OMB Reform – Getting Heritage Planning Right

Marc Denhez [1]

Introduction

Why are there are so many planning disputes? Why don't people just play by the rules, notably developers and municipalities? Here are three propositions:

1. A "planning system" is *only as good as its criteria* – the framework of underlying principles that motivates its decisions. Without those principles, one cannot call the system "planned".
2. About 20 years ago, criteria started to be introduced. Today, there are binding criteria everywhere – but some are *controversial*, and there was *no public buy-in*.
3. Recent measures are an improvement, but the underlying malaise is more fundamental, and will take longer to solve. The issues are (a) *chronic uncertainty*, and (b) *economics*.

Early History

Ontario was among the last Provinces to adopt "planning" legislation. It passed the *Planning Act* in 1946, and expanded it in 1949, under the Conservative government of George Drew and Leslie Frost – on the insistence of municipalities. However, possibly in response to cries of an invasion of property rights, their 1949 Act contained two overt reservations:

- An owner could demand a rezoning anytime – with a right of appeal if Council did not agree. So a Council could go through a huge consultative process – but the day after the by-law came into effect, any owner could still walk off the street and demand to *change* it.
- The government of the day would not allow any zoning to come into force, unless *approved* by its own Cabinet appointees. They would sit on a "Board" – the Ontario Municipal Board ("OMB").

If someone wanted a variance, severance, subdivision, or rezoning, they would apply to the municipality; or perhaps Council wanted to rezone. The dance would begin, with many steps. If there was a dispute, it went to the Board, comprised of appointees of Mr. Frost and his cabinet.

And all of this was called the "*Planning Act*" ("the Act").

"Planning"

The first question is: what does "planning" even mean?

It was not defined. It still is not. The Act is about "planning", but the relevant authorities did not *plan* enough to bother with a definition. As an OMB adjudicator, I have used the *Concise Oxford Dictionary*'s definition: "*To arrange beforehand*". In normal parlance, "planning" is all about predictability.

But that leaves the question: just *what* was "arranged beforehand"? In any decision-making system – particularly something that calls itself a "planning" system – *the process is only as good as its criteria* – the principles which guide it. That is the key to what makes a system "*planned*".

The 1949 legislation, however, specified no clear criteria on which the Board was expected to render its decisions.[2] Everything was "discretionary". Essentially nothing was "arranged beforehand". It was not the "*Planning Act*", but the "*Non-Planning Act*".[3]

The Sixties and Beyond

By the 1960's, the Board no longer vetted every zoning by-law; but it became insistent that "planning" just *had* to be guided by transparent policies, not pure "discretion". The Board started to codify its own "principles", on which to base its decisions.

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2 The closest that the Act came, to identifying criteria, were vague references to doing a "program of development" mindful of "the public interest".

3 One view is that the "*Planning Act*" had *nothing to do with arranging anything beforehand*: it was about putting everything under the direct supervision of what was affectionately called "The Big Blue Machine" – the Conservative Party hierarchy, which ran Ontario for over 40 years.

That was slapped down by the Ontario Court of Appeal. In a case called *Hopedale* [4], the Court held that, even if the Board laid down such "principles", it should not *insist* on them. Saying that a developer "must comply with them before the Board will allow the application is clearly wrong and the Board, *if it so fettered its discretion, would be in error*."[5]

Next came "the *Farlinger Rule*".[6] In 1975, the Court of Appeal held that

- The "*highest and best use*" of property was *not* what the Official Plan said it was, let alone the zoning by-law;
- but rather its value *after a hypothetical rezoning*, as long as that rezoning was "within a reasonable expectation".

In other words, said the *Farlinger* decision, *neither the Official Plan nor the Zoning By-law are definitive*, in telling what the "highest and best use" of the property is.

For example, that is municipal authorities recently told owners of a prominent golf course that, for *property tax* purposes, their land should be assessed *as if* it had a subdivision on it. The owners replied that

- the Official Plan called it a golf course,
- the zoning called it a golf course,
- and the owners intended a golf course (no plans for a subdivision),
- but the municipality responded that – *hypothetically* – if a subdivision *were* applied for, it was "within a reasonable expectation" that the subdivision would be approved. Ergo, the tax assessment should be increased.

