

AMO's Quick Guide for Responding to the Provincial Review of the Ontario Municipal Board

In October 2016, the Ministries of Municipal Affairs and the Attorney General released a [Public Consultation document](#) to solicit comments on the scope (what it deals with) and effectiveness (how it operates) of the Ontario Municipal Board ("OMB", "Board"), an important part of the Province's current land use planning system.

The review is conducted by Ministry of Municipal Affairs and the Ministry of the Attorney General. Their purpose of the review is to build on past improvements to ensure the Board can contribute within the system to its best effect. As such, the Review has been organized according to five themes such as jurisdiction and powers, decision-making, and alternative dispute resolution.

In anticipation of this review, in June 2016, AMO adopted a report entitled, "[OMB Reform: Maturing Roles Discussion Paper](#)". The following is to assist municipal representatives in responding to the provincial review, either in written submissions or in provincial consultation round-table discussions. AMO will be providing its submission as well.

AMO'S GUIDING PRINCIPLES FOR ITS REVIEW WORK

1. Municipalities are a mature order of government. They have taken on a more rigorous role in land use planning over the years. This requires a transformation of the OMB's roles and procedures.
2. The planning process in Ontario has been and should continue to be public and democratic. However, the Board has not kept up with the intent of legislation to recognize and respect the municipal decision making role and this needs to be reinforced.
3. Should there be a situation where the OMB believes it needs to supersede municipal decisions, then it must ensure fair and equitable participation by local community members, and that decision-making processes include the public.

PROVINCIAL THEMES FOR IT'S OMB REVIEW

THEME 1: OMB'S JURISDICTION AND POWERS

Under this theme, the Province has provided suggestions on how to limit the jurisdiction and powers of the OMB.

AMO supports limiting the ability to appeal amendments to planning documents that implement provincial interests. However past experience has been that outcomes at the OMB often do not reflect the intent of the legislation. We have yet to see if the direction of Bill 73 – *Smart Growth for Our Communities Act* will actually curtail appeals of amendments implementing provincial interests.

AMO recently undertook a review of OMB appeals¹ that demonstrated that only nine percent of appeals are successful at an OMB hearing, with the majority being settled before hearing, withdrawn, or deemed invalid. This suggests that one source of concern with the OMB may be its role and how the creative tension of appeals are leveraged by the parties.

The Province is proposing to exclude Committee of Adjustment decisions from OMB jurisdiction, and strengthen the role of Local Appeal Bodies. Minor variances and consents form a significant amount of appeals received by the OMB, with more than two thirds coming from central Ontario. If Toronto sets up its own Local Appeal Body, it is possible that this would relieve pressures at the OMB.

Planning matters dealt with by Committees of Adjustment (or equivalents) have much higher rates of appeals being dismissed and deemed invalid at the OMB. Most of these applications are never considered by Councils before the appeal proceeds to the OMB. In addition to the current option to create Local Appeal Bodies, the AMO is proposing that municipal councils should also be allowed to be the appeal body for Committee of Adjustment. While the *Planning Act* allows municipalities to develop a local appeals body, none have been created primarily citing financial barriers. The Province should support the establishment of these local appeals bodies through enabling funding.

Regarding the provincial proposal to require the OMB to return an amendment to Council when significant new information is submitted, this is already included in the rules for the OMB. Furthermore, recent changes have required applicants to submit complete applications to municipal councils before local decisions are to be made. The OMB must have regard to the information that was in front of the council when it made its decision. However, during the pre-hearing and hearing processes, new evidence introduced by any party as a means to interpret the information presented within the complete application has been allowed. The OMB must use their powers and report to a greater extent on the rationale for their decisions to allow this. OMB Board members have a responsibility to ensure that new material/evidence is not introduced.

The Province is also suggesting a shift away from 'de novo' hearings. It is AMO's position that the OMB already has the powers to do this, and to ensure it occurs the Board must be compelled to do it by removing the permissive language. Civil action cannot be the consequence of scoping the Board in this manner. This would be costly and time consuming. Improving the OMB, strengthening council decisions as the right planning decision, along with greater reporting and transparency and accountability of the OMB is needed if the OMB is to remain an adjudicative body. Routine public reporting from the OMB would help the citizens and municipal governments better understand the OMB rationale for decisions and precedents.

¹ This study is available on the AMO [website](#). This work is based on a sample of appeals to the OMB between 2013 and 2015.

THEME 2: CITIZEN PARTICIPATION AND LOCAL PERSPECTIVE

The Province is suggesting expanding the Citizen Liaison Office, which helps the public understand what the OMB does and how to participate in the process. It is also considering funding tools to help citizens retain their own planning experts and lawyers.

