

Think twice about appealing to the OMB

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Summary

There are many miss-conceptions on the OMB, the process it follows and the likely outcomes of OMB appeals. The following is a pragmatic guide:

- The OMB does not exist to “do the right thing”. It is a Planning and Legal based organization bound by the Provincial Planning Guidelines, “good planning” and (in theory) the Municipality’s Official Plan as a basis for judgments.
- An OMB appeal, if it reaches the “hearing “stage”, grants the OMB officials wide latitude in how they reach a decision, with no appeal to a higher organization. An appeal starts ‘from new’ (“de novo”), as if the developers application had just been tabled, disregarding the Municipalities report or decisions by the Municipalities Planning Committee or City Council. Pragmatically, the OMB track record favors developers as much as 60%+ of the time.

However, judgments by various OMB hearing panels have varied widely, making it risky to appeal to the OMB for developers, private Individuals or community groups.

- While individuals can present at the OMB, if they do so without Legal or Planning credentials, experience shows their testimony will be dismissed out-of-hand by the OMB.
- To have any chance in an OMB appeal (against both the City and the developer) you will need \$35,000 at a minimum and contingency to \$80,000 to hire the Legal and Professional Planner expertise to be credible at the OMB.
- Due to the “from new/de novo” approach to the OMB in hearing OMB challenges, it invites the Developer to table what they really wanted vs. what the City approved or refused. That includes where individuals or community groups (vs. the Developer) were the ones that appealed to the OMB.

So there is a significant risk that the OMB will approve development of a larger/higher proposal than what the City approved or refused in Council.

- Appealing to the OMB needs to have a very strong case (e.g. can prove City violated Community Design Plan, Secondary Plan or their own guidelines) in order to have any chance of success. For 1131 Teron, as an example, there is a not a strong case.

Details

Appealing a City Decision to the OMB

Points to consider:

- The first step in the process is “mediation” where the OMB seeks a compromise between the Developer and the appellants, which means likely compromises (including giving up changes by Planning Committee or City Council vs. what was recommended in the City Planning Staff Report).
- If the City approves a development application without change to City Planning Staff recommendations, the chances of challenging the [City] decision and winning are less than 25% (1 in 4). In this situation you are up against both the City and Developer defending the City decision.
- Where the Planning Committee or City Council modified the City Planning Staff recommendations, the chance of success becomes more favorable to the Developer, but still subject to OMB unpredictability.
- Whether the Developer, Individual or Community Group challenges a City decision to the OMB, a Developer can table earlier proposals and ask for much larger/higher buildings than the City approved or rejected.
 - ◇ Developers run the risk of having the OMB reject the proposal entirely or substantially reducing the proposal.
 - ◇ Individuals or Community Associations run the risk of having a much larger/higher building approved by the OMB that was approved by the City.
- The track record of the OMB is inconsistent enough to suggest that Developers, Individuals and Community Associations should only appeal to the OMB where they have VERY strong case (for or against).
- Where Community Design Plans (CDPs) or Secondary Plans exist, there have been recent decisions where the OMB (based on Individual or Community appeals) have rejected City approvals as violating those plans.
- Where CDP or Secondary Plans do not exist for the Community, chance of success is minimal. In addition Peter Hume has also stated that the City does not consider Heritage Status a barrier to intensification within Communities with Heritage Status.

Where the Developer appeals a City Decision to the OMB

If a developer doesn't like a City decision they can also appeal to the OMB.

- In this case the City is obligated to defend its decision at the OMB.
- Going against a City decision where the City did not change a City Planning Staff recommendation/report will be rejected 75% of the time
- Where the Planning Committee or City Council modified the City Planning Staff recommendations, the chance of success becomes more favorable to the Developer, but still subject to OMB unpredictability.

- As stated earlier, the Developer can ask for approval for earlier larger/higher proposals than what the City approved.
- Should a Community Association choose to oppose a Developer appeal to the OMB:
 - ◇ It is highly recommended that Individuals and Community Associations also present a case against the Developer, with Professional Planning arguments, preferably presented by someone who is a Professional Planner.

As the Community will be arguing against the Developer and in conjunction with the City, we can leverage the City's legal counsel, only needing to fund our own Planning expert at much lower expense (e.g. under \$10,000)