by Leo F. Longo

Should the OMB be abolished?

Within the last 12 months, both Mississauga[1] and Toronto[2] city councils have passed resolutions seeking the abolition of the Ontario Municipal Board. In both instances, similar refrains were articulated and accusations leveled that the board is undemocratic, unelected, unaccountable, and unnecessary.

Are these criticisms valid?

The board's jurisdiction and hearing process have been periodically reviewed by the province,[3] resulting in some enlarged[4] or abridged[5] powers, and certain appeal rights being removed.[6] In addition, sections 1.1 (f) and 2.1 of the *Planning Act* provide:

> 1.1 The purposes of this Act are,
>
> . . .
>
> (f) to recognize the decision-making authority and accountability of municipal councils in planning.
>
> . . .
>
> 2.1 When an approval authority or the Municipal Board makes a decision under this Act that relates to a planning matter, it shall have regard to,
>
> (a) any decision that is made under this Act by a municipal council or by an approval authority and relates to the same planning matter; and
>
> (b) any supporting information and material that the municipal council or approval authority considered in making the decision described in clause (a)."[7]

Notwithstanding all of the above, these statutory provisions and reforms have not silenced the board's critics. In addition, board decisions in certain "high profile" cases have acted like lightning rods, attracting calls for significant board reform or abolition from the segments of those communities who considered themselves aggrieved by such rulings [usually including the unsuccessful party at the board].[8]

Examining the Criticisms

Let's examine each criticism:

Unelected – Board members are appointed by the provincial government (now in accordance with the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*).[9] Judges are appointed by our provincial and federal governments. Under our common law heritage, judicial and quasi-judicial administrative determinations have never been made by elected individuals. We have always left it to those we elect to select our judges and tribunal members. That is a fundamental component of and consistent with our democratic system of governance.

Unaccountable – While the provincial government appoints and can remove board members, our common law traditions also call for quasi-judicial administrative tribunals, such as the OMB, to be independent and to act fairly and impartially in exercising their jurisdiction. Board decisions are judicially reviewable.[10] Under certain circumstances, board decisions can also be reviewed by the province.[11] All of this is a fundamental component of and consistent with our democratic system of governance.

1 Mississauga Resolution 0176-2011, June 22, 2011; see <http://mississauga.ca/file/COM/Resolution0172-2011.pdf>.

2 Toronto Resolution, Item PG9.11, February 6, 2012; see <http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2011.PG9.11>.

3 Numerous reviews over the past three decades by the Provincial Standing Committee on Government Agencies that considered the role and practices of the board have been undertaken. For the most recent review, see the September 8, 2009 Hansard account of the Standing Committee's proceedings: <www.ontla.on.ca/committee-proceedings/transcripts/files_pdf/08-SEP-2009_A032.pdf>.

4 For example, see the board's new powers respecting ruling on the "completeness" of certain development applications: *Planning Act*, R.S.O. 1990, c. P.13, ss. 22(6.1)-(6.5); 34(10.4)-(10.8) and 51(19.1)-(19.5).

5 For example, see the *Planning Act*, R.S.O. 1990, c. P.13, s. 17(50.1), which limits the board's powers to modify an Official Plan.

6 For example, see the *Planning Act*, R.S.O. 1990, c. P.13, ss. 17(24.1) and (36.1) and 22(7.1)-(7.3) respecting "second unit" residential policies, employment land conversions, and settlement area expansions.

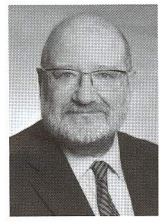
7 Judicial consideration of section 2.1 concluded that much stronger statutory language would be required to mandate greater deference being given to municipal council planning decisions by the board; see *Ottawa (City) v. Minto Communities Inc.*, 2009 CanLII 65802 (Ont. Div. Ct.).

8 See the Toronto "Queen West" [January 10, 2007; Case File No. PL051230] and Ottawa "Manotick" [April 8, 2009; Case File No. PL080373] board decisions.

9 S.O. 2009, c. 33, Schedule 5.

10 See the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2 and the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, s. 96.

11 See the *Planning Act*, R.S.O. 1990, c. P.13, ss. 17(51)-(54) and 34(27)-(29.1).



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Undemocratic – The land use planning process in Ontario is a remarkably open and accessible one. Applications and filed supporting materials are made available to the public. Prior to council decisions being made, public meetings must be held with prior public notice. Public deputations and written submissions are considered. Notice of council's land use planning decisions must be provided. Broad rights of appeal to the board are granted to both the applicant and any opposition.

The board process is open and accessible, too. That certain parties may have greater resources than others to participate more fully at the board raises a broader societal issue (like access to the courts) than proof that the board is undemocratic.

