



VILLAIN OR SCAPEGOAT

THE ONTARIO MUNICIPAL BOARD AND LAND USE PLANNING IN ONTARIO

BY: AARON A. MOORE

PRESENTED FOR THE INSTITUTE ON MUNICIPAL FINANCE AND GOVERNANCE

DECEMBER 6TH 2011

Introduction

- Since the mid 1990s, residents and local politicians have vilified the Ontario Municipal Board.
- However, opponents and proponents of the Board rarely address the larger institutional and legal framework governing planning in Ontario.
- This presentation tries to place the OMB in this larger context.
- I intend to argue that the OMB is not the main source of discontent in Ontario over planning and development.
- Rather, it is the seemingly arbitrary and opaque nature of planning in Ontario that is responsible for the ire directed at the Board.

Outline

- Why is the Ontario Municipal Board perceived as a villain?
- My research.
- Is the OMB pro-development? (Toronto as a case study)
- How does planning in Ontario compare to other US and Canadian jurisdictions?
 - The OMB and other Appeals Bodies
 - The role of State and Provincial government
 - Planning legislation in the US and Canada
- What is the practice of planning in Ontario? (Toronto as a case study)
- What would happen if we got rid of the OMB?
- Is the OMB a Villain or a Scapegoat?
- Short and long term policy considerations.

Why is the Ontario Municipal Board perceived as a villain?

The Ontario Municipal Board

- Ontario Railway and Municipal Board created in 1906.
- Early 1930s name and purpose of Board changed.
- Over the decades, the OMB acquires even more power over municipal government.
- By 1990s, Board becomes primarily an appeals body for municipal planning decisions.
- Anyone can appeal to the Board.
- Developers can appeal if a municipality fails to make a decision 120 days after a proposal is submitted.

Why is the Ontario Municipal Board perceived as a villain?

Powers of the OMB

- The Board's powers are substantial.
- The Board hears appeals on both minor and major planning issues.
- The Board can uphold municipal decisions.
- The Board can overturn municipal decisions and support developers' proposals.
- The Board can ignore both sides to a hearing and substitute its own decision.

Why is the Ontario Municipal Board perceived as a villain?

Source of Discontent

- The Board is an appointed provincial body.
 - Its members are chosen by the government of the day (for a maximum of 5 years).
 - Its members typically come from law, planning, and politics.
- Opponents of the Board claim that it is beholden to the development industry and is anti-democratic.

Past Research

- Forthcoming book:
 - *Planning Institutions and Politics: The Ontario Municipal Board and Toronto.*
 - From the University of Toronto Press (available summer 2012).
- Examined the influence of the Ontario Municipal Board on the politics of urban development in Toronto
- Compared and contrasted the OMB and Ontario with other North American jurisdictions.
- Compiled a database of over 320 OMB appeals of Toronto City Council decisions from 2000 through 2006.

My research

Continued...

- Also conducted 8 in-depth case studies
- Relied heavily on OMB archive material:
 - City Planning reports;
 - Communications between interested parties;
 - All other submissions made to the OMB and to City Council, etc.
- Conducted interviews with:
 - 1. Developer; 2. City Councillors; 3. City and private sector planners; 4. Municipal lawyer; 5. Neighbourhood Association