AMO believes that there is always room to improve the experience of a citizen trying to navigate the OMB processes. AMO recommends a strong case management process that, as part of assessing the planning merits of the appeal, could work with citizens to explain the status of the file and what they can expect. For example, hearing preparation guides similar to those used for drainage hearings could be helpful. Funding mechanisms associated with the various boards that provide for interveners could be explored.

Some jurisdictions including Borough of Hounslow in London, and Information Commissioners Office in the UK, have clear checklists to screen out appeals without merits, specifically those that are frivolous and vexatious.² AMO recommends that Ontario adopt such a list which would help citizens understand what constitutes a viable appeal.

THEME 3: CLEAR AND PREDICTABLE DECISION-MAKING

The Province is considering increasing the number of OMB adjudicators and ensuring they possess necessary knowledge and skills by providing further training.

AMO would strongly support these proposed changes. The effectiveness of the OMB as an appeal agency for planning disputes is dependent on parties seeing hearing officers as being credible, reliable and independent. Therefore, the provincial government must ensure that the OMB appointment process is seen as consistent, transparent and relevant to all stakeholders. The Province should seriously consider developing a competency profile for the knowledge and skill set that a member hearing planning issues should hold. It starts with provincial appointments. Most entities have competency profiles for board members, the Province should as well.

Board members tend to be lawyers. They bring skills. Many board members do not have land use planning experience. This reinforces the perception that the OMB is about “good lawyering rather than good planning”. Breaking this perception is important to the success of any changes.

In addition, the OMB should ensure that Board members have ongoing training on OMB subject areas, including legislative changes and ensure that staff performance measurement is taking place. Training should be an ongoing effort to ensure that Board members fully understand and can utilize their powers, such as not adding new parties to cases who have not participated in municipal consultation on a matter.

² In Britain, the ICO has [guidance](#) that could be re-purposed to the types of situations the OMB may face.

If the breadth of issues in question at a hearing requires a return to a multi-member panel, then the OMB should do so in order to get the scope of knowledge and skill required to achieve a quality result.

Some argue that the practice of two-year appointments to the Board is too short. AMO recommends that the Province should lengthen appointments to four year terms with possible renewals in keeping with the current limit. Evaluation of how the objectives of the legislation are being achieved should be built into a term renewal process and form part of ongoing performance metrics.

While the OMB is a quasi-judicial body and this framework is important given the impacts of its decisions, there nevertheless is an obligation for the processes of the Board and the interaction with the legislative provisions to be effectively monitored and reported publicly. Plain language explanations of both process and outcomes should be instituted.

THEME 4. MODERN PROCEDURES AND FASTER DECISIONS

The Province is suggesting OMB hearings should be less formal and less adversarial. As well, they are considering ways to modernize procedures and promote faster decisions.

AMO agrees. To achieve this, AMO believes that a robust pre-screening process for all appeals is needed. This process would screen for the merits of the appeal. In other words, the OMB could not proceed with a hearing or mediation if appeals have no land use planning merits or are frivolous and vexatious. Through the pre-screening process, appeals that have land use planning merits should be sent to mandatory mediation in appropriate circumstances.

The OMB must place very strict limitations on attempts to introduce new materials or parties to the application during pre-hearing and hearing procedures.

Strengthening case manager role or asking Board members to also act as case managers should be explored. Case managers could educate participants on the OMB process and help to set expectations regarding the length of the process and possible costs for participation.

THEME 5. ALTERNATIVE DISPUTE RESOLUTION AND FEWER HEARINGS

The Province is encouraging the use of alternative dispute resolution in order to reduce the number and duration of OMB hearings.

AMO would agree that alternative dispute resolution should be encouraged. A significant number of appeals are dismissed or deemed invalid, however, in many cases these were not deemed as such until after a pre-hearing or hearing. As noted above, when appeals are first received by the OMB, there should be a pre-screening process using clear criteria utilized by case managers. Appeals must be able to identify specific procedural or land use planning grounds for the appeal.

During this pre-screening process, criteria should be applied to identify the best process for a timely decision, including pre-hearing, mediation, or move directly to hearing. Mediation should be sought often as the ideal dispute resolution process. Given the high number of cases that are settled, it is possible that parties involved in appeals have much in common and additional time or support outside of formal OMB processes is often needed. A robust alternative dispute resolution process should be in place prior to an appeal becoming a case.

AMO'S GENERAL CONCLUSIONS:

1. Address why the existing authorities and powers of the OMB have not been fully implemented. We have moved the yardsticks in the past but the outcomes remain almost the same. This review has to be more substantive with demonstrable outcomes.
2. Scoping the authority of the OMB so official plans or secondary plans are indeed considered 'official' needs to be firmly established.
3. Administrative practices, transparency and accountability can be vastly improved.