where a hearing would be more expeditious in resolving the matter;
- Establishing a merit-based approach to appeals; and
- Establish mandatory review of every appeal for mediation potential

3. DE NOVO HEARINGS

The Halton Area Planning Directors strongly support a reduction in OMB ‘de novo’ hearings. Focussing on the validity of a Council decision, rather than seeking a new decision would improve efficiencies of the OMB process while supporting local decision-making on critical land use matters.

The Halton Area Planning Directors support the Province’s recommended actions to reduce ‘de novo’ hearings by:

- Requiring that the OMB review municipal/approval authority decisions on a standard of reasonableness; and to
- Authorizing the OMB to overturn a decision made by a municipality/approval authority only if that decision does not follow local or provincial policies.

Recommendation

To effectively limit ‘de novo’ hearings the OMB should limit its review of an approval authority’s decisions on a standard of reasonableness and permit overturning an



approval authority's decision only where the original decision was not consistent with local or provincial land use policies.

To address this, the Halton Area Planning Directors recommend specific legislative action by:

- Amending the *Planning Act* to limit de novo hearings at the OMB and give validity to Council's decisions on land use matters

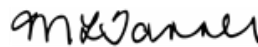
In addition to the aforementioned commentary and recommendations, the Halton Area Planning Directors have also provided detailed responses to the Province's twenty-four consultation questions in Appendix 1 attached to this submission.

CONCLUSION

The Halton Area Planning Directors appreciate the opportunity to provide comments and recommendations to the Ministry of Municipal Affairs and Ministry of the Attorney General on the OMB Review consultation. The Halton Area Planning Directors are supportive of all of the Province's contemplated changes as well as the additional recommendations specified above. The Halton Area Planning Directors expect to be consulted further on these matters so that these changes can be implemented expeditiously.



Ron Glenn, MCIP, RPP
Director of Planning Services
& Chief Planning Official
Halton Region



Mary Lou Tanner, MCIP, RPP
Director of Planning & Building
City of Burlington



John Linhardt, MCIP, RPP
Executive Director of Planning
& Chief Planning Official
Town of Halton Hills



Mark Simeoni, MCIP, RPP
Director, Planning Services
Town of Oakville



Barb Koopmans, MCIP, RPP
Commissioner of Planning & Development
Town of Milton



Barb Veale, PHD, MCIP, RPP
Manager, Planning and Regulation Services
Conservation Halton



G. Murphy

Gary Murphy, MCIP, RPP
Director of Planning & Development
Services
Credit Valley Conservation

N. Davy

Nancy Davy
Director of Resource Management
Grand River Conservation



APPENDIX 1

OMB REVIEW: CONSULTATION DOCUMENT QUESTIONS HALTON AREA PLANNING DIRECTORS' RESPONSES October, 2016	
No.	QUESTIONS
Theme 1: OMB's Jurisdiction & Powers	
Province's contemplated changes: <ul style="list-style-type: none"> OMB Jurisdiction & Powers: protect Provincial land use issues and support community decision-making Restricting appeals of municipal official plans, OPAs, ZBAs for development that supports provincially funded transit infrastructure. No appeal of a municipality's refusal of a new secondary plan for 2 years No appeal of a municipal interim control by-law Expand authority of local appeal bodies to include appeals to site plans Limit OMB authority to dealing with matters that are part of a municipal council's decision, so that the OMB may only deal with the same parts of an OP as those dealt with by Council. Decision of an approval authority reviewed on standard of reasonableness Authorizing OMB to overturn an approval authority decision if it did not follow local/provincial Requiring OMB to review approval authority decisions on a standard of reasonableness OMB Hearing – examine whether the original decision was within range of defensible outcomes within authority of approval authority All planning decisions be made on provincial legislation and planning documents and municipal planning documents in effect at the time of the decision. 	
Protect Public Interests for the Future	
Q 1	What is your perspective on the changes being considered to limit appeals on matters of public interest?
Response: <p>The Halton Area Planning Directors fully support further limitations on matters that can be appealed to the OMB in order to streamline implementation of the Province's policy-led planning system and bring stability to municipal planning documents.</p> <p>While the consultation document indicates that the Province is considering limiting appeals on provincial land use planning decisions on matters of "public interests" these interests are not fully defined in the Consultation document. It would be helpful if the Province could clearly define what specific "public interests" would be restricted from appeal to the OMB.</p> <p>For example, municipally-initiated comprehensive and area-wide official plans should be exempt from appeal.</p>	
Bring Transit to More People	
Q 2	What is your perspective on the changes being considered to restrict appeals of development that supports the use of transit?
Response: <p>The Halton Area Planning Directors support adding additional matters that can be sheltered from third party appeals including restrictions on appeals of official plans/official plan amendments, and zoning by-laws/zoning by-law amendments in order to support transit use.</p>	