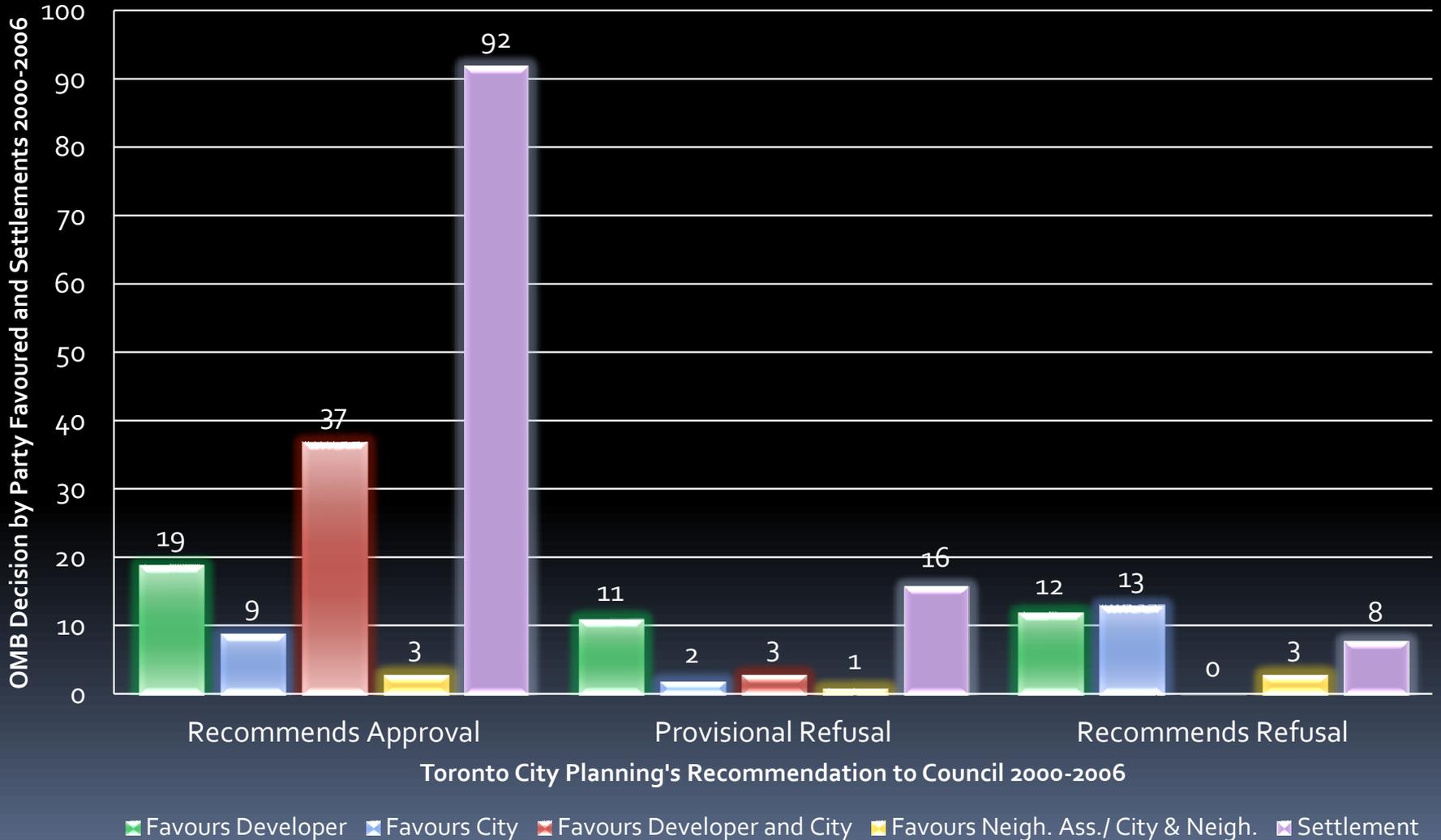
My research

Current Research

- Examines the role City Planners play in shaping planning policy and politics in Canada's major cities.
- Side project examines the use of density bonusing in Toronto and Vancouver
- Currently compiling database of City Council and sub-committee decisions for 8 major Canadian cities.
- Databases draw on City Council minutes, subcommittee minutes, and City Planning reports.
- For Toronto, currently compiled data for all council meetings from Sept. 2008 through Sept. 2011.

