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Towards A More "Reasonable" Ontario Municipal Board: Looking To Nova Scotia

Edward LaRusic
Ryerson University

TOWARDS A MORE "REASONABLE" ONTARIO MUNICIPAL BOARD: LOOKING TO NOVA SCOTIA

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Edward LaRusic, BA, Dalhousie University, 2009

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ABSTRACT

The powerful Ontario Municipal Board (OMB, or the Board) has long been maligned as an unelected provincial body with the authority to meddle with local land-use planning decisions. Concurrently, politicians have been accused of abusing the purpose of the OMB by pushing politically contentious decisions on the Board, rather than oppose an active neighbourhood association. This paper argues that these issues stem from the Board's "standard of review", which guides the OMB to make the "most correct" decision, sometimes in opposition to the municipality. If the OMB adopted a standard of review of "reasonableness" when reviewing land use planning appeals like the Nova Scotia Utility and Review Board does, much greater deference would be given to municipalities by the Board. This would keep the expertise of the OMB intact, without the radical impacts to development that may accompany the creation of a new process for appealing municipal decisions.

Key Words: Ontario Municipal Board; standard of review; planning; appeals; legitimacy

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Finally, I would like to acknowledge that chair under the stairs that I spent most of 2nd year sitting in. You were a good chair.

I'll miss you the most.

DEDICATION

To Seema,

my rose, my support, my love.

TABLE OF CONTENTS

Chapter 1: Introduction

1.1 Setting the Context

In May of 2011, a road in Toronto was finally awarded the name "Johnson Farm Lane"(Rider, 2011). As unassuming as that name may be, for the people who were planning to move into the freshly built townhouses along the road it was certainly better than the *first* suggestion.

In August 2005 Churchill-Basswood Developments went to the Ontario Municipal Board (OMB, or the Board) to appeal a decision made by the North York Community Council (NYCC), one of four City of Toronto "community level" council committees that makes local planning decisions in the area formerly known as the City of North York (now dissolved with other municipalities when the City of Toronto was created in 1998). The developer believed that their particular parcel of land was suitable for 38 three-story townhouses.

The NYCC and their municipal planning staff disagreed. Their position was that the proposed development lay outside the area that had been designated for such construction. After hearing the evidence from both parties, the OMB approved the construction of 36 units, with some additional measures to be taken to respect the privacy of a neighbouring property (Churchill-Basswood v. City of Toronto 2005). Councillor John Filion, a NYCC member, did not take the news well. In an act of protest against the OMB for what he believed to be an "absurd and ridiculous" decision, he made a motion to name the new road that would be constructed within the development "OMB Folly".

Councillor Filion was later quoted in the Toronto Star, where he expanded on why he was so angry at the Board, saying that he felt the decision set a bad precedent:

> *Other developers will follow the lead and say, `Let's just run off to the Ontario Municipal Board and see if we get a crazy decision, too.' It's worth it for them to gamble $50,000 on an OMB hearing and roll the dice (Moloney, 2008).*

Councillor Filion was unhappy that a planning decision that the NYCC had made, supported by their planning staff, was overturned at the Board. "OMB Folly" is probably one of the more memorable shots at the quasi-judicial tribunal. However, for all the vitriol that has been slung at the Board over the years, it is not a secret that the OMB has served as a scapegoat for municipal councillors to take advantage of.

In 2004, Sherway Gate Development Corporation (SGDC) submitted a proposal to build four condominium towers, known as "One Sherway", to the Etobicoke York Community Council (EYCC), a body much like the NYCC but for the old cities of Etobicoke and York (which were dissolved when the new city of Toronto was established). The proposal had the support of the EYCC ward councillor, Peter Milczyn, and City planning staff. What the proposal *did not* have was the support of a nearby neighbourhood called Alderwood, As Moore notes, the objections from the Alderwood community were known, and dismissed by city staff:

> *In its report, City Planning noted that any limited shadow cast by the buildings would fall solely on the Toys R Us and Sherway Gardens. The report also noted that the Queen Elizabeth Way (QEW), a major expressway that separates the site from the Alderwood community to the south, produced far more noise than any possible generated by the new development. Finally, City Planning had accepted a traffic study from the developer, which concluded that the existing road network in the area could accommodate any increase in traffic resulting from the development. City staff noted that the SGDC had already committed itself to a minimum of $500,000 for provision of open space and public art under section 37 of the* Planning Act. *(Moore, 2009a: 11)*

The EYCC ward councillor for the Alderwood community, Mark Grimes, opposed the development, and he and seven of the ten EYCC members rejected the proposal. The developer, SGDC, appealed the decision to the OMB (Sherway Gate Development Corporation v. Toronto, 2005). Moore again:

> *Typically, neighbourhood opposition to a development emerges in the same ward as the proposed development. In this instance, there was limited opposition to the development in Councillor Milczyn's ward, so he was free to support the development without repercussion to his standing with residents in (Alderwood). The opposition arose from the community to the south of the proposed development… Councillor Grimes clearly felt pressured to oppose the development." (Moore 2009a: 11)*

Herein lies the other side of the OMB coin: while it can potentially frustrate a municipality by overriding what might be considered their "reasonable" planning decision, the "One Sherway" case illustrates how municipalities may make what might be considered "unreasonable" planning decisions. Such has often been the critique of the OMB. With it, democratic decision making is stifled. Without it, NIMBYism would run rampant, as developers find themselves shut out by councillors who instead bow to pressure from anti-growth coalitions. This paper suggests that both extremes can be addressed simultaneously by modifying the OMB's "standard of review" of municipal land use planning decisions.

1.2 The Purpose of This Paper

A "standard of review" is a legal term that essentially communicates the various potential levels of *deference* that a court gives to a lower court/tribunal when reviewing a decision. The standard of review of municipal land use planning decisions by the OMB, as this paper sees it, is one that approaches *correctness.* The OMB generally hears each case *de novo*

(in other words, from the beginning) and because of its ability to substitute its own decision for that of the municipality, the Board seeks to make the most *correct* decision it can. There is no guarantee of *deference* to the municipality's decision.

Nova Scotia has its own quasi-judicial tribunal, the Nova Scotia Utility Review Board (NSURB), that performs a similar function to the OMB. One major difference, however, is that its standard of review of municipal land use decisions is *reasonableness.* When the NSURB reviews a municipality's decision, it makes a judgment as to whether it was a "reasonable" one or not. If so, the NSURB gives *deference* to the municipality's decision and denies the appeal. If the municipal decision is deemed *unreasonable*, the appeal is allowed.

This paper proposes that changing the OMB's standard of review from "correctness" to "reasonableness" would both empower municipalities with the confidence that good land use planning will be respected at the OMB, while maintaining the OMB's role in ensuring that developers and citizens have the ability to appeal "bad" municipal land use planning decisions. In relation to the "OMB Folly" decision, a standard or review of reasonableness may have upheld the NYCC's decision. At the same time, the case of "One Sherway" may have been still allowed the appeal on the basis that the municipality was not acting reasonably.

Further encompassing this change is this paper's belief that such a change is not only better in terms of municipal planning, but that it serves a nobler purpose: it would lend more "legitimacy" to OMB decisions. Legitimacy in the context of this paper refers to the normative concept that decisions by political actors refer "to some benchmark of acceptability or justification of political power or authority" (Fabienne, 2010).

In plainer terms, those observers of a political decision (such as a land use planning decision) believe that the process was *fair*. They may not agree with the decision, but they believe that the body (whether it be a municipality of provincial board) has justified its *coercive power* (Fabienne, 2010). Elections are a common example of how politicians justify their "coercive power": the electorate gives the politicians it elects the authority to enact laws and levy taxes. Federal judges in Canada, in contrast are seen to get their "legitimacy" from having such attributes as judicial experience, moral character, and appointment from an elected Federal government ("Federal Judicial Appointment Process" 2005).

But there are obvious limits on coercive power; we would not easily accept the City of Mississauga to conscript young persons into a militia, and likewise we expect our federal judges to tie decisions to our Constitution and Charter of Rights and Freedoms rather than from personal ideology. Given this starting point, where does the OMB get its "legitimacy" and what are its limits? This paper proposes that changing the OMB's standard of review would lend its decisions more *legitimacy*. Such a change would make its decisions less controversial, an important factor when considering that if one believes the OMB *should* dismiss appeals where the city is found to have acted "reasonably", then by definition every appeal it does hear will have been judged *unreasonable*.

1.3 Central Research Question, and Chapter Breakdown

The central research question this paper will be examining is: "how could changing the standard of review from 'correctness' to 'reasonableness' at the OMB improve land use planning in Ontario?" It will examine this question in two parts. First, the paper will show *how*

the current standard of review can potentially overturn "reasonable" municipal land use planning decisions while still allowing municipal politicians to use the OMB as a depository for politically contentious ones. Second, the paper will show that changing the standard of review used by the OMB could better support the legitimacy of land use planning decisions in the province. If changing the standard of review represents the *how*, then exploring its effect on the legitimacy of land use planning decisions represents the *why*. The following outline describes how this paper will unfold.