In addition, not all municipalities in Halton have a transit system but are planning new greenfield and growth areas at sufficient densities to support transit use. Any legislative amendments to the *Planning Act* should be drafted in a way to ensure that these restrictions can apply to municipalities that have a functional public transit system as well as municipalities that have not yet established a public transit system.

Give communities a stronger voice

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

Response:

- a) Broaden the list of matters that cannot be appealed to the OMB (for example, all municipally-initiated official plans or official plan amendments that are made to be consistent with, or conform to, provincial policy). This will enable municipalities to bring stability to and fully implement their official plans that are in keeping with provincial interests;
- b) Empower municipalities to restrict appeals from being filed to the OMB where persons did not make oral or written submissions to a municipal council; and
- c) Dismiss appeals that lack sufficient land use planning grounds.

“De novo” Hearings

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

Response:

De novo hearings should be restricted, through legislative amendments to the *Planning Act*, to give validity to Council’s decisions on land use matters.

Other potential improvements to Board practices to limit hearing evidence ‘de novo’

- a) Clear direction to the OMB for the requirement to “have regard to” municipal decisions to provide greater deference to those decisions;
- b) Relieve the backlog of files awaiting resolution;
- c) Institute rules of practice and procedure regarding the treatment of new evidence brought to the Board; and
- d) Institute procedural controls to make the process less litigious.

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

Response:

Use mediation or alternative dispute resolution to move away from a litigious process to a process of negotiation and dialogue focussed on scoped issues leading to good planning solutions.

The OMB should be required to review municipal/approval authority decisions on a standard of ‘reasonableness’.

The ‘threshold test’ that must be met before the OMB can overturn such decisions should be raised.

Transition and Use of New Planning Rules

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



	<ul style="list-style-type: none"> • 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?
<p>Response:</p> <p>Support applying policies at the time a decision is made to ensure that the most up to date planning documents are applied.</p> <p>Support applying Bill 51 changes to applications made prior to 2007 to ensure that the most up to date provincial policies apply to these older applications.</p>	
Theme 2: Citizen Participation & Local Perspective	
<p>Province's contemplated changes:</p> <ul style="list-style-type: none"> ▪ <i>Expanding the CLO – retaining more staff; might include more in-house planning experts and lawyers who would be available to the public (subject to eligibility criteria)</i> ▪ <i>Explore funding tools to help citizens retain their own planning experts and/or lawyers</i> 	
Q 7	If you have had experience with the Citizen Liaison Office, describe what it was like — did it meet your expectations?
<p>Response:</p> <p>No comment.</p>	
Q 8	Was there information you needed, but were unable to get?
<p>Response:</p> <p>No comment.</p>	
Q 9	Would the above changes support greater citizen participation at the OMB?
<p>Response:</p> <p>True reform to the land use planning and appeal system should focus on increased citizen participation in policy development and/or development application processes to avoid appeals and dispute resolutions.</p>	
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?
<p>Response:</p> <ul style="list-style-type: none"> • Provide clear direction on options for participating in an OMB process. • Information on how to avoid going to OMB or requiring mediation. • Expand on this material and include more information regarding the complexity and potential costs for an appeal. • Improve the navigation of the Board's website, making it easier to find relevant material. • Information on: <ul style="list-style-type: none"> - what constitutes a substantiated 'land use planning' argument and what does not; - what expert(s) and evidence may be required to assist citizens in representing their interests in mediation, alternative dispute resolution, and Board proceedings; and - party and/or participant status. <p>Recommend that the government hold focus group or to expand the citizen liaison office to assist citizens who have attempted to appeal decisions for the first time.</p>	