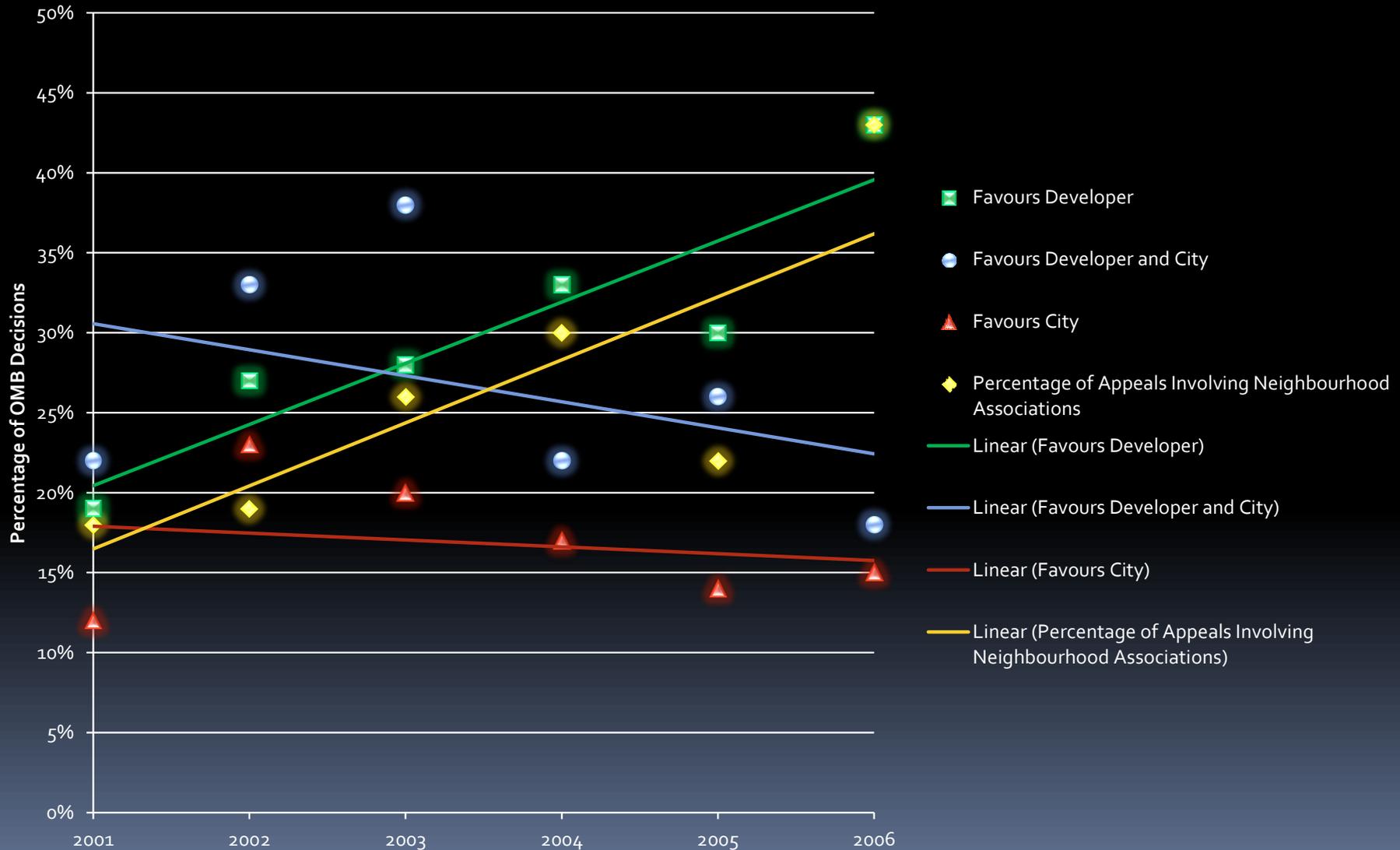
Is the OMB pro-development?

City Planning's Recommendation to Council/OMB Decisions for Toronto



Is the OMB pro-development?

Trends in OMB Decisions, Hearings, and Participation - 2001 - 2006



Is the OMB pro-development?

The OMB as a Tool of Developers

- Bias cannot simply be attributed to a pro-development sentiment.
- Decisions based largely on planning rationale.
- Developers can outspend municipalities and residents on planning expertise.
- The OMB is biased against individuals lacking the requisite knowledge of planning.
- If all other things were equal, the Board would be biased in favour of *city planners*.

How does planning in Ontario compare to other US and Canadian jurisdictions?

Other Appeals Bodies in North America

- All provinces but BC have some form of appeals body.
- None have the same breadth of power as the OMB.
- The Nova Scotia Utility Review Board comes the closest.
- In the US, many states rely solely on the courts.
- Trials are often long and expensive processes.
- Other states in the US have appeals bodies, but most lack the power of the OMB.
- Oregon's Land Use Board of Appeal is an important exception.

How does planning in Ontario compare to other US and Canadian jurisdictions?

Oregon and the Land Use Board of Appeal

- Same decision-making power as the OMB, but only in relation to Comprehensive Plans.
- Makes its decisions largely based on planning rationale.
- Anyone can appeal municipal decisions.
- But most emanate from the **Department of Land Conservation and Development (DLCD)**.
- The **DLCD** oversees Comprehensive Plan Amendments, but cannot overturn the decisions of municipalities.
- Few appeals make it to the LUBA.

How does planning in Ontario compare to other US and Canadian jurisdictions?

The Ontario Government and Planning

- How does the provincial government of Ontario stack up against the State of Oregon?
- Very little involvement in municipal planning through 90s and early millennium.
- The Liberal government has ventured into urban planning:
 - *Places to Grow Act; Greenbelt Protection Act; Growth Plan for Greater Golden Horseshoe; Provincial Policy Statement*
- Even altering legislation governing the OMB:
 - *Strong Communities (Planning Amendment) Act, 2004;*
 - *Planning and Conservation Land Statute Law Amendment Act, 2006 (Bill 51)*
- But, the Province has proven very reluctant to involve itself directly in the affairs of municipal planning.

How does planning in Ontario compare to other US and Canadian jurisdictions?

Planning Legislation in North America

- In Oregon, municipalities can amend their comprehensive plans and zoning by-laws as frequently as they want.
- However, this is not the norm.
- In many US jurisdictions, planning law is “self-executing” (Cullingworth 1993)
- Comprehensive (or Official) Plans are often even less flexible than zoning.
- Many states severely curtail municipalities’ ability to amend their plans.
 - Georgia limits major amendments to **one** every **five** years.
 - Florida requires that all amendments to comprehensive plans be approved by the State’s Department of Community Affairs.