Also in 1975, the Province assigned new responsibilities for the *Ontario Heritage Act* to the OMB, notably for heritage districts (those responsibilities were increased in 2005, pertaining to demolitions).

Next, in 1983, the Bill Davis government amended the *Planning Act* to allow municipalities to *sell upzoning* and Official Plan Amendments. If a developer offered enough cash or "community benefits", Council might change the rules. This is now called s. 37 of the *Act.* The result, according to some authors, is called "Let's-Make-A-Deal Planning". [7]

But it came at a cost to credibility. Henceforth, when a Council adopted zoning or an Official Plan, neither developers nor neighbours knew (for sure) whether Council actually "meant it", or whether the Council was intentionally lowballing the figures, to maximize its bargaining position for ensuing monetary negotiations.

In municipalities which made extensive use of s. 37, many developers *presumed* that Council had a certain density target in mind – but that it then lowballed that target, in its Official Plans and zoning, to position itself to collect more s. 37 benefits – notably whenever a developer proposed what Council secretly expected in the first place. So when that Council adopted land-use controls, the industry said it did not know if Council "meant it", or was just looking for "a piece of the action".

Indeed, in some municipalities, councils adopted what were commonly called "Placeholder" by-laws, with overtly fictional requirements – to apply to the property until someone proposed something Council could really sink its teeth into.

Incidentally, the municipalities that made the most use of s. 37 also appear to have had the *highest rate of developer appeals* of their land-use controls. Of course, that may be just a coincidence.

The Provincial Policy Statement

In 1996, at the height of the "Common Sense Revolution", the government of the day issued the Provincial Policy Statement, or "PPS", for all municipal and Board decisions under the *Planning Act*. It declared (up front, at s. 1.1.1) that the Province's *first* stated intent was to "*promote… cost-effective development*".

Furthermore, the PPS recommended that all urbanisation should "*intensify" and "redevelop",* i.e. increase population density. Lest anyone miss the point, the PPS said so 19 times.

Indeed, it became fashionable, in some circles, to say that intensification was the Province's *only* interest. That view was wrong [8], but that was irrelevant. I heard so-called "experts" testify that, as long as the project was an intensification, "the Provincial interest has been satisfied." In one intensification case, where I asked more questions about planning compliance than the developer's lawyer liked, he asked me: "Mr. Chair, what is it about Provincial policy that you don't understand?"

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4 *Hopedale Developments Ltd. v. Oakville (Town),* (1965) 1 O.R. 259, 47 D.L.R. (2nd) 482.

5 In *Cloverdale Shopping Centre Ltd. v. Township of Etobicoke*, (1966) 2 O.R. 439, the Court of Appeal added that, in terms of unqualified discretionary authority, the Board "is to be regarded as being *the Minister himself*." The Board was subsequently referred to as "standing in the shoes of the Minister."

6 *Farlinger Developments Inc. v. East York (Borough),* (1975) 8 L.C.R. 112. In theory, *Farlinger* was originally supposed to be only about *land compensation* on an expropriation – not about planning generally; but that did not stop people from using the same argument everywhere – for the simple reason that it was already accepted wisdom throughout the industry for a generation.

7 e.g. Patrick Devine , "Section 37: An Update on 'Let's Make a Deal' Planning'". *Law Society of Upper Canada Six-Minute Municipal Lawyer*, March 2008; Jake Tobin Garrett, "Let's Make a Deal: Illuminating the often-murky world of Section 37", *Torontoist*, April 26, 2012.

