

CURE Policy Brief



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The evolution and contradiction of Ontario's land-use oversight mechanisms and their implications for urban sprawl

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Introduction

North American cities are infamous for their sprawling built environment, characterized by low-density housing, large networks of roadways, single-use zoning, and a reliance on the automobile. Sprawling single-use residential districts have been argued to endorse private over public space, while lacking the vibrancy of pedestrian parks, community hubs, or easily accessible marketplaces (Doucet, 2007). Urban sprawl is also increasingly linked to energy and resource use, and thus climate change (Burda, 2008). Critics of urban sprawl argue its incompatibility with environmental, economic, or social sustainability.

Supporters of sprawling developments, largely unable to counter the aforementioned arguments, provide alternate rationale against regulating sprawl. They label such regulation as social engineering, in which politicians and planners should not engage (GOHBA, 2010, p. 1). They further assert such regulation as contrary to consumer choice, or the free market, exacerbating housing shortages in the urban core. Developers have demonstrated obvious success (judging from the present landscape) in leverage these arguments through strong lobbies, and litigation professionals.

Between 1971 and 1996, Canada's urbanized land area increased by 77% despite Canada's urban population increasing by only 37% (Bunting, Filion, & Priston, 2002). From 2001 to 2006, the populations in the suburban areas of the 33 census metropolitan areas grew at double the national average (Tindal & Tindal, 2009, p. 73). Because land-use planning is under shared provincial-municipal jurisdiction, the federal government has been unwilling and unable to enforce land-use policies to contain this pattern of sprawl (Robinson, 2009, p. 155).

In the Canadian context, nowhere has urban sprawl been worse than in Ontario. The loss of Ontario farmland to development is particularly concerning because Ontario hosts the best agricultural land in the country - over 21,000 km² of class 1 farmland - more than the rest of Canada combined (Sierra Club, 2003, p. 9). Since 1981, Ontario has lost nearly 5,000km² of prime farmland. Ontario's best farmland overlaps almost directly with Ontario's most urbanized areas, which includes both the Greater Golden Horseshoe Area (GGH) and the Ottawa Area. In 1967, over 62% of the Greater Toronto Area (GTA) was class 1-3 farmland. In 1997, this figure had dropped to 44% (Sierra Club, 2003, p. 10). An increasingly populated urban region is thus losing the capacity to feed itself. The continuous transformation of such lands threatens not only ecosystem resilience, but human security, as it compromises the ability of present and future generations to grow food in close

proximity their populations.

At present, Ontario's municipalities are largely aware of the relationship between the aforementioned problems and urban sprawl. They further realize that in addition to the less tangible social and environmental costs, municipalities bear substantial cost burdens in building and maintaining infrastructure to sprawling suburbs, upon which the expanded property tax base will not cover (City of Ottawa, 2003, p. 73). While Ontario's municipalities have had to deal with the consequences of urban sprawl, they face immense difficulties challenging aggressive land development, despite being the primary locus of land-use decisions.

Sprawl has continued in Ontario under the auspice of the Ontario Municipal Board (OMB), a provincial body with oversight on municipal land use decisions. Many opponents of sprawl argue the present state of Ontario's sprawling built environment has been the result of the cumulative pro-developer decisions at the OMB. This, among other factors, spurred calls for an overhaul of this institution, with the issue culminating in 2003 in the face of residential developments on Southern Ontario's ecologically critical Oak Ridges Moraine. It was in these circumstances that Dalton McGuinty's liberal party was first elected, with a platform committing to reform of the OMB. The evolution and effectiveness of such reform, as it relates to urban sprawl, will be a key theme of this paper.

This paper maintains that oversight mechanisms are not inherently counter-democratic or environmentally regressive. However, this paper reveals the recent difficulty in the design of oversight mechanisms for urban sprawl that are both accountable and effective. This paper asserts that, in Ontario, McGuinty's slate of "reforms" actually constitute an additional oversight body, while the OMB, as the original oversight body, has largely been retained in its original form. Although these newer policies have been explicitly designed to control urban sprawl, these policies have incomplete and deficient geographic coverage. When the old and new oversight mechanisms are taken together, they systematically contradict one another, leading to sprawl - particularly in regions of the province where policy coverage is deficient.