Chapter Two will conduct a short literature review on two areas: the different boards (OMB and NSURB), and literature related to "legitimacy". The former is important to juxtapose the public image of the OMB against scholarly examinations of the Board, as well as for comparison purposes with the NSURB. Exploring legitimacy is salient in explaining much of the criticism of the OMB, given their relationship as being between elected municipal body and an appointed provincial one.

Chapter Three will explore the history of the OMB and land use planning in Ontario, as well as briefly examining how land use appeals work in other provinces. In doing so, this paper will examine how the OMB's standard of review evolved into the state it is today, and how it compares across Canada, and why comparing the OMB to the NSURB is more appropriate than comparing their appeals process to those found in Quebec or British Columbia.

Having fully set up the context around the OMB and the NSURB, Chapter Four will show how the standard of review that each body uses relates to the legitimacy of their decisions. This section will delve into case law from both boards and higher courts to legally define the

standards of review of both “correctness” and “reasonableness” in the context of both bodies, and then show how they strengthen (or weaken) each board’s respective “legitimacy”. This paper will justify its claims using selected cases from the OMB and the NSURB, as well as discuss the strengths and limitations of “reasonableness.”

Chapter Five will summarize the findings, and will attempt to answer the research question posed by this paper. If successful, this paper will have shown how changing the standard of review can benefit municipalities by giving them greater breath in defending their land use decisions to the OMB, while simultaneously giving the OMB greater legitimacy when it seeks to overturn a poor land use decision.

Chapter 2: A Literature Review of the OMB and Legitimacy

Exploring the literature around the OMB and judicial "legitimacy" necessitates splitting these two concepts into two parts. The first part of this chapter will explore existing literature on the OMB, to understand how others have interpreted the Board in respect to land use planning. Two authors in particular, George Chipman and Aaron Moore, have undertaken studies of OMB decisions which are pertinent to this paper. The second half of this chapter will briefly explore concepts of "legitimacy" in an attempt to tease out why there are calls to abolish its role in land use planning.

2.1 Literature about OMB decisions

Chipman (2002) is perhaps one of the fiercest critics of the OMB. The crux of his argument is that "the board" (as he refers to it) has been given too much jurisdiction, yet at the same time not enough direction as to how it applies its role, leading it to "craft" policy as it balances provincial interests with municipal and private ones. The net effect is a board who no one controls, and with no one in control, he suggests it is "ripe for reform, if not abolition" (Dutil, no date).

His work examines OMB decisions from 1971 to 1978, and 1987 to 2001. Of note, Chipman's analysis suggests that while the Board was unsure as to how much it should interfere with municipal decisions in the 1970s, he noticed that by 1987 the Board had developed unwritten 'rules of interference' that appeared to guide when and where they should flex their authority (Chipman, 2002: 72). In short, the OMB had developed an internal guide that allowed

it to skip justifying any deference to a municipal council. The results of such "de facto" justification are unclear, as Chipman records both the approval of applications *supported* by municipalities *and* the approval of applications *opposed* by municipalities rising between 1971 and 2001 by more than 10% each (Chipman 2002: 72-73).

While vigorous in his criticism of the Board, Chipman does not find any suggestion that the Board was "favouring" the decisions of private developers, stating that his results "do not suggest that the board has been captured by any interest group" (Chipman 2002: 55). Chipman ultimately suggest that the Board *must* in fact interfere in overturning the position of municipalities, else it turn into a "rubber-stamp" for council decisions (Chipman 2002: 71). While he admits the evidence that municipal politicians "use" the OMB is weak (Dutil, no date), he ultimately concludes in his book that the framework to provide such "security" for municipal politicians is present (Chipman 2002: 208). While he has no love for the Board, he sees some use in maintaining it for specific purposes (such as disputes between municipalities) but otherwise argues that other provinces manage to balance public and private interests without relying "totally" upon a provincial body to judge planning appeals (Chipman 2002: 207).

Aaron Moore's work, "Planning Institutions and the politics of urban development: The Ontario Municipal Board and the City of Toronto, 2000-2006", is focused on attempting to see how the OMB affects "political economy" in Ontario. Moore seeks to understand how the influence of the OMB changes the behaviour of other actors in land use planning, namely local politicians, private developers, neighbourhood associations, and experts in the City of Toronto. While his discussions of political economy hold marginal interest to this paper, Moore provides

an in-depth examination of OMB decisions regarding Toronto from 2000-2006, which is of great interest to this discussion.

Moore states that of the 328 Toronto-related OMB cases he examined, only a "small portion" gain any media attention, and those that do tend to be "highly contentious proposals" (Moore 2009b: 115). However, he also notes that appeals due to the neglect or rejection of private developers applications account for more than half of all OMB appeals. Moore also notices that about half of cases before the OMB are settled between the city and developer, an important fact that will be explored in more depth in Chapter Three. In an examination of planning appeal boards across Canada, he notes that Nova Scotia's NSURB's role in "planning, its powers, and its appeals process, seem most similar to the OMB's, at least in terms of the relevant legislation relating to both boards" (Moore, 2009b: 70). A summary of some of Moore's findings follows:

1. The OMB cited expert testimony in almost 70% of the cases Moore studied.
2. The City of Toronto had better luck "winning" appeals at the OMB when it had the support of city planning staff. Likewise, the city is less likely to win if their planning staff does not support them.
3. Neighbourhood associations fare poorly at the board, but are somewhat successful in influencing local politicians to support them. Without a neighbourhood association, "the City appears far more inclined to work toward an agreement with developers" (Moore, 2009b: 135), although Moore admits this correlation is weak. Their poor showing at the

Board may be a result of having inadequate resources to hire experts, hence their propensity to influence local politicians instead.

4. It does not to appear that Board decisions are biased in favour of developers.

In total, this suggests that while there are actors who influence whether a proposal is rejected by council and, likewise whether it is then approved at the OMB, the OMB is hardly a "roll of the dice." Experts, including those employed by the City of Toronto, exert a great influence over whether an appeal succeeds or not. The large amount of settlements between the city and developers however is a hole in the overall picture. Do these settlements suggest the city knows it will lose on the appeal? Or do these settlements suggest that the developer knows it will lose on the appeal?

In a later paper, "Passing the Buck: The Ontario Municipal Board and Local Politicians in Toronto, 2000-2006" Moore is much more explicit in stating that he indeed believes that local politicians are apt to side with local neighbourhood association when the association opposes a private development. The case of "One Sherway", as seen in the introduction, is Moore's most convincing example. While Moore is unable to quantitatively prove a relationship between neighbourhood association involvement and municipal councillors opposing a development in the face of "good planning", as far as this paper is concerned the mere fact that it *could* (and as "One Sherway" suggests, *does*) happen is justification enough to scrutinize whether municipalities *should* have a final say in land use planning.

2.2 Literature about Legitimacy

Exploring literature related to legitimacy is important in the context of criticism of the OMB. Many critics of the OMB are quick to associate the provincial government's process of appointing members to the Board, rather than through a general election, as evidence that the existence of the OMB is an affront to democracy. But where does this come from? Legitimacy is a concept that essentially helps justify the coercive power that governments and courts have to justify their rulings. Similarly, municipalities and judicial bodies (even quasi-judicial bodies like the OMB) draw their "legitimacy" from different avenues (elections and processes respectively). However, how the legitimacy of a board like the OMB can *change* is much harder to describe, although this literature review will attempt to do so.

Political "legitimacy", such as the kind a municipal body would possess, is a relatively simple concept to grasp. Elklit and Reynolds (2002) describe political legitimacy as being realized through democratic elections. Their study of democratic elections highlights three areas that lead to a "legitimate" election: the basic legal framework, the electoral management body, and the polling system. The more these concepts were perceived to be fair, non-partisan, and accurate, the more legitimacy an election (and by extension those elected) would possess (Elklit and Reynolds 2002). In the Canadian context, we could say that despite the persistent grumblings about the first-past-the-post system that follow our elections, Elections Ontario and Elections Canada run a fair game. There are not the concerns with fraud or coercion that many other democratic countries face, and should problems arise our legal system has the capacity and legitimacy (to be explored below) to ensure that people will accept election results, even if

they disagree with whom won. Thus, elections give the elected the legitimacy to represent their constituents.

Judicial legitimacy however, comes from a different place. Members of judicial and quasi-judicial bodies are typically appointed by the government, rather than through an election. While one could claim that the legitimacy that a politician possesses (such as the Premier of Ontario) gives legitimacy to the decisions their appointees make, the legitimacy of courts must come from something *more* if we are to believe our judges will act impartially in the face of those who appointed them in the first place.

Buchanan (2002) recognizes that legitimacy can be obtained from places other than by election when he is defining where "legitimacy" comes from:

> *…entities wielding political power can be legitimate even if they do not achieve an ideal of democratic governance or are less than morally optimal in some other respect. It also leaves open the possibility that entities wielding political power can be legitimate even if the individuals over which political power is wielded do not constitute a political community in some normatively robust sense according to which all members of the community are said to have significant special obligations toward each other. (Buchanan, 2002: 691)*

Central to his argument is that legitimacy only exists if those being coerced *give their consent* to be coerced (Buchanan, 2002: 698-699). People understand there are consequences of having a society without rules, so it sets up institutions to enforce the law (i.e. police) and protect people from harm (i.e. firefighters).