So that is what the PPS said. Of equal importance is what it *did not say* – like anything about "sustainability"; nor did the PPS say much about quality of life, e.g. whether communities should look half-decent. On the contrary, the strongly-held view, in some legal circles, was that the Province had dictated that municipal attention to aesthetics was not only unwise, but outright illegal. It was like George Orwell's "crimethink". This "right to be ugly" supposedly meant that a Council could not even let the subject cross its mind, for fear of "tainting" their by-law with an *illegal consideration*. That view was entrenched in some legal circles, until a contrary Board decision, only five years ago. [9]

A 2005 amendment added that the PPS would now be *binding* on all *Planning Act* decisions. Instead of *discretion* vested in government appointees, the Board was now bound by written criteria. But the question remained: did the people of Ontario – or their elected representatives – ever agree to those criteria? I have known Cabinet Ministers in my time, but I never met one who would admit to ownership of those criteria.

Finally, last year, the Province announced sweeping changes to OMB appeal procedures. It also announced more emphasis on Official Plans. But why has there been such difficulty, over the decades, to introduce a clearer planning system, with broadly-accepted rules that everyone will play by?

The Parties

Board hearings are often a three-sided affair – owner/developers, the municipality, and the neighbourhood. Some Councils are as vocal, in calling neighbourhood and volunteer associations NIMBY'S, as developers are – or worse. They might label groups BANANA's, which stands for "Build Absolutely Nothing Anywhere Near Anything".

Then there are developers, but their case is more complicated. People ask: why don't developers just stick by the rules? Why don't they all just build in accordance with the existing Official Plan and zoning – what is called "*as-of-right development*"? Here is some background.

Most developers cannot afford to do land banking. They cannot set aside land for aeons, waiting for the right moment. To stay in business, they usually have to buy prospective sites from a speculator or another developer. But in urban Ontario, the public and private sectors have long grown *used* to the notion that upward adjustment to development was not only possible, but *expected* (via variances, rezoning, Official Plan Amendments, etc.), as seen in the *Farlinger Rule*.

Educated *sellers* are as familiar with "highest and best use" as buyers; so the potential for upzoning is *factored* into the asking price. *It has already been priced in*. So the broadly-held view was that a developer, who *restricted* projects to as-of-right development, would inevitably *overpay* for land acquisition, and be out of business in six months.

The supposed corollary was that the first business objective was to *outwit the planning documents* – e.g. upzoning to something even *more* than what the seller had *already factored into the purchase price*. To some observers, this explains why, in the GTA, significant projects *typically* involve a Plan Amendment and/or rezoning. There is a lot of development in Canada's largest market – but *almost no major projects stick to the original planning documents*.

By that reasoning, "planning" is a far cry from "arranging beforehand". On the contrary, the best way to guarantee that a given vision would *never* materialize would be to entrench it in the planning documents.[10]

One prominent Toronto lawyer went to the Divisional Court [11], saying the *Oxford* definition of "planning" was improper: in Ontario, planning was not about "arranging beforehand". *Au contraire*, the definition of "planning" was to provide a methodical way of *processing and approving what was never arranged beforehand*. That is Ontario "planning" (or at least what some lawyers think it is). The Court turned him down, though on other grounds.

As for municipalities, some observers might think municipalities would consider this parade of upzoning applications problematic, or at least tedious. That is not necessarily so. In light of s. 37, one retired senior municipal official testified:

> When the (Official Plan) says the (development) maximum is "X", and the zoning by-law says the maximum is "X", that does not mean the maximum is "X". "X" merely marks the spot where negotiations begin. [12]

That opinion is today shared by many municipalities and developers alike. Aside from occasional glitches (which went to the Board), many municipalities supposedly had a comfortable symbiotic relationship with developers: councils would adopt land-use controls, *purportedly* with a planning vision, but these would be routinely finessed, in the words of one prominent real estate spokesman, by "smearing some money around."

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8 The PPS contained a wide variety of principles, which it insisted be "read as a whole". The argument that intensification was Provincially-dictated everywhere – without exception – was equally erroneous (e.g. in floodplains) – but that did not stop various lawyers from "trying their luck" with that argument in almost every relevant hearing.

9 *Greater Ottawa Home Builders' Association et al. v. Ottawa (City),* Decision PL120666, issued March 8, 2013.

10 This proposition is advanced in the Board Decision in *Shoreline Towers Inc. v. Toronto (City),* File PL130885, issued August 30, 2016.