Critics suggest that applicants can and do, in effect, by-pass council by waiting the minimum statutory timeframe within which a decision is to be made on an application and then taking their case directly to the board. While this may have been valid in the past, the minimum timeframes have been extended and the appeal "clock" does not even begin to start until a "complete" application has been filed with the municipality.

See also the discussion below concerning the board's ability to overturn an elected council's decision.

Unnecessary – See below under "Should the OMB be abolished?"

Can the OMB be improved?

Absolutely.

The board exercises only the jurisdiction given to it by the province. The board does not "assume" jurisdiction. If it were decided that fewer matters ought to be appealable to the board, the province could so limit those matters after proper consultation with all affected stakeholders.

It must always be remembered, however, that Ontario's land use planning system is one "led by provincial policy"[12] and requires integration of "matters of provincial interest in provincial and municipal planning decisions."[13] It is doubtful that the province would leave to municipalities the un-appealable right to apply provincial policies and to determine and address provincial interests.

The board's appeal and hearing process can be formal, lengthy, and expensive. Yet, the board already has many tools available to it to control its process. More rigorous and creative use of its prehearing conferences and mediation alternatives might lead to more expeditious, less expensive, and just determinations of the matters coming before the board. Actual hearings can be better managed and conducted.

Attracting and retaining well-qualified and knowledgeable individuals to serve on the board is an ever-present challenge. The current "2-3-5 and out" system of appointment and term needs to be refined. Board member compensation should be commensurate with the judiciary.

Should the OMB be abolished?

Absolutely not.

Land use planning decisions define the communities we live in and deal with fundamental individual property rights. The financial and social stakes involved in any particular development application can be enormous.

As such, if the board were to be abolished, it is hard to conceive that applicants would not demand that council give their applications the full attention and consideration that same deserve. Those in opposition would seek similar treatment. In this era of "complete applications" with well-documented supporting materials, applicants would request a meaningful opportunity to present their "case" in full to council and test and respond to opposing views that might be submitted by municipal staff or the public. Currently, councils are ill-equipped and disinclined to expend the time and resources necessary to offer such consideration.

The criticism often leveled at the board is that it is manifestly undemocratic for an appointed board to substitute its opinions for the considered judgment of elected councillors. This presumption of "considered judgment" is often illusory, especially in municipalities like Toronto where its political culture has ward councillors respecting each others' "turf," and planning decisions frequently being based upon narrow local and/or most vocal interests.

Furthermore, even if a "full consideration" scenario was ever followed, municipal decisions respecting land use planning decisions would still be sought to be challenged by those unhappy with the result.

If the board were to be abolished, such challenges would be made to either the court or the provincial government. Would that improve matters? Not likely. The court system is currently no better equipped to render more expeditious and less expensive determinations than is the board. As well, most judges are unfamiliar with the specialized area of law and policy affecting land use planning.

12 *Planning Act*, R.S.O. 1990, c. P.13, s. 1.1(b).

13 Ibid., s.1.1(c).

OMB, cont'd on p. 36

OMB, cont'd from p. 18

The provincial legislature created the board in the first place in order to lessen the demands being placed on Queen's Park to deal with railway and municipal matters. Establishing an independent administrative tribunal with specialized expertise in these areas greatly improved the management and disposition of such matters. Without the board, the provincial cabinet would likely become overburdened with requests to review those municipal decisions that have far-reaching economic or societal effects.

Ongoing Necessary Role

Until the current municipal political culture changes, and balanced and informed decision making around land use planning by councils becomes the norm, the Ontario Municipal Board will continue to be a necessary and effective administrative tribunal. It has an important role in addressing and determining significant land use planning matters while weighing the myriad of competing public and private interests affected by same.

Both the Mississauga and Toronto resolutions called upon the province to hold public consultations prior to considering their respective requests concerning the abolition of the board.

In his September 2, 2011 response to Mayor McCallion's letter forwarding the OMB abolition resolution, then Minister of Municipal Affairs and Housing Rick Bartolucci shared his ministry's perspective on the OMB. He advised that there are no immediate plans for significant changes to the planning system and its appeal components and noted:

> The OMB is an independent adjudicative tribunal. Its main role under the *Planning Act* is to adjudicate land use planning disputes. Its decisions seek to balance a number of competing public-policy objectives based on the evidence presented, local land use planning policies, and provincial interests. In balancing competing interests, the board's decisions are likely to be contentious and unpopular with some of the participants and/or public who may have an interest in the matter before the board.

While administrative responsibility for the board rests with the Attorney General, Minister Bartolucci's response is no doubt indicative of the provincial government's current thinking about the ongoing existence and role of the Ontario Municipal Board. MW