For this consent to be given, however, it is inherent that the boundaries of coercion be drawn. Police officers, for example, are not allowed to detain an individual for an unreasonable amount of time without justification, and firefighters are not allowed to break a door down

without an emergency occurring behind it. Similarly, the OMB is similarly "framed" as a land use planning tribunal to protect public and private interests. However, we would not allow the OMB to step outside this jurisdiction. As an extreme example, we would not ask members of the Board to rule on a question of law relating to a homicide. But where then, are those boundaries set? As will be explored in Chapter 3, the power and scope of the Board is quite broad.

In the case of the OMB, the province gives the Board consent to protect provincial interests in land use planning. Municipal councillors meanwhile, sometimes may "unofficially" give their consent to allow the OMB to override the decisions they do not wish to properly judge, a claim that is backed up by Moore's assertions of councillor behaviour (Moore, 2009a). However, when said councillors make what they feel is a perfectly justifiable decision (i.e backed by planning staff and conforming to provincial interests), they are implicitly denying another body (such as the OMB) to override their order without moral justification.

Buchanan suggests that without the moral authority to do so, a wielder of political power (such as the OMB) may be seen an illegitimate if they are deemed to be an "usurper… wrongly deposing a legitimate wielder of political power" (Buchanan 2002: 703). Thus we might understand why some councillors might detest the OMB's presence. As the Planning Act outlines, an appeal from the OMB may only be done on a question of law – not opinion. Given this, an argument could be made that since opinion is inherently subjective, the imposition of an OMB ruling may be deemed illegitimate unless a municipal council has misinterpreted planning law.

Such literature places the discussion at an impasse. Despite the objections, the OMB has largely functioned as a fair and independent body. It has, however, potentially allowed politicians and skirt their responsibility by abusing the OMB as a place to dump unpopular decisions, else allowing neighbourhood associations to hold power over private interests.

On the other side however, there is the danger in having a body that can override municipal decisions, as the results may be seen as illegitimate without the moral justification to do so. The ideal solution is thus to have a "sorting" method that would allow justifiable municipal decisions to be upheld and not struck down by the OMB, who in such a case may appear to be illegitimate. Unjustifiable municipal decisions should have a body that an unhappy developer can go to for recourse. Chapter 3 will therefore explore the inner workings of the OMB appeal process, show where it gets its legitimacy, and compare it to similar bodies in Canada.

Chapter 3: The OMB and Land Use Planning in Ontario

To properly understand the current standard of review in Ontario requires exploring what the OMB is, how and what appeals are considered by the Board, and from where the Board gets its authority.

This chapter will: (1) examine the legislation that gives the OMB its authority as a land use tribunal, (2) examine the common appeals that cause contention at the Board, (3) examine the appeal process to and from the OMB, and finally (4) examine how other land use tribunals in Canada handle land use appeals between municipalities and the province.

3.1: A Brief Introduction to the Ontario Municipal Board

The OMB functions not unlike a "typical" courtroom, where lawyers present experts and evidence in order to sway one or more OMB members (who act in a capacity similar to a judge) to "prefer" their clients interpretation of "good planning". The Board is a quasi-judicial tribunal, which means that while its members are not judges, it possess some amount of authority to rule on decisions that affect the rights of individuals (Duhamine, no date). As a quasi-judicial body, the principles of natural justice apply, which means that people have the right to be heard and receive a fair hearing ("Administrative Justice", 2010).

Aggrieved parties can make statements in support or against an appeal to the Board, and mutual settlements between the parties are heavily encouraged. If no settlement is reached between the parties involved, then the OMB can conduct its hearing, weigh the evidence presented, and decide how the matter shall be resolved.

There are three provincial acts that outline where the Board's power and authority come from: (1) the Ontario Municipal Board Act (1990), (2) the Statutory Powers and Procedures Act (1990), and (3) the Planning Act (1990). This legislation has helped guide the OMB both in determining its authority and jurisdiction, but as Chipman has noted, these acts have been sufficiently broad enough that the Board has, in some cases, been forced to determine its own role in land use planning matters (Chipman, 2002). Despite this, these pieces of legislation can still be used to help explain the powers and responsibilities of the OMB. It is also important to note that because the OMB is involved in matters outside of land use planning, that not everything written in these acts are necessarily land use related.

The Ontario Municipal Board Act (OMBA) has several important features. There are a number of administrative issues described in the OMBA, such as the composition of the Board, salaries of its members, and how vacancies should be filled. Most important for land use planning is Part III of the OMBA, which establishes the Board as a court of record, with the power to "determine" law and fact (sections 34 and 35). The OMBA also allows the Board to conduct its own independent inquiries on any matter it has jurisdiction over (section 47), and can even approve municipalities to borrow money (section 54(1)a). Additionally, the OMBA allows the Board to craft interim and/or contingent decisions (section 87) and even create its own "general rules regulating its practice and procedure" (section 91).

The Statutory Powers and Procedure Act (SPPA) applies to all agencies, boards, and commissions, and sets out "minimal procedural rights and procedures" that a tribunal is legally required to give ("Tribunal and Boards", no date), such that parties may have a just and

expedient trial as outlined in section 2 of the SPPA. Section 25.1 allows a tribunal (such as the OMB) to set its own rules governing the practice and procedure of the Board, which, combined with the OMBA's own section 91, gives them great flexibility in determining how cases before them are conducted. While the SPPA is not specific for the Board, its contents, in conjunction with the OMBA and the Board's rules, define the OMB as a quasi-judicial tribunal, giving it the power and authority much like a traditional court of law.

The Planning Act (1990) is perhaps the most important piece of land use planning legislation for municipalities, as it defines their planning powers and the role of the OMB in adjudicating land use planning disputes. Section 2 outlines the "provincial interest" that the OMB and municipalities alike must recognize when making planning decisions, which is further enunciated in section 3(5). Following this, section 2.1 contains the provision that the Board must "have regard to" municipal council decisions, as is the most relevant section for discussion in this paper. Section 2.1 is key in outlining the amount of deference the OMB is to give to municipal councils, and will be more robustly explored in Chapter 4.

Section 3.5 says that with regard to provincial policy statements (which provide broad direction on land use planning), both municipalities and the OMB must make decisions that are consistent with them. Provincial plans (such as the Places to Grow Act which defines areas and targets for growth and development in Ontario), must be conformed to. This means that documents such as municipal official plans cannot contradict them.

The majority of the rest of the Planning Act defines both a municipality's land use powers and responsibility, and the recourse that an aggrieved party can seek, which typically

leads through the OMB. In this manner, the Planning Act works as a standard that a municipality must meet in order to fulfill its planning obligations. Official plans (part III), and land use controls (part V) are of particular relevance, as they are the two main areas of contention between developers and municipal politicians that comprise the majority of cases that go to the Board ("Toronto Staff Report", 2002). A description of these appeals follows.

3.2: Common Appeals to the OMB

Municipalities are required to create and enact official plans (OPs) under section 17(13) of the Planning Act, and they serve as a kind of road map that outline municipal policy, and how they will achieve the goals set out within. Such documents act as a "big picture" for their respective city, eschewing technical details in favor of broader objectives and policy. Many OPs in Ontario, for example, have sections regarding the conversion of agricultural land into other uses. They might also include maps that highlight key concerns for a municipality, such as areas where there is a lack of parkland, or areas that are under a more in depth secondary plan.

As example of what one may find in an OP, the City of Toronto OP, section 3.1.3, outlines the city's policy in regards to tall buildings. The Toronto OP does not clarify what a "tall" building is aside from being those that are "greater than the width of the adjacent road allowance" (Toronto Official Plan, 2002: 3-8). For most roads in Toronto, this would mean a building that is more than 20 metres high (approximately six stories). For reference, the tallest skyscraper in Toronto, known as 'First Canadian Place', measures 298m in height (72 stories tall). While the OP does not make a distinction between either extreme, it helps give some direction to both city staff and developers as to how it should consider a building in the context

of the neighbourhood it is located in. Other sections of Toronto's OP include a map that roughly outlines which areas the city considers to be "downtown" or "centres", with the intention of putting the buildings on the higher end of the scale in these areas, and buildings closer to six stories along roads designated as "avenues" (Toronto Official Plan, 2002: Map 2).

Upon adoption by the city in 2002, the Toronto OP saw a flurry of appeals to the Ontario Municipal Board in regard to the goals and objectives set out in it, and to this day there are still ongoing appeals in reference to this document. This is not to suggest that these appeals are a black mark against the Board's existence, for among these appeals are property owners who are looking to ensure the livelihood of their operations. Rather, it highlights the challenge in getting new OPs approved, and the need for negotiation between cities and land owners.