How does planning in Ontario compare to other US and Canadian jurisdictions?

Ontario in Comparison

- Zoning in Ontario is not “self-executing.”
- Zoning By-law Amendments are a common occurrence.
- As in Oregon, municipalities can amend their official plans as frequently as they want.
- Unlike Oregon, there is limited provincial oversight of OPAs.
- Provincial legislation even encourages municipalities to amend their planning laws.

How does planning in Ontario compare to other US and Canadian jurisdictions?

Incentive to Amend: Section 37

- Section 37 of the Planning Act allows for “density bonusing” in Ontario,
- The practice of granting density and height that exceeds zoning by-law restrictions in return for “benefits” from the developer.
- Amendments to zoning by-law for height and density bonusing often requires OPAs as well.
- In Ontario’s larger cities, the use of section 37 can be very lucrative.

How does planning in Ontario compare to other US and Canadian jurisdictions?

Ontario: The Wild West of Planning

- Zoning by-laws and Official Plans do not provide a *clear* indication of municipal planning policy in Ontario.
- Flexible versus a rigid system of planning:
 - Rigidity:
 - Clear indication of municipal policy.
 - Cannot adapt well over the long-run
 - Flexibility:
 - Allows for municipal planning law to adapt and evolve.
 - Lack of clear guidelines can lead to greater conflict.
- Municipal planning law needn't adhere to either extreme.

What is the practice of planning in Ontario?

The Practice of Planning in Toronto

- What is the impact of this highly flexible system of planning on the actual practice of planning?
- The following data from my recent research on Toronto provides some indication.
- From Sept. 2008 through Sept. 2011 Toronto:
 - Amended its zoning by-laws **261** times.
 - Amended its Official Plan (in force since 2007) **98** times.
 - Implemented section 37 agreements **118** times.
 - Approved **238** development proposals requiring OPAs and ZBLAs and rejected **31**.
 - Out of the **284** proposals City Council heard, **44** involved requests from city planning for direction for OMB hearings .

What is the practice of planning in Ontario?

Urban Development Politics in Toronto

- Beyond the Statistics.
- A few important, though perhaps not surprising findings from the research for my forthcoming book.
- Issues of urban development have been a major source of conflict for decades in Toronto.
- However, since the nineties, rarely an elections issue.
- The OMB allows local politicians to avoid real decision-making.
- Real planning decisions are made mostly by City Planning and the OMB.

What would happen if we got rid of the OMB?

Ontario without the OMB

- Now that we understand the broader context and practice of planning in the province:
 - What could we expect if we stripped the OMB of its authority over planning?
- In jurisdictions without appeals bodies, the courts are the first stop.
- Court cases are long and costly.
- Ontario's *Planning Act* strictly limits appeals of OMB decisions to the courts for this reason.
- How likely are planning disputes to turn into litigations in Ontario?

What would happen if we got rid of the OMB?

The Consequence of No OMB

- Urban development remains a major source of conflict in Toronto and elsewhere in Ontario.
- The Courts would not consider planning rationale.
- Developers could use past council decisions to justify similar developments.
- Refusing development based solely on noncompliance would be difficult if a municipality frequently amends its planning laws.
- The courts are unlikely to leave planning decisions solely to the whims of municipal councils.

Is the OMB a Villain or a Scapegoat?

- Is the OMB a force for good?
- Should the OMB be abolished?
 - Subjective answer: No. I have a forthcoming book on the OMB, and it will sell better if it still exists.
 - Objective answer: Maybe. But we must address the broader issues in our current planning regime if we are to do so.
 - The current system of planning in Ontario is opaque, and to the uninitiated can appear arbitrary.
 - Abolishing the OMB would not address this.

Short Term Policy Considerations

- Focus on technical planning rationale currently places both residents and smaller municipalities at a disadvantage.
- Ensuring everyone gets their own urban planner and lawyer is not the answer,
- But the Province should invest in resources to help non-experts navigate urban planning and the appeals process.
 - E.g. an easily accessible website or a hotline that could address residents' questions about planning language and planning law.

Long Term Policy Consideration

- The existing system is at the root of discontent over planning in Ontario, not the OMB.
- Democracy should be an important aspect of municipal planning.
- However, would we be happy if the Provincial or Federal Governments constantly changed legislation?
- We need to address whether the current planning regime is still appropriate in this age of rapid development.

...continued

- The Province should restrict Official Plan Amendments , or become more actively involved in monitoring them.
- The process of enacting a new plan should not take half a decade because of OMB appeals.
- The Province must enforce a timeline for considering appeals of new official plans.
- The Province should reconsider its current regulation of density bonusing.
- Making planning more transparent will significantly reduce much of the ire currently directed at the OMB.