Q 11	Are there funding tools the province could explore to enable citizens to retain their own planning experts and lawyers?
Response: Yes, only if the OMB finds merit in the application/appeal to minimize frivolous types of participation in an OMB process.	
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?
Response: The appeal must be assessed by the OMB to have legitimate planning merit that mediation and or ADR have been unsuccessful, only then should there be consideration for support. The support could be in-kind or from a pool of experts that the province could retain.	
Theme 3: Clear & Predictable Decision-Making	
Province's contemplated changes:	
<ul style="list-style-type: none"> ▪ Reintroduce multi-member panels who represent a broad range of skills/backgrounds to ensure clear/predictable decision-making at OMB: <ul style="list-style-type: none"> - Having multi-member panels only conduct complex hearings; and - Having multi-member panels conduct ALL hearings. 	
Multi-member Panels	
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?
Response: If it is a multi-member panel, then an array of expertise may be warranted e.g. planner, lawyer, ecologist, architect/urban designer, land economist. There may be opportunities to include a citizen participant (non-impacted) to provide community perspective. The OMB needs to focus on good planning outcomes, and the OMB appointments should reflect this.	
Q 14	Do you believe that multi-member panels would increase consistency of decision-making? What should be the make-up of these panels?
Response: Multi-member panels may be warranted for larger, complex hearings to help streamline decision-making. A broader range of experience as noted in Q13 may assist in understanding different perspectives.	
Q 15	Are there any types of cases that would not need a multi-member panel?
Response: Appeals of site specific development applications (not involving multiple parties), minor variances, consents, site plan.	
Q 16	How can OMB decisions be made easier to understand and be better relayed to the public?
Response: Decisions should be written in plain language without use of legal or planning jargon. Decisions should be clearly worded as to what the decision is, what the order is, and what it does.	



Greater clarity and improved timing could be achieved where the Board makes decisions that are “in accordance with Exhibit X”, the relevant document may or may not be attached to the decision. The public does not necessarily have good access to the documents, nor staff, who at a later date must contact the Board to have a decision reissued with attachments, resulting in delays.

Board decisions should be issued in a timely manner and be subject to metrics.

The Board’s website could also be enhanced to provide more user-friendly information to the public.

Theme 4: Modern Procedures & Faster Decisions

Province’s contemplated changes:

- To see a less formal/adversarial culture at hearings, changes may include:
 - Allowing OMB to adopt less complex and more accessible tribunal procedures; and
 - Allow active adjudication (e.g. explain rules/procedures; scope issues and evidence; question witnesses).
- Other ways to modernize procedures and promote faster decisions:
 - Setting appropriate timelines;
 - Increasing flexibility for how evidence can be heard;
 - Conducting more hearings in writing in appropriate cases;
 - Establishing clear rules for issues lists to ensure that hearings are focused and conducted in the most cost-effective and efficient way possible (issues list: details specific questions related to the concerns raised by parties to the appeal); and
 - Introducing maximum days allowed for hearings.

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

Response:

Merit assessments should be completed within 30 days of receipt of a complete appeals package.

If improvements are made to the appeal system wherein appeals are scoped and substantiated, then the ‘nature of appeals’ will be altered and the timelines for resolutions shortened. For example, Committee of Adjustment appeals should require less hearing time.

A greater number of OMB members would help deal with backlog cases by providing more hearing opportunities and giving more time for decisions to be written.

Limiting the number of expert witnesses within the same discipline would save hearing time.

180 days of receipt of a complete appeals package to scheduling of first hearing represents ½ year in which an official plan or zoning by-law is not in effect. Perhaps the 180 days should represent the maximum permissible time to schedule a first hearing rather than the target time.