Official Plan Amendments (OPAs) are essentially by-laws that change parts of an Official Plan, and they too may be appealed to the Board. They are of particular concern for the OMB because unlike Official Plans which are only reviewed every five years, OPAs may be introduced at any time, either via the municipality or through a developer who wishes to see the OP changed to conform to their plans. A developer whose proposal does not conform to a municipality's Official Plan may apply to have an OPA enacted that modifies the Official Plan in question, and may appeal to the OMB if the municipality refuses to enact it, either by refusing the OPA or by not responding to the request within a prescribed amount of time, as per the Planning Act.

Zoning By-Laws (ZBLs), in contrast to Official Planning Amendments, are very technical documents that primarily outline the range of uses that may occur on a property. ZBLs may

outline, amongst other measures, what businesses may be run on a property, what kind of houses may be built, the total amount of floor space allowed (i.e. building density), and how tall any particular structure on a property may be. Other aspects that may be found under a ZBL include setbacks from the road or neighbouring properties, or how many parking spaces are allowed. Like Official Plans, new ZBLs may be appealed to the OMB. Also like Official Plan Amendments, developers may ask to have a ZBL amended, and may appeal to the Board should the municipality refuse to enact the ZBL, either outright or by not making a decision within a prescribed amount of time as per the Planning Act.

3.3: The Planning Act and Appeals

The Planning Act contains a number of key sections in regards to official plans and zoning by-laws, and it is here where the OMB gets its authority to judge these matters. Of note are section 17(50), which allows the OMB to approve, refuse, or modify official plans, and section 34(26), which allows the Board to repeal or amend city by-laws. These two sections allow the OMB to a great deal of berth in judging any appeal that comes before them.

A scenario that could occur is where a developer appeals a city council decision to refuse to enact a zoning by-law that would allow the developer to build a structure that is taller (for example, 30m) than the current by-law allows (for example, 20m). The Board could do more than simply 'approve' or 'refuse' the appeal. They could modify the by-law to allow a building that is 25m to be constructed, or even allow a height that is greater than what the developer is asking for (for example, 35m). In any case, whatever the OMB decides is appropriate (or, "good planning") takes effect, just as if the municipality in question had

enacted it. With such power, it is certainly understandable that municipalities can feel uneasy with their relationship with the Board, and potentially might explain the Board's heavy reliance on expert witnesses to justify their decisions (Moore, 2009b).

There are limits on what can and cannot be appealed to the OMB, but they are mostly intended to catch and dismiss frivolous appeals. These grounds are outlined in sections, 17(25), 34(25) and 45(17) of the Planning Act, and will be further discussed in Chapter 4. In summary, as long as an appellant can prove: (1) their appeal involves a "planning ground"; (2) is an appeal in good faith; and (3) has taken the necessary time and money to start the appeal process, then they will get their day at the Board.

The only avenue of appeal *from* an OMB decision lies in an appeal to the Ontario Divisional Court. To have an OMB decision overturned the appellant must generally prove to a Divisional Court judge that the OMB made an error in *law*, not *opinion*. A full discussion about the relationship between the OMB and the Divisional Court is beyond the scope of this paper, but put simply, Divisional Court judges are experts on law, not 'good planning'. Therefore, they will not entertain appeals whose focus is on a difference in opinion, for such matters are better heard by OMB members who have far greater experience at determining what is or is not 'good planning.'

The Board's decisions are guided by legislation that the province has created over the years. Whereas the Planning Act may give clarity to the jurisdiction and powers of the OMB, Provincial acts clarify the Board's role in protecting provincial interests. Two popular examples are the *Greenbelt Plan, 2005*, which protects a large swatch of Ontario's ecological system from

urbanization, and the *Growth Plan for the Greater Golden Horseshoe*, *2006*, which sets out where and how cities can place new housing and employment. Much as how city official plans and zoning by-laws must conform to these documents, OMB decisions *shall conform with* (or at least not conflict with) such provincial matters under Section 3(5b) of the Planning Act.

3.4: Other Land Use Appeal Bodies in Canada

Exploring how other bodies handle land use appeals can shed some insight into how other provinces treat the decisions made by their respective municipalities. The following is a brief review of how other provinces manage this often complicated process:

- British Columbian municipalities use local "Boards of Variance" to hear land use appeals. These boards are not provincially run, but appointed by municipal councillors to 3 year terms. ("Board of Variance",2011)
- Alberta uses a variety of boards to govern land use appeals, meaning there is "no consistent appeal process" (Chaisson, 2009). Municipal land use planning decisions must only comply with regional land use plan set out by the province to prevent an appeal (Chaisson, 2009).
- In Saskatchewan there are two levels of boards that hear appeals. The first are local municipally appointed development appeal boards (DABs), and past that, the Planning Appeals Commission (PAC), part of the Saskatchewan Municipal Board. The avenue of appeals in Saskatchewan is limited relative compared to Ontario; a DAB must refuse any development permit which does not conform to zoning regulations, governing permitted uses, and intensity of uses that has not been discretionarily

approved by council or is a prohibited use (Planning and Development Act, 2007: s 219(2)). There is also no appealing an Official Plan (called a "Official Community Plan") or zoning by-law that a municipality in Saskatchewan enacts once approved by the province, meaning that neither DAB nor PAC are allowed to modify them.

- The Manitoba Municipal Board (MMB) is similar to the OMB, but like Saskatchewan their authority is much more restrained. The MMB may hear appeals to a new Official Plan (here called a "Development Plan") or zoning by-law, but may not change either once they have been enacted (Manitoba Planning Act s 54 and s 77(11)). Furthermore, land use decisions are made by local "planning commissions" which are appointed by city council. Appeals to planning commission decisions are decided by city council, whose decision is final if they agree with their planning commission.
- Quebec's commission Municipale Quebec (CMQ) has a similar history to the OMB, but its role is limited to ensuring conformity to the plans of upper-tier municipalities. A minimum of five voters can appeal a lower government's decision to the CMQ, who then compare the lower-tier decision to the upper-tier plan and render a verdict without a hearing (see Moore, 2009b: 68 for more information).
- New Brunswick's Assessment and Planning Appeal Board (APAB) may hear appeals to municipal land use planning decisions, but they are largely limited to judging an appeal on legal grounds rather than planning grounds (Community Planning Act 1973 s. 86(2), Moore 2009b, 69).

- Prince Edward Island's Regulatory and Appeals Commission allows for developers to appeal municipal land use decisions under their own Planning Act (2003, s. 28) to the Island Regulatory and Appeals Commission (IRAC). However, the IRAC may determine its own procedure in relation to an appeal (s28(10)). Like the OMB, the IRAC hears any appeals *de novo*, and its standard of review is correctness (Cheverie. 1998).
- Newfoundland has four regional appeal board and three city appeal boards created by its Urban and Rural Planning Act (2000). Newfoundland appeal boards are created by the province except in the cases of the cities of St. John's, Cornerbrook, and Mount Pearl, which appoint their own. (Urban and Rural Planning Act, 2000: s. 40(2)) Like the OMB, appeal boards in Newfoundland have the discretion to approve, reverse, or modify a municipal decision. However, these boards are limited to only hearing appeals to development applications (Urban and Rural Planning Act, 2000: s. 42(1)); existing municipal plans may not be modified.

In terms of a province that has a provincial body that can be compared to the OMB, it is the one found in Nova Scotia which is of particular interest to this paper. The Nova Scotia Utility Review Board offers an interesting contrast between itself at the OMB, and the differences in how they examine municipal decisions may yield insight as to how an attempt at reforming the Board may occur.

Chapter 4: Municipal Land Use Planning Decisions and the OMB's Standard of Review

The focus of this chapter is on defining the current "standard of review" utilized by the Board, and then looking at an alternative that could be applied instead. It will: (1) define standards of review and their purpose, and a brief examination of common standards of review will help define what they are and how judicial bodies may use them; (2) construct a standard of review of the OMB by examining the Planning Act, and exploring OMB case law; and (3) examine the Nova Scotia Utility and Review Board's standard of review to show how an alternative standard of review might change a provincial quasi-judicial board's relationship with municipalities. It concludes by arguing why changing to a standard of "reasonableness" would benefit land use planning in Ontario.

4.1 Standards of Review: a Summary

Standards of review are, in essence, "the lens through which a tribunal will evaluate the determination of a prior authority" (Allen, 2007: 2). In reference to judicial courts, they often represent the amount of *deference* that a court (such as Ontario's Divisional Court) gives to an administrative body (such as the OMB) when reviewing a judgment that has been made, such as during an appeal.

Standards of review exist between judicial courts, and can exist between non-judicial or quasi-judicial bodies. While a standard of review is not always explicitly defined between a tribunal (such as the Ontario Municipal Board) and an administrative body (such as Ontario Municipalities), there will necessarily be one developed in order for the tribunal to properly fulfill their role as an appellate court.