Provincial oversight mechanisms: The Old and the New

The present provincial oversight mechanisms for municipal land-use decisions comprise the OMB, as well as a number of policies put in place after the election of the McGuinty government in 2003. This paper divides these into two separate oversight mechanisms - old and new. The rationale for this organizational division becomes evident within the context how these institutions and policies came into force in Ontario's recent history.

The Ontario Municipal Board and its criticisms

The OMB is a long-standing adjudicative tribunal that has survived and evolved in Ontario over more than a century. In the few decades prior to 2003, the OMB's mandate has been relatively stable. The OMB exists as the venue for appeals against municipal land-use decisions, including planning applications, zoning bylaws, and planning related documents such as municipal Official Plans (Ministry of Municipal Affairs and Housing, 2010, p. 2). Appeals are brought forward by businesses, community groups, individuals, and most notably, developers. Land developers have learned to use the OMB to overturn municipal planning decisions which were unfavourable to their objectives. Developers are able to leverage huge legal resources and expert testimonies, often against financially constrained municipalities or community groups that rely primarily on voluntarism. Stephen Hamilton, of Dalhousie University, performed an empirical analysis of past OMB rulings and confirmed what community groups and municipalities have long suspected - that the OMB has a tendency to favour developers (Hamilton, 2007, p. 91). Aaron Moore, in his study focusing on Toronto, revealed that between 2000 and 2006, the OMB awarded favourable decisions to developers 64% of the time (Moore, 2009, p. 9). In this same period, neighbourhood associations participated in 77 appeals, winning just five favourable decisions (6.5%). Adjudication patterns at the OMB have effectively disrupted the efforts by other actors to prevent urban sprawl.

In the 1990s, the NDP government established the Commission on Planning and Development Reform. A key recommendation produced by the Commission and accepted by government, was that municipal decisions regarding land-use had to be "consistent with" government planning and policy statements (Legislative Assembly of Ontario, 2004, pp. G-465). This modest but critical attempt at curbing sprawl was undone in 1997, two years into PC Premier Mike Harris' pro-development "Common Sense Revolution".

The Sierra Club of Canada published a damning assessment of these Harris era policies in its February 2003 report, entitled *Sprawl Hurts Us All*. Their report dismissed Harris' self-proclaimed Smart Growth policies as a greenwash that was inherently pro-development. Municipalities no longer had to be "consistent with" solid policies, but only had to "have regard for" a general "Provincial Policy Statement". The Harris government modified the Planning Act to loosen regulations and eliminate citizen participation from the planning process (Sierra Club, 2003, p. 18). Furthermore, it eliminated intervener funding for appeals (Sierra Club, 2003, p. 20). Sierra Club's report cited several examples of citizens' coalitions and municipalities battling sprawl at the OMB, not only losing, but being hit with SLAPP (strategic litigation against public participation) lawsuits over developers' legal costs. They list many examples: In one instance, developers in Collingwood were awarded \$500,000 from the town itself. In yet another example, the community group "Save the Rouge River", was

asked to pay \$10,000 in developers' legal expenses after they lost their appeal, despite spending \$20,000 on their own legal fees (Sierra Club, 2003, p. 21).

Harris' second term in office coincided with huge development battles around the Oak Ridges Moraine, an environmentally sensitive area critical for groundwater recharge in Southern Ontario. The Town of Richmond Hill, containing a southern portion of the moraine, spent \$1M defending their decisions against developers who were estimated to have spent \$15M in court. Between 2000 and 2001, municipalities in the GTA spent more than \$20M in total defending their land-use decisions at the OMB (Shular, 2002). These legal fees are significant considering that capital budgets of smaller municipalities may only be a few million dollars (Sierra Club, 2003, p. 20). Mike Colle, Liberal MPP for Eglinton-Lawrence and outspoken critic of the OMB, pleaded for the passage of a Private Members' Bill abolishing the OMB's role in granting developments on the moraine, stating that "The OMB should not be deciding the future of our fish, our wildlife and our communities." (Legislative Assembly of Ontario, 2000, p. 4092)

Growing public consciousness regarding the loss of the Oak Ridges Moraine increased pressures on the government to end its complacency with sprawling development. In 2001, the Harris government passed the Oak Ridges Moraine Conservation Act (ORMCA), which marked a provincial return to regional planning after three decades of absence (Wekerle & Abbruzzese, 2009, p. 587). However, the ORMCA was fraught with loopholes, making little impact in slowing the rate of development on the Moraine, and doing nothing to change decisions at the OMB. In the lead up to the October election campaign, the protection of the Oak Ridges Moraine became one of the key issues for residents in the GTA, most notably suburban voters (Eidelman, 2010).