11 *ADMNS Kelvingrove Investments Corp. v. Toronto (City),* (2010) ONSC 6065, Court File 190/10, Nov. 3, 2010.

12 *Sterling Silver Development Corp. v. Toronto (City),* [2005] O.M.B.D. 3032.

A related view is that 1996 was a vindication – when the government of the day first published the PPS, with its emphasis on intensification.

- The *intent*, according to the official line, was that *forcing* cities to grow upward and inward (instead of outward) would *control urban sprawl.* That might even be true. Perhaps Mike Harris did lie awake nights, worrying about the encroachment of urbanization on farms, trees and chirping birds.
- But another view is that it was all about reinforcing *upward pressure on land-use controls* – and elevating that pressure from a business imperative to the status of a virtue. Persistent upzoning was not only legitimized: it was *codified*.
- For their own reasons, municipalities reputedly did not object.

Some Resulting Theories of Planning

So where does that leave Official Plans? And land-use controls? And "planning"?

According to some expert witnesses, the result was to "dumb down" leading policies – and "Plans" generally. One major planning firm's "experts" routinely testified that the "rightful" role of an Official Plan was to convey inspirational and uplifting thoughts, but certainly not to *specify* anything.

The Underlying Malaise

So that is "the system". Note: *neither developers nor municipalities created this system*. Neither did the Province – at least not consciously – though that is where the seeds were planted, generations ago. Today, the question is whether the new system will *solve all of the longstanding problems* in Ontario's planning framework.

No one said it would.

I do not envy the Attorney General. He is trying to make the best of a difficult situation, which evolved over the course of almost 70 years. Previous governments revisited the subject every few years, for decades now, yet the malaise persisted. The core of the issue runs much deeper, and has (so far) eluded any definitive analysis, let alone resolution.

The basic conundrum is in two parts. The first is *chronic uncertainty*. Look at what this so-called planning system inherited – what was "arranged beforehand"? Granted, as for "guiding criteria", the cupboard is no longer bare, as it once was. But –

- One cannot rely on the Official Plan and zoning to tell what the recognized "highest and best use" is;
- One cannot necessarily know whether that Plan and zoning were adopted in earnest, or instead as a bargaining position, in anticipation of something bigger and more lucrative for city coffers;
- And whatever those documents may say, there is formal instruction from the Province to "intensify" the outcome.
- Meanwhile, a branch of the planning profession itself swears that Official Plans should not specify anything anyway.

And people wonder why there are so many hearings, and why they take days and weeks, just to figure out what has been "arranged beforehand" – not to mention that we have also inherited a cottage industry, of legal and planning experts, to argue over how to figure it out.

The second part of the conundrum is economic:

- On one hand, all Ontarians are agreed on the importance of *planning for a better urban future*.
- On the other, no one has faced (let alone figured out) how a large part of the industry can *make money, building within the existing groundrules*, and not go out of business. Although "as-of-right development" works in rural Ontario, the real estate sector appears unanimous that, after decades of the *Farlinger Rule* (or equivalent) in urban downtowns and suburbs, *"as-of-right development" there is problematic*.
- In short, no one has figured out how to *get the development we want and plan for, without killing the goose that laid the golden egg.*

That, along with the uncertainties of everyone wanting a "piece of the action", helps explain the tortured dance which has characterized Ontario's planning system over the last many decades.

Conclusion

A decision-making system is only as good as its criteria. Ideally, they should reflect the values of Ontarians – and there should be a public, transparent *buy-in*. That could take years. But it just is not good enough to rely on a direction which essentially came out of back rooms at Queen's Park over 20 years ago.

No one ever suggested that fixing the planning system can be done in one fell swoop: it will require determined analysis, dialogue, and effort, possibly over the course of many years.

So to recap, here are my three points:

- It is about the *criteria* – the framework of underlying principles that motivates decisions.
- We need criteria that not only reflect Ontarians' *values,* but also have a public *buy-in*.
- Recent measures are an improvement, but the *underlying malaise may take longer to solve*. The issues are (a) *chronic uncertainty*, and (b) *economics*.

  That should be the next item on the agenda.