Standards of review vary between different courts, but can generally be thought of as having two extremes when deciding the amount of deference given. At one extreme, a standard of review can involve a tribunal giving little to no deference to the judgment of an administrative body. Under this standard, a case under appeal may be heard by the tribunal anew, with a decision reached independent of the administrative body's. The tribunal *may* come to the same conclusion or decision, but there is no obligation for them to do so.

At the other extreme, a standard of review could see a tribunal being very concerned about upholding the decision of an administrative body. Typically, such a standard of review would require that a clear error be found that justifies changing the decision, such as a legal error (i.e. the lower court misinterpreted a law). This type of review will generally not allow an appeal based on a difference of opinion, even if the tribunal official(s) may have come to a different conclusion given the same evidence and testimony; they instead defer to the decision made by the administrative body.

Standards of review differ based on courts and even countries. The United States frequently uses three standards of review (see Maloy, 1999):

i) "clearly erroneous" (i.e. a misinterpretation of facts),

ii) "abuse of discretion" (i.e. there was no reasonable basis for the decision made), and

iii) "de novo" (i.e. "from the beginning"; the higher body hears the case afresh).

These three represent a sliding scale of deference: "clearly erroneous" provides a high amount of deference, whereas "de novo" provides very little deference to an administrative body.

In Canada, two standards of review have been recognized by judicial courts since 2008: *reasonableness* and *correctness,* as per *Dunsmuir v. New Brunswick* (2008). These two concepts are therefore useful for framing the OMB and the NSURB as land use planning tribunals, as both are well-defined concepts in Canada's legal system.

Whereas some phrases might be difficult to interpret, "reasonableness" and "correctness" both offer guidelines for a tribunal to follow when hearing an appeal from an administrative body. As a standard of review, "reasonableness" defines the tribunal's responsibility as determining if it can understand how an administrative body came to its outcome, and whether the decision is an *acceptable* outcome. The "reasonableness" standard of review does not ask the tribunal to determine if it is correct, nor if it is one that the tribunal might otherwise prefer. "Correctness" meanwhile assumes no deference need be given to the administrative body: the tribunal is free to shape their own decision.

When dealing with an administrative body that is itself a tribunal (such as the OMB), courts are usually loathe to apply a standard of review that would offer little deference to the lower tribunal. To apply a standard of "correctness" on a matter of planning opinion would require a Divisional Court judge to question the OMB's expertise (Hall et. al, 2008), an act they would be reluctant to do as Divisional Court judges are generally not planning experts. *Dunsmuir v. New Brunswick* affirmed that the courts' "view of the law" (the judicial system) will only prevail when a question is "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (Dunsmuir v. New Brunswick 2008: paragraph 128). The conclusion therefore for judicial courts is to apply a standard of

"correctness" very narrowly when dealing with administrative tribunals (Hall et. al, 2008). In comparison, however, the OMB provides a much different scenario in relation to Ontario municipalities.

4.2 The OMB: Approaching a Standard of Correctness

Unlike Divisional Court, OMB members have both the authority to rule on matters of planning opinion due to the authority vested in them by the Planning Act, as well as a general level of planning expertise given the nature and function of their occupation. There is nothing in the Planning Act that specifically directs the Board to apply a standard of correctness when dealing with appeals.

This paper argues that the OMB, consciously or not, applies a standard of correctness when hearing appeals. This is due to two reasons. First, the language in the Planning Act offers little deference to Ontario municipalities when dealing with appeals. Secondly, despite attempts at strengthening the municipal role, the OMB has not clearly articulated what deference should be given to municipalities when hearing appeals.

The language used in the Planning Act regarding when the Board may dismiss an appeal without holding a hearing is not particularly restrictive, limited generally to appeals the OMB feels are made in bad faith. As Chapter 3 outlined, sections, 17(25), 34(25) and 45(17) of the Planning Act govern which planning matters may not be sent to the OMB, and are generally described as follows, as taken from section 34(25):

Despite the Statutory Powers Procedure Act and subsections (11.0.2) and (24), the Municipal Board may dismiss all or part of an appeal without holding a hearing, on its own initiative or on the motion of any party, if,

(a) it is of the opinion that,

(i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Board could allow all or part of the appeal,

(ii) the appeal is not made in good faith or is frivolous or vexatious,

(iii) the appeal is made only for the purpose of delay, or

(iv) the appellant has persistently and without reasonable grounds commenced before the Board proceedings that constitute an abuse of process;

(b) the appellant has not provided written reasons for the appeal;

(c) the appellant has not paid the fee prescribed under the Ontario Municipal Board Act; or

(d) the appellant has not responded to a request by the Municipal Board for further information within the time specified by the Board. (Planning Act, 1990)

If appeals may only be dismissed because an appellant is acting in bad faith, then it narrows the grounds on which a municipality may ask the OMB to accept their decision by default (and therefore dismiss the appeal in question).

The net effect of such a low barrier to getting an appeal heard is that the decision a municipality makes has little to no effect on whether an appeal should be allowed. As long as an appellant can prove their appeal involves a "planning ground" and has taken the necessary time and money to start the appeal process, they being a process that affords them another chance to get their proposal examined. Without being able to rely on restrictions in the appeal process to uphold their decisions, Ontario municipalities must find their next line of defense in section 2.1 of the Planning Act.

In 2006, the Ontario Government introduced "Bill 51", which sought to "empower municipalities" by giving their decisions more weight at the Board (Planning and Conservation Land Statute Law Amendment Act, 2006). As part of Bill 51, a new section was added to the Planning Act as 2.1, immediately following the list outlining what the provincial interest is:

> *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). (Planning Act, 1990; emphasis this paper's)*

The phrase, "have regard to", raised new questions about the standard of review that the OMB must apply to Ontario municipalities.

As per the Planning Act, municipalities' planning decisions must be consistent with Provincial Policy Statements, and conform with provincial plans in their legislation (zoning by-laws and official plans included). In those circumstances, Board decisions may be more clearly enunciated if the appeal is rooted in a disagreement about how a policy statement must be interpreted, allowing section 2.1 to be superseded as provincial interests must always take priority. This still leaves questions as to how the Board should handle an appeal from a developer over a municipal decision that is not clearly opposed by provincial policy. The ambiguous nature of the phrase "have regard to" in section 2.1 offers little guidance as to how the OMB should weigh a prior decision.

Whereas the language of "shall conform to" in section 3.5 of the Planning Act makes it clear that municipalities and the OMB cannot ignore provincial matters, "have regard to" leaves a wide space for interpretation. The phase appears multiple times in the Planning Act, but it is never defined despite often being invoked. One case, *Lipszyc v. City of Vaughan* (2007) said that the Board had "regard to" section 45(18.1.1) of the Planning Act (Lipszyc v. City of Vaughan, 2007: 2), a section that allows the OMB to not give notice on an amended application "if, in its opinion, the amendment to the original application is minor." Was "regard" being given, or was procedure simply being followed?

One attempt to construct a definition of "have regard to" goes back to 1968, in a decision by the United Kingdom's Privy Council:

> *The requirement that the Board shall "have regard" to certain matters tends in itself to show that the board's duty in respect of these matters is limited to having regard to them. They must take them into account and consider them and give due weight to them, but they have an ultimate discretion... (Ishak v. Thowfeek, 1968)*

Such a definition was applied to the Planning Act in 2001, several years before Bill 51 would be given Royal Assent (Friends of Marshfield Woods Coalition v. Town of Essex, 2001). Neither the Privy Council nor the OMB describes what is meant by 'due weight'.

A year earlier in 2000, the phrase was tested in regards to section 3 of the Planning Act, which once had the "shall have regard to" language rather than the "shall conform with" language it contains today. *Concerned Citizens of King Township Inc. V. King Township,* (2000), challenged whether the OMB had "regard to" provincial policy statements in Divisional Court. The ambiguity of the phrase was neatly summed up by A. Campbell J.:

> *The question is whether the planning authorities and the OMB must seriously, conscientiously, and carefully consider the provincial policy guidelines or whether it is sufficient simply to pay lip service to them. (Concerned Citizens of King Township Inc. V. King Township, 2000: paragraph 16)*

The Divisional Court interpreted "have regard to" as describing various degrees of conformity, which did little to establish a procedural definition. Ultimately, it was decided that the OMB should interpret "have regard to" as meaning that provincial policies should be examined "carefully in relation to the circumstances at hand, their objectives and the statements as a whole, and what they seek to protect, and determining whether and how the matter before it is affected by, and complies with, such objectives and policies, with a sense of reasonable consistency in principle"(*Concerned Citizens of King Township*, 2000: paragraph 22). As read, the OMB may render an independent decision, but must satisfy some ambiguous measure of care and examination.

Another test of the "have regard to" language occurred in *Ministry of Municipal Affairs & Housing v. City of London* (2001), which outlined three questions the Board said were necessary to ask to "have regard" to provincial policy statements:

> *Does the individual goal meet with the intent and objectives of the policy statement?*
>
> *If there is a conflict between the individual goal and the policy statement, is there a way to resolve it and meet the policy statement?*
>
> *If there is not a way to resolve it, what higher purpose does the individual goal serve that would allow it to supersede the policy statement? (Ministry of Municipal Affairs and Housing v. City of London, 2001: 5)*

The third question suggests that the OMB always has the potential to arrive at a decision that contradicts provincial policy, as long as they can justify the intrusion. One may interpret these questions as building off *Concerned Citizens of King Township Inc. V. King Township*'s definition

of “have regard to”, indicating that the OMB may supersede a municipal position if it is deemed to be for a “higher purpose”.