In addition to the criticisms levied against the Harris government, The Sierra Club blasted the institution of the OMB, citing their decisions as "one of the leading causes of urban sprawl, especially in Southern Ontario." (Sierra Club, 2003, p. 20) Sierra Club's recommendations were as follows:

- Abolish the OMB, replacing it with a new appeals board
- Prevent that appeals board from overturning municipal urban boundary decisions
- Train board members around issues relating to urban sprawl
- Reinstate intervener funding to community groups
- Establish enforceable urban growth boundaries for all Ontario towns and cities

Ontario's New Policies

In his campaign for provincial election, Liberal candidate Dalton McGuinty pledged a commitment to reign in urban sprawl, specifically stating that he would halt development on the Oak Ridges Moraine and stop a highly controversial development project for some 6,600 houses. Developers, fearing impending regulation, accelerated their development applications and housing construction in an attempt to lock-in their development plans. The Toronto Star reported that there were "[noise] complaints from area residents that graders started working 24-hours a day in response to McGuinty's announcement." (Funston, 2003)

On October 2nd, 2003, Dalton McGuinty and the Liberal Party swept the provincial election, forming a majority government (CBC, 2003). In the three weeks between the election and McGuinty's inauguration, Toronto Star reporters again visited the site of the controversial development. They reported that within this time span, these developers ramped up promotion via billboards while continuing to aggressively sell houses (Funston, 2003).

A mere two weeks into his term, an embarrassed McGuinty failed to make good on his high-profile election promise to block the construction of the 6,600 homes. After weighing an estimated one billion dollar price tag in litigation from the developers, McGuinty stated, "We're trying to make the best of a bad situation. The developers have, in fact, acquired some legally enforceable rights." (Mackie, 2003) This illustrated the problem that continues today - that once suburban land development rights have been permitted, these rights are difficult to rescind (Robinson, 2009, p. 160). In the wake of McGuinty's inauguration, and prior to official releases of improved land-use planning legislation, developers continued to aggressively use the OMB to appeal decisions that restricted urban boundary expansion and/or developments.

The release of carefully crafted and consultation-based legislation and policy proved to take some time. In May of 2004, Dalton McGuinty "fired a warning shot at developers" - as The Globe and Mail's John Barber described it, in reference to the first report from McGuinty's Greenbelt Task Force (Barber, 2004). Within hours of its release, David Donnelly, lawyer for Environmental Defense, slammed it onto the desk at a critical OMB hearing in Richmond Hill that would decide the fate of 607 hectares within the greenbelt study area.

"We told [the government] two months ago that they had to come out by May 14 or else we were going to have to pull out the bunny suits and say, 'You guys are not committed,' [but as of now] they've done everything they said they would." - David Donnelly, Environmental Defense Canada

The Greenbelt Task Force report marked the onset of what others would later call the "boldest attempt to address urban sprawl in Canada, and arguably North America." (Eidelman, 2010, p. 27) The barrage of legislation and policies produced by the McGuinty government (shown in the following table) have been outlined and critiqued by Cherise Burda of the Pembina Institute, in the 2008 progress

report entitled “Getting Tough on Urban Sprawl.” Ontario’s new policies have been explicitly designed to control urban sprawl and preserve agricultural and natural lands. Two elements of these policies, the Greenbelt Act and the Places to Grow Act, have targeted specific regions, in effect creating an oversight mechanism preventing municipalities from authorizing urban sprawl. However, these acts have incomplete and deficient coverage. Regions not covered by these acts are guided by other Ontario policies - broad policy statements as well as the Strong Communities (Planning Amendment) Act (Bill 26), designed to empower public interest and prevent appeals of municipal decisions at the OMB.