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

Response:

The government needs to approach the problem as an operational business process problem if it contemplates ‘modernization’ of practices. If the goal is to improve ‘service delivery’ to the public, then significant process and operational changes to scope matters that appear before the Board, to improve



and streamline administrative and business practices, and to enable alternative dispute resolution are required.

Amend rules to allow for a docket or split-day style hearing that would allow multiple matters to be heard on the same day. This would be in a manner similar to court scheduled matters.

Allow the possibility for matters to be heard in a neighbouring municipality where a short hearing is already scheduled.

Greater consistency on procedural matters such as the submission of new evidence, the appearance of new parties, the status of municipal guideline documents and the requirement to send matters back to Council.

Greater authority for municipal clerk to make administrative determinations such as if an appeal is valid (i.e. within time frame, complete, etc.) instead of relying on the OMB staff and their internal processes. A change like this would require "Internal Procedure" be formalized by the Board and a commitment to using it to prevent non-appeals from actually becoming appeals.

Improve consistency and transparency in scheduling practices with standardized protocol for canvassing availability and scheduling recommendations. Matters should be scheduled according to a queue and based on the OMB's calendar. The schedule should not be dictated by numerous counsel conflicts that are virtually impossible to accommodate. Similar to court proceedings, a date is booked and parties must make themselves available.

Update service requirements, to clarify that personal service, courier, etc. permitted. Also explicitly permit the use of file sharing services when serving by email given the sizes of different documents.

Greater scrutiny where summons are requested for the planner, senior planner, manager and director, when all are related to the same matter.

Require that if there is to be a challenge to a proposed expert's ability to be qualified, that advance notice of such a challenge be required and a motion in advance be required if not resolved.

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

Response:

Arguments in support or defence of a decision are documented in Witness Statements as well as in the responses to Witness Statements. Oral hearings represent a model of litigious and adversarial "court style" proceedings with the need for legal counsel to cross-examine witnesses that are not required in all cases, e.g. consent matters or questions of law.

Theme 5: Alternative Dispute Resolution (ADR) & Fewer Hearings

Province's contemplated changes:

- To encourage more land use disputes be resolved through ADR that will lead to fewer/shorter OMB hearings by:
 - Actively promoting mediation
 - Requiring all appeals be considered by mediator prior to scheduling hearings
 - Allowing mediators to be available at all times during an application process, including before an application arrives at municipal council, to help reduce number of appeals



<ul style="list-style-type: none"> - Strengthening the case management at the OMB to stream, scope issues in dispute and identify areas that may be resolved at pre-hearing and to support OMB members during hearings - Creating timelines/targets for scheduling cases, including mediation 	
Q 20	Why do you think more OMB cases don't settle at mediation?
<p>Response:</p> <p>In large measure this is a function of business decisions of stakeholders who may not see any gain in settling an appeal through mediation if their business plan forecasts better outcomes through protracted and prolonged hearings</p>	
Q 21	What types of cases/situations have a greater chance of settling at mediation?
<p>All cases where there is merit in the appeal, and valid planning grounds. In particular, site specific applications may be easier to settle in mediation.</p>	
Q 22	Should mediation be required, even if it has the potential to lengthen the process?
<p>Response:</p> <p>Yes, mediation should be utilized even if there is the potential to lengthen the process. It should be about a good planning decision. As well, participants must be willing to undertake this process.</p>	
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?
<p>Response:</p> <p>A Board should have dedicated resources to ensure that applications are reviewed for merit and scope. Appeals that have merit should be assessed for mediation and hearing. Appeals that are beyond scope should be refused.</p>	
GENERAL	
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?
<p>Response:</p> <p>The Province should be commended for bringing forward solutions to improve the scope and effectiveness of the OMB as proposed in this Consultation document. Recommend that the Region's and its member municipalities suggested changes to Board practices and procedures be implemented quickly and efficiently.</p> <p>Appeals to the OMB due to lack of decision – in many cases, the municipality deems the application complete however, the technical studies are subpar. The technical arguments end up being debated at the OMB. This should be reduced by having the mediation up front, before the Board is involved (and by having the municipalities review the technical studies for completeness before declaring the application complete)</p>	