The “OMB Folly” proposal from the introduction to this paper is ultimately about whether a particular section of land was a good candidate for intensification. The Board in that case heard planners from both the city and the developer, and upon review preferred the developer’s position. The examples set by *Concerned Citizens of King Township Inc. V. King (Township)* and *Ministry of Municipal Affairs & Housing v. City of London* both affirm that “have regard to” gives the Board space to render a decision that *does not* respect the decision made by a municipality. A case in late 2010 affirmed such an interpretation of the phrase:

> *To read (section 2.1) as creating some kind of obligation on the Board to be bound by and to implement such decisions would be placing too narrow an interpretation on the section. Other provisions of the Act such as ss. 17(36), 17(50), 34(19) and 34(26) clearly allow for, and contemplate the possibility of parties appealing a decision of a municipal council and the Board overturning it. Therefore, not withstanding a level of inherent deference contained in s.2.1, the Board does, and should, for obvious reasons, retain its independent decision-making authority. (Chan v. City of Niagara Falls, 2010: 5)*

Such a recent interpretation of “have regard to” raises serious questions as to whether Bill 51 and section 2.1 has done anything to “empower” municipalities.

Attempts to apply section 2.1 have yielded faint direction as to its interpretation. One hearing in 2010 saw the OMB search through the minutes of a municipality’s planning committee, counting the number of delegations in support and opposition of a proposed zoning by-law amendment (*Zammit et al. v. Town of Milton*, 2010: 6). In a different hearing, the OMB member chose to observe section 2.1 by noting that the municipality supported a modified site plan (*Tralee Development Inc. v. Town of Richmond Hill*, 2011: 2). The frustrations over the

"have regard to" language noted in *Concerned Citizens of King Township Inc. V. King Township* remain alive and well.

Regardless of how the phrase should be interpreted or applied, the Ontario Divisional Court has ruled that "have regard to" should not impose a high degree of deference to municipal decisions. In *Ottawa v. Minto*, Judge Aston J. said that the problem was not the Board's interpretation of the phrase, but rather the language that the province had chosen:

> *The legislature used language that suggests minimal deference when choosing the words "have regard to", considering the many other expressions it could have used to signal the level of deference suggested by the City in this appeal. In my view the traditional role of the Board, and the broad powers it exercises, should not be altered radically without a more clear and specific expression of legislative intent. (Ottawa (City) v. Minto Communities Inc., 2009" paragraph 31)*

He concludes that the Board had interpreted the phrase correctly, that "have regard to" is not a test of reasonableness (Ottawa (City) v. Minto Communities Inc., 2009" paragraph 33).

The OMB has been quite clear in affirming that Board hearings are heard "*de novo",* or, as if "new" (see *958049 Ontario Ltd. v. City of Hamilton* 2007, O.M.B.D.No.1210, and recently, *City of Toronto v. 2267713 Ontario Inc.* 2011*,* PL110529, O.M.B.). While there is nothing explicit about a *de novo* trial that would prevent the Board from "regarding" a municipal decision, as defined earlier *de novo* tends to offer little deference. Its definition is also very similar to the definition of "correctness". Schafler and Na describe "correctness" as where "a court accords no deference to the administrative tribunal and undertakes its own analysis of the question decided by the tribunal" (Schafler and Na, 2008: p1); while it is perhaps unfair to describe *de novo* as being strictly equivalent to "correctness", it is fair to say that a "de novo" standard shares much in common.

Without the limits on expertise and authority found in Divisional Court, the OMB is empowered to "craft" the best decisions, based on the evidence presented before it. Whereas the Divisional Court can shed their responsibility in ensuring a correct planning decision is made (merely a legally correct decision), the OMB *must* decide an outcome to any appeal if the parties cannot agree to a settlement. This means that the Board must decide how to weigh evidence placed before it. In the absence of clear language or clear precedence, the only alternative for Board members is to try and craft the "best" outcomes possible from the evidence and opinion placed before it. While it is often not a true standard of "correctness", the low amount of deference afforded to Ontario municipalities *approaches* one.

In *Ottawa v. Minto*, where it was upheld that the OMB's standard of review based on the "have regard to" language is not reasonableness, did see a dissenting opinion by Judge Matlow. He felt that despite the language in the Planning Act, the intent of the "have regard to" phrase was to offer more deference to municipal decisions. While he agreed that the OMB "had regard" for the municipal decision in this instance, the problem was that they failed to apply a proper standard of review:

> *The first reason given by Council for its decision was on a mixed issue of law and fact. The remaining four reasons given were on issues that were all within the exclusive jurisdiction discretion Council to legislate and within its exclusive discretion. The standard of review applicable to all five reasons is, therefore, reasonableness. ([Sic], Ottawa (City) v. Minto Communities Inc., 2009" paragraph 58)*

The question that follows that might be asked: "what does reasonableness look like?" The land use tribunal in Nova Scotia is a great example of how the relationship between municipalities and the OMB could operate differently in Ontario.

4.3 The NSURB and the Standard of "Reasonableness"

An alternative standard of review towards municipal decisions can be found in the province of Nova Scotia, which operates a tribunal similar to the OMB called the Nova Scotia Utility and Review Board (NSURB). The NSURB handles land use planning appeals regarding municipal planning decisions, but with a few key differences between itself and the OMB that make it particularly interesting to study.

Like the OMB, the NSURB hears appeals related to zoning by-law amendments. Unlike the OMB, the NSURB may not hear appeals on 'municipal planning strategies', which are somewhat equivalent to official plan amendments (Moore 2009b: 70). Like the OMB, the NSURB is relatively independent in how they may craft a decision, such as by ordering a municipality to modify their zoning by-laws to allow a development as they prescribe. There are, however, limits on what may be appealed to the NSURB governed by section 250 (1) and (2) of their Municipal Government Act (1998):

> *250 (1:) An aggrieved person or an applicant may only appeal*
>
> *(a) an amendment or refusal to amend a land use by-law, on the grounds that the decision of the council does not **reasonably** carry out the intent of the municipal planning strategy;*
>
> *(b) the approval or refusal of a development agreement or the approval of an amendment to a development agreement, on the grounds that the decision of the council does not **reasonably** carry out the intent of the municipal planning strategy;*
>
> *(c) the refusal of an amendment to a development agreement, on the grounds that the decision of the council does not **reasonably** carry out the intent of the municipal planning strategy and the intent of the development agreement.*
>
> *(2) An applicant may only appeal a refusal to issue a development permit on the grounds that the decision of the development officer does not comply with the land use by-law, a development agreement, an order establishing an interim planning area or an order regulating or prohibiting*

> *development in an interim planning area. (Municipal Government Act, 1998: s.250(1) and 250(2), emphasis this paper's)*

The Municipal Government Act's use of the term "reasonable" represents the NSURB's standard of review. Before hearing an appeal, the NSURB examines the municipality's decision in relation to their municipal planning strategy (i.e. "official plan"), and if it *reasonably conforms* to the intent of their strategy the appeal is to be denied by the NSURB (as per section 251(2) of the *Municipal Government Act*):

> *251(2): The Board shall not allow an appeal unless it determines that the decision of council or the development officer, as the case may be, does not **reasonably** carry out the intent of the municipal planning strategy or conflicts with the provisions of the land use by-law or the subdivision by-law. (Municipal Government Act, 1998: s.250(1) and 250(2), emphasis this paper's)*

This lies in stark contrast to the OMB, which hears each case *de novo* without prior consideration of an Ontario municipality's decision.

"Reasonableness" is a term that has been defined by the Supreme Court of Canada in Dunsmuir v. New Brunswick (2008, paragraph 134), and upheld as the proper definition in regards to the NSURB in Archibald v. Nova Scotia (2010, paragraph 21). "Reasonableness" is described in Archibald v. Nova Scotia as the following:

> *The reviewing court does not ask whether the tribunal's conclusion is right or preferred. Rather the court tracks the tribunal's reasoning path, and asks whether the tribunal's conclusion is one of what may be several acceptable outcomes. (Archibald v. Nova Scotia 2010, paragraph 22)*

The Honourable Justice Fichaud further defined "reasonableness" in Archibald v. NSURB (2010):

> *In Dunsmuir, Justices Bastarache and LeBel said "reasonableness" has components of process and outcome.*
>
> *For process, the reviewing court considers whether the decision under review expresses a justifiable, intelligible and transparent reasoning path to the tribunal's conclusion. This is not a*

> *correctness analysis in disguise. Rather, the reviewing court determines whether it can understand how the tribunal reached its outcome, and whether the tribunal's reasons afford to the reviewing court the raw material for the reviewing court to perform its next task of assessing whether the tribunal's conclusion inhabits the range of acceptable outcomes.*
>
> *The court then assesses the outcome's acceptability through the lens of deference to the tribunal's "expertise or field sensitivity to the imperatives or nuances of the legislative regime". This respects the legislators' decision to leave certain choices within the tribunal's ambit, constrained by the boundary of reasonableness. The reviewing court does not ask whether the tribunal's conclusion is right or preferred. Rather the court tracks the tribunal's reasoning path, and asks whether the tribunal's conclusion is one of what may be several acceptable outcomes. (Archibald v. NSURB, 2010: paragraph 22)*

Before an appeal can be granted on a land use planning decision in Nova Scotia, a step is taken by the NSURB to determine if there are legitimate reasons to believe an appeal is warranted. This is consistent with section 250(1), but its appearance in 251(2) is important because it directly ties the strength of a municipal decision with the appeal process.