| Legislation/Policy | Description |
|---|---|
| The Greenbelt Act <i>introduced October 2004</i> | Legislation that establishes a 240,000-hectare greenbelt in the GGH within which urban development will not be permitted. |
| The Greenbelt Plan <i>effective December 2004</i> | The specific goals and policies intended to enact the Greenbelt Act. Applies to the Greater Golden Horseshoe area. |
| The Places to Grow Act <i>introduced October 2004</i> | A legal provincial framework to coordinate planning and decision making for long-term growth and infrastructure renewal in Ontario. It gives the Province the power to designate geographical growth areas and to require municipalities to bring their official plans into conformity with the growth plan for their area. |
| Provincial Policy Statement (PPS) <i>revised March 2005</i> | Revised planning rules that allow development only in areas where it can be sustained and supported by infrastructure. These include new policies to support intensification, more transit friendly land use patterns, stronger direction on land use policies for improved air quality and alternative and renewable energy. |
| Strong Communities (Planning Amendment) Act, 2004 <i>effective March 2005</i> | Legislation that requires planning decisions on applications subject to the new PPS “shall be consistent with” the new policies. It allows more time and opportunity for public scrutiny in the planning process. |
| Growth Plan for the Greater Golden Horseshoe <i>released June 2006</i> | A designated <i>growth plan</i> under The Places to Grow Act. It is a plan to delineate and set policy for where and how growth/development can occur in the GGH, including the identification of intensification nodes, build-up areas, settlement lands, greenfield areas, and employment lands. |
| Bill 51 <i>effective January 2007</i> | The Planning and Conservation Land Statute Law Amendment Act, establishing local appeal bodies to hear appeals as an alternative to the Ontario Municipal Board (OMB). |
| Growth Plan for Northern Ontario <i>released March 2011</i> | Another designated <i>growth plan</i> under The Places to Grow Act. Less focused on urban sprawl than the GGH plan. |

*Adapted from (Burda, 2008; Robinson, 2009; Ontario Ministry of Infrastructure, 2011).

The Implications of Ontario’s New Policies

Several of the above listed pieces of legislation have relevance only to particular regions of the province. The Greenbelt Act and its Greenbelt Plan are only relevant to municipalities within the Greater Golden Horseshoe. The Places to Grow Act mandates that the province, in consultation with the public and municipalities, prepare province-wide regional growth plans that, among other objectives, curb urban sprawl. So far, only two growth plans have been released: one for the Greater Golden Horseshoe, and one for Northern Ontario. While these two plans encompass the majority of Ontario’s land mass, they leave out many other regions that are challenged with reigning in urban sprawl. The remaining policies listed in the table above have therefore had to suffice in directing and empowering municipalities to prevent urban sprawl. These remaining policies have implications for OMB decision making, and thus, constitute a sort of reform to both the OMB and the Planning Act.

The Planning Act, legislated in 1990, establishes the rules for land-use planning in Ontario and “describes how land uses may be controlled, and who can control them.” (Ministry of Municipal Affairs and Housing, 2010) The McGuinty government reinstated the text in the Planning Act that required land-use planning, including decisions made by the OMB, to “be consistent” with a now strengthened Provincial Policy Statement (PPS). The Planning Act grants the authority to issue the PPS to the Ministry of Municipal Affairs (Environmental

Commissioner of Ontario, 2005, pp. 39-46). This new PPS was designed to curb sprawl, and emphasizes intensification and minimum densities, mixed-use development to reduce travel needs and traffic congestion, required minimum standards for planning authorities, and established provincial plans.

Under the Strong Communities (Planning Amendment) Act, the Minister of Municipal Affairs can declare a provincial interest in an appeal before the OMB if that minister believes it affects a matter of provincial interest. Once declared, the OMB's decision is non-binding until it is confirmed by cabinet. If a provincial interest has been declared, cabinet is not obligated to adhere to the 2005 PPS (Environmental Commissioner of Ontario, 2005, pp. 39-46). When introducing this legislation at Queen's Park, John Gerretson, then Minister of Municipal Affairs, stated that:

"planning reform would give the province the option to exercise authority on significant matters that affect provincial interests. It would provide the province with the authority to confirm, vary or rescind an OMB decision if it adversely affects a declared provincial interest regarding official plans and zoning." (Legislative Assembly of Ontario, 2004, pp. G-463)

NDP opposition member Julia Munroe expressed her concerns regarding the accountability aspect of this legislation, calling it a "double-edged sword", inquiring as to "what kind of checks and balances are in place by cabinet?" (Legislative Assembly of Ontario, 2004, pp. G-465) Gerretson responded by saying that the powers to overrule an OMB decision have always existed, but have only been used in four instances in the past, and that he had no intention of abusing these powers in the future (Legislative Assembly of Ontario, 2004, pp. G-467).

In Burda's assessments of Ontario's new policies, she notes while they afford greater decision-making authority to municipalities, municipalities need not do anything more than to "conform to broad policy, which [presently] allows for 60% of development in greenfields, resulting in sprawl." (Burda, 2008, p. 22) However, she also advocates for municipalities to have even greater decision-making authority, which although "democratic", could in many instances serve to aggravate the aforementioned problem. Burda's additional recommendations include reforms to the OMB, paralleling recommendations made by the Sierra Club five years earlier. She advocates that the OMB appointment process be modified such that new openings are subject to an open call for qualified candidates, reviewed by a non-partisan advisory committee, and selected by the Attorney General. She also calls for the re-establishment of intervener funding for advocates of the public interest (Burda, 2008, p. 42).

Drawing conclusions as to the degree of success of Ontario's new and often complex policies are both difficult and contentious. Burda hesitates to make such a conclusion, instead stating that "the effects of this legislation will need to be understood over time" (Burda, 2008, p. 39).

Conclusion

Although the Ontario government committed to a reform of the OMB, the additional legislations and policies that were meant to bring about this reform have clearly not been realized in practice. This is especially true in municipalities which fall outside both planning areas of Ontario's Greenbelt Act and Places to Grow Act. This implies that a partial remedy can be found by deploying additional growth plans under the Places to Grow Act to cover the remaining regions of the province.

While the Minister of Municipal Affairs has the authority to intervene in the OMB appeals process if it is deemed a matter of provincial interest, this power has yet to be exercised in preventing an urban sprawl development. A case could arise whereby the Minister could intervene to "save" municipalities on a case-by-case basis. While this tactic may win a particular battle, it is a double-edged-sword. Using the same powers afforded under Ontario's new policies, a subsequent government simply has to change the text of the Provincial Policy Statement, or state a provincial interest prior to an OMB hearing, and that Minister can decide the outcome of any land-use adjudication. Such future Provincial Policy Statements or declared provincial interests are not required to be in-line with curbing sprawl, and present an opportunity to be used for ominous ends. As such, requesting Ministerial intervention at the OMB may set a precedent for rampant intervention by any subsequent governments, including those not concerned with urban sprawl.

Affording final say in land-use decisions to municipalities is also no guaranteed solution to urban sprawl. As evidenced by statistics on developer campaign contributions to councillors, it may be the case where council pushes through a pro-development agenda. In comment submissions on the Strong Communities Act, the Ontario's Environmental Commissioner's Office concedes this point, stating that:

"the transfer of final decision-making powers from the OMB to municipal councils may be positive when municipalities are progressive in their approaches to land use planning - but potentially problematic when they are not." (Environmental Commissioner of Ontario, 2005, pp. 36-39)

Despite this possibility, many environmental organizations like The Pembina Institute and Sierra Club continue to advocate for these strengthened decision making powers at the municipal level, while at the same time advocating stronger direction from the provincial government. This paradox is highly illustrative of the difficulty in provincial oversight mechanisms that attempt to further a particular policy direction. Unless sustainable development is fortified as a non-partisan issue, it is unreasonable to expect long-term continuity in provincial

oversight that will effectively prevent sprawl. To achieve this, principles of sustainable development must be embedded not just in legislation, but in the constitution.

The OMB, as a historic institution, may just be experiencing bureaucratic inertia. With time, board members should eventually be replaced by competent planners familiar with sustainable land-use policies and the problems associated with urban sprawl. With 8-year board member terms, such institutional change will be slow, and in that time, the natural lands will continue to be lost to concrete and pavement.

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