A standard of reasonableness accepts that the role of a reviewing court is not to see if the decision under appeal is the "best" decision, but rather is an acceptable one. It does this by examining *how* the tribunal (or for our purposes, the municipality) reached its decision. Reasonableness is not achieved by reviewing the evidence, deciding the "best" decision, and then seeing how close the municipality came.

In *Gagné v. Canada* (2010), Justice Martineau said that reasonableness lead him to allowing a "reasonable" decision that he did not actually prefer. In his role as a reviewing judge, Justice Martineau stated that it was not his duty to pick the most 'equitable' solution, merely to judge the decision placed before him (Gagné v. Canada, 2010: paragraph 27).

This is echoed in *Citizenship and Immigration Canada v. Khosa* (2009), where it was ruled that "If the process has the consideration of 'principles of justification, transparency and

intelligibility' then it is not open for a reviewing court to substitute its own point of view". (Citizenship and Immigration Canada v. Khosa, 2009: paragraph 59).

The NSURB has been consistent in deferring to the decisions made by municipalities due to section 251(2). A notable 2002 decision came when the council for a City of Kings refused an application to rezone some lands to allow a higher density of building to be constructed upon it (Ward v. Kings, 2002: paragraph 5). A planner for the City of Kings examined the application, and upon review believed that allowing the rezoning would have been consistent with the municipal planning strategy for Kings. As mentioned, section 251(2) says that an appeal can be allowed if it is determined the decision of council "does not reasonably carry out the intent of the municipal planning strategy", thus being a ripe case to appeal to the NSURB.

The NSURB, upon review disagreed, ruling that the city's decision *did* reasonably carry out the municipal planning strategy, despite the opposite opinion of their own planner. In their judgment, the NSURB found that while "the Planning Report prepared by staff indicated that the proposed development was consistent with the policies in the (municipal planning strategy) and recommended approval by Council, the Board finds that Council has considered and addressed all relevant policies" (Ward v. Kings, 2002: paragraph 42). The NSURB then dismissed the appeal. Such a level of deference to municipal authority is unheard of in Ontario.

The language and interpretation of the Municipal Government Act does pose some problems. One NSURB case in 2005 found that it is not in the NSURB's jurisdiction to review the procedure that a municipality undertook, just the decision that was ultimately produced. Doing so, it was ruled, would "allow an appeal without making a finding on whether Council's decision

reasonably carried out the intent of the M.P.S. – a position that the Board sees as inconsistent with the language of ss. 251(1)(b) and 251(2)" (*Federation of Nova Scotian Heritage*, Re, 2005: paragraph 134).

Due to this interpretation, a municipal council in Nova Scotia could theoretically produce a "reasonable" decision which was arrived at via misconduct, such as "boldly disregarding a statutory requirement, or by allegedly failing to give citizens a fair hearing" (*Tsitouras v. Chebucto Community Council*, 2009: paragraph 47). Therefore a flawed procedure that leads to a decision, that itself *meets* the test of reasonableness is still acceptable for the NSURB to deny an appeal.

The "reasonableness" standard of review says that there must be a "justifiable, intelligible and transparent reasoning path" to a tribunal's conclusion as per *Archibald v. Nova Scotia* (2010: paragraph 22). This is in contrast to Federal Court decisions such as *Hagel v. Canada* (2009) and *Baker v. Canada* (1999) where procedure fairness, the manner in which a decision was made, was examined. Procedural fairness, as stated in Baker v. Canada, is "to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker" (Baker v. Canada, 1999: paragraph 22). The aims of procedural fairness therefore compliment and illuminate "reasonableness", and should not be discarded should a standard of "reasonableness" be adopted by the OMB.

4.4 Why the OMB Should Become More "Reasonable"

While the OMB aims for "good planning" outcomes, their standard of review offers little deference to municipalities. While studies by Chipman and Moore found no discernible bias towards developers over municipalities, the image of the OMB in the media is largely a negative one. A recent editorial in the Toronto Star attacked the Board as a "century-old oppressor… an unelected, widely despised provincial agency with the power to overrule any community's development decisions" ("Ontario Municipal Board Interference" 2012). This perception hampers the public perception of the OMB, despite the fact that the Board is simply fulfilling their duties as set out by provincial legislation.

The OMB possesses many traits that make it valuable as a land use tribunal, such as its independence, its collective experience, and the fact that it is funded by the province. Even Chipman, a fierce critic of the OMB, admits that the Board has "served the Province and municipalities well" (Chipman, 2002: 192-193).

Another critic, Lionel Feldman, states that many of its decisions "have been unpopular and have aroused protest but generally it has functioned well" (Feldman, 1961: p 297), and the Ontario Bar Association submitted in 2009 that the OMB "played a vital role in ensuring that the broad public interest is protected" (Brown and Potts 2009: 17). The Board's reliance on expert testimony, however, may have unintended consequences.

Moore notes in his analysis of OMB decisions that experts were cited in over 60% of all OMB decisions; "even in instances where the City and appellant(s) reached a settlement, the OMB still referred to experts' testimony and opinion approximately 61% of the time, despite

not needing to justify its position in these cases" (Moore, 2009b: 125). An even more striking statistic that Moore notes is when the OMB makes a decision that solely favours the developer; in those cases, expert witnesses were cited in the justification of the decision "almost 90% of the time" (Moore, 2009b: 125), a tactic that Moore believes is used in order to quell the backlash of what are likely very contentious issues.

If expert testimony is so important to the Board in crafting their decisions, then it stands to reason that groups who are unable to afford experts may find themselves at a disadvantage at an OMB hearing. Before provincial legislation was introduced to protect sensitive environmental areas from development via the Oak Ridges Moraine Conservation Act (2001), for example, cases were being brought to the OMB where the resources of environmentalists, concerned residents and the City of Toronto were outmatched by the developers (Bocking, 2002: 12).

The OMB is not a body which can (or necessarily should) provide weight to an individual or party based on the amount of resources they possess. This does not mean that groups like neighbourhood associations are absent from the discussion, just that they are more likely to put pressure on Toronto politicians to support their view (Moore, 2009b). The reliance on experts also highlights how costly the Board can potentially be. While the exact figures are unknown, one city councillor in Toronto pegged the cost of being at the OMB at $80,000 per day, while Toronto officials believe the OMB costs them about "1,400 lawyer days" a year between legal and planning staff (Alcoba, 2011).

Municipalities are certainly not ignored by the Board, but research suggests that "winning" at the OMB – and what counts as a "win" can certainly be up for debate – requires city planners to provide solid evidence to justify the city's decision. This intuitively makes sense, but what must be kept in mind is that "good planning" is not necessarily easily defined, and indeed one may be able to propose several different options to redevelop a parcel of land, and have multiple (or all) of these options fall under the "good planning" umbrella. This can happen not only due to differences in opinion, but due to conflicts in policy.

The Provincial *Growth Plan for the Greater Golden Horseshoe* describes the importance of balancing mineral aggregate resources next to natural heritage and agriculture uses (Growth Plan, 2006: 30). What weight should the OMB give each use when a significant amount of aggregate resources is found under prime agricultural land? Planning opinion may present a similar conflict for the OMB when clear guidelines about what is or is not appropriate planning is under dispute.

A standard of reasonableness can provide deference in line with "good" planning, while still giving a board like the OMB room to punish "bad" planning. If a planning decision that a municipality makes is an acceptable outcome, then it is the best one because it is both acceptable *and* accountable. A new standard of reasonableness may not change the OMB's reliance on experts, but it would better define the municipal role in the planning process.

If it can be agreed that municipal politicians can abuse the OMB by using the Board instead of practicing "good planning", then rewarding municipalities for crafting "reasonable" planning decisions would encourage compromise and discourage blatant NIMBYism;

municipalities would become aware that if they refuse to practice good planning, they risk losing at the Board. Citizen groups in turn would be better able to understand what success at the OMB requires, and could pressure municipalities to aid them in crafting "reasonable" decisions.

The legitimacy of a decision is often questioned when the OMB overrules a municipal council decision. Voters elect councillors to run the city and make planning decisions, not the Board. The Planning Act Review Committee made reference to this in the White Paper on the Planning Act, stating that "authority for local planning actions should rest in the first instance with the elected municipal council and not with appointed bodies such as planning boards, committees of adjustment or land division committees ("*White Paper"*, 1979: 47). The Committee also recommended that "good planning" should not be a provincial interest as long as provincial interests "are not violated" ("*White Paper", 1979: 38)*. Chipman argues that the province's continued refusal to allow its municipalities such authority is intentional:

> *(T)he province has never believed that municipalities should be free to make planning decisions without the opportunity for 'sober second thought' be a tribunal consisting of its appointees… this theme of control by means of a provincial tribunal has run unaltered through numerous changes to planning legislation. (Chipman, 2002: 194)*

When planning decisions are made by an unelected body such as the OMB, the ability that voters have to respond to these decisions, such as through elections or lobbying, is diminished. For most purposes the province is absent to the average citizen who engages with land use planning; building permits, zoning by-laws, and public meetings typically do not involve the province as an engaged actor, and the introduction of the OMB might serve as a shock; for what effort was the lobbying, the meetings, the democratic process if it may be usurped by a

different level of government? Effective governance suggests that decisions that affect only the residents in one municipality are best made by the municipality unless the decision "spills" outside of their borders (Kitchen, 2002: 44).

Democratic elections help institutions such as municipalities craft outcomes that "domestic actors such as voters, parties, media, and local observers" may use to assess their legitimacy (Elkir and Reynolds, 2002: 87). As OMB members are not elected, it becomes harder for the public to judge how good or bad the decisions the Board crafts are. It is difficult for voters to punish the OMB for decisions that they disagree with; the nearest source of democratic relief is their Member of Provincial Parliament (MPP), but a remedy is difficult given the fixed terms of OMB members. Placing pressure on an MPP to reform the OMB is further stifled given how many other responsibilities the province possesses that voters may prioritize. MPPs are responsible for an array of important responsibilities, including taxes, health care, and education. To expect voters to be narrow their decision as to who should be elected down to each candidate's opinion on an arms-length quasi-judicial tribunal is wishful thinking. Too many other issues are likely to dominate a voter's interest; at best a group of voters who would prioritize OMB reform would likely be small and geographically dispersed across Ontario.

That is not, however, to suggest that the OMB should be considered illegitimate, rather a consensus on the role the Board plays is necessary between all actors. OMB decisions, as municipal and provincial ones, coerce groups into particular courses of action. Much like how municipal and provincial governments can gain legitimacy from elections, judicial (and by extension, quasi-judicial) bodies can gain legitimacy by getting the permission of actors *to*

consent to their coercion (Buchanan, 2002: 198-699). From the provincial side, Ontario governments have set the boundaries that the OMB must consider when evaluating matters of provincial interest. The Planning Act, with its "shall conform with" language in section 2, outlines when the OMB may coerce the province, although admittedly the avenues are narrow.

The "have regard to" language, as explained above, sets few boundaries as to when and where the Board may coerce a municipality. Whereas municipal politicians might "consent" to the coercion of the OMB over a decision they have little interest in rationally defending, conflict ensues when a municipality does not consent to the OMB overriding a course of action they truly believe best represents the interest of their constituents.

In the absence of clear boundaries, the OMB *does not* necessarily get the consent to coerce a municipality. Herein lies what Buchanan describes as a feeling that the OMB has usurped a legitimate use of political power (Buchanan 2002: 703). The challenge therefore is in finding a balance between retaining the Board's independence, while still allowing greater role for municipalities, which a different standard of review can allow.

The Board, as it exists today, "provides security for municipal politicians, who know that making decisions with respect to politically contentious land use disputes will ultimately be the responsibility of someone other than themselves" (Chipman, 2002: 208). A municipality that takes advantage of the OMB's jurisdiction is doing a disservice to the democratic process. While strengthening a municipality's planning role could empower them to produce "good planning", it could also empower the OMB to be less of a body that *decides* good planning, and more of a

board that *rewards* good planning, and "punishes" those municipalities who choose to practice "bad" (or perhaps, "unreasonable") planning.

Chapter 5: Conclusion

This paper does not argue that the ability to have appeals heard by the OMB is *wrong:* there *should* be an avenue to appeal municipal land use planning decisions, for planning is a collaborative process. As a collaborative process, both municipalities – and the citizen groups that elect them – too should be a part of the conversation. Despite the volume of appeals that go to the OMB, many are settled before the Board renders a final decision (Moore, 2009b: 121-123), perhaps indicating that a spirit of compromise is still alive and well between municipalities and developers. Cases such as "OMB Folly" or "One Sherway" represent the outliers in OMB decisions – the ones that get the most media and political attention – which in turn overshadows the good work that the Board typically engages in.

The Board is not without problems. Their reliance on experts in formulating decisions likely has a negative effect on citizen's groups (Moore, 2009b: 126). This reliance on experts, in turn, makes fighting an appeal a very expensive proposition for any municipality. Most notably, as municipalities are elected and the OMB is provincially appointed, the ability for the Board to override "reasonable" land use planning decisions from a municipality can be seen as an unfair abuse of authority, and at the extremes, illegitimate. The OMB is, in turn, often panned as being a body that favours developers.

If such a relationship exists, it has not been seen in the (admittedly few) studies on OMB decisions. If the relationship does not exist, the perception *does*, fed by a slim number of OMB decisions that have upset citizens groups and politicians. Within the past year, Mississauga has asked Ontario to abolish the Board (Clay, 2011), while Toronto has asked to be removed from

the OMB's jurisdiction (Moloney and Dale, 2012). How the province will respond is at this point unknown.

If the problem is the perception, then the root of the problem lies in the language of the Planning Act. The current language affords too little deference to municipal decisions, putting the outcome squarely on the shoulders of the Board. Consequently, politicians sometimes abdicated their responsibility in crafting a reasonable outcome by passing contentious planning decisions to the OMB, rather than facing the wrath of an aggrieved citizen's group. Attempts at reform in 2006 with Bill 51 failed to "strengthen" municipal deference through the weak "have regard to" language, that even today has yet to be properly defined at the Board as a standard for evaluating municipal decisions. This is not to suggest that the OMB does not "have regard" to municipal decisions, rather that according to some experts the OMB *did* even before Bill 51 (Longo, 2007: 3).

The OMB has a wealth of land use planning experience, provincial funding, and can exist as an independent forum to hear disputes between municipalities, or between municipalities and the province. To abolish the Board, instead of reforming it, is short sighted, and ignores all the good that the OMB brings to land use planning in Ontario. If it can agreed that a Board that is beholden to developers is undesirable, then it should also be agreed that a municipal council that is beholden to citizen groups is also undesirable.

The Nova Scotia Utility Review Board (NSURB) shows that a provincial land use planning tribunal that rewards "good planning" from municipalities exists within Canada. It does so by applying a standard of *reasonableness* to municipal decisions. If a Nova Scotia municipality

makes land use planning decisions that follow their "municipal planning strategy" (analogous to an Ontario municipality "official plan") then the NSURB will refuse an appeal on the decision. This standard of "reasonableness" is as defined by the Supreme Court of Canada, meaning that there is ample case law and precedent behind the term that allows NSURB members to apply it when examining municipal decisions.

The OMB and the NSURB are similar enough in role and function that a new relationship between municipalities and the Board may be feasible without upheaving the entire system of land use planning in Ontario. Other reforms, such as adopting local "Boards of Variances" similar to those found in British Columbia, would be costly. Municipalities across Ontario would need to create these institutions at both great expense and time, a new relationship between the OMB and municipalities would need to be determined, and all actors would need to adapt to a brave new planning world. In short, the change would likely cause tremendous uncertainty in land use planning in Ontario, one that could frustrate development and citizen groups alike until a new political equilibrium may be reached.

Changing the OMB to apply a standard of reasonableness would likely not be as simple as changing a few words in section 2.1 of the Planning Act. However, Nova Scotia's Municipal Government Act provides a solid starting point to see how a change would be interpreted at the OMB and in Divisional Courts. More importantly, "reasonableness" is not a vague phrase like "have regard to" is; the word carries a substantial bevy of judicial review that can direct both the OMB and potentially even the Divisional Court in judging municipal land use planning decisions.

How could changing the standard of review from 'correctness' to 'reasonableness' at the OMB improve land use planning in Ontario?

A new standard of "reasonableness" would help solve the negative perceptions of the Board by clearly defining the responsibility of municipalities in crafting "good planning". If a municipality does its due diligence in articulating the reasons for making a decision, then it may be confident that the OMB will give proper deference to them.

If, however, they choose to use the Board as a place to send politically contentious decisions instead of properly engaging with a developer, then their lack of proper judgment will be laid bare. The standard of review the OMB uses, which approaches *correctness,* diminishes the role of Ontario municipalities in land use planning by presenting a high threshold of "good planning", and coercing municipalities to accept the Board's view of "good planning" rather than their own. Changing the standard of review from 'correctness' to 'reasonableness' at the OMB would improve land use planning decisions in Ontario by empowering municipalities to craft "good planning" together with citizens and developers.

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