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You and the OMB

by William H. Roberts

You are facing an application that is about to go to the OMB. What can you do as a group of citizens who want to fight the application? How do you prepare? This paper outlines some key points for you to consider in preparing for the hearing. One key point, the OMB exists and you have to function within that reality.

No news is never good news. Most often those who oppose an application wait too long and do not fully prepare. There are tasks you can do well in advance of the hearing. These points are to assist you in doing what needs to be done.

1. **Remember the Ontario Municipal Board (OMB) is like a court of law.** Understand that the Ontario Municipal Board makes its decision based on mixture of facts and law. While it is not a court, a modified set of rules of evidence applies. It can allow evidence that would not be allowed in a court of law, subject to the weight it gives such evidence.
2. **Weight** is a legal term. In effect the result is that **certain types of evidence will receive little or no consideration.** For example *petitions are given little weight* since they are usually informal and it is generally assumed that some people will sign anything just to get the person to leave them alone. *Letters are given more weight* because someone had to take the time to write them and presumably they mean what they say, but if the writer is not present to be cross-examined by the opposing lawyers it is given less weight than if the person is present and willing to testify. Form letters which only require a signature are given less weight, but more weight than a petition.
3. **If your opinion conflicts with the opinion of an expert, the expert's opinion will be given more weight** because he or she is an expert. Even between experts, the board will give more weight to one expert than another if the one is speaking in an area they have been trained in or been qualified in, in the past, versus an expert who may be speaking beyond their area of expertise. For example on official plan matters a planner will usually be given more weight than an architect because of the nature of training.
4. **The evidence of an expert is a mixture of facts and opinion.** All expert opinions are based on certain facts, and assumptions based on those facts, and the generally accepted opinion of other experts in the field.
5. **If the facts the expert relies on are not correct then the opinion can be attacked.** If the facts are wrong, then it follows the assumptions resting on those facts are faulty and as a result the opinion is faulty.
6. **If the assumptions are not correct then the opinion can be attacked.** This will be harder for a layperson to attack unless they have been advised by an expert in how to make the connection. Even this may prove risky.
7. So **do not rely on the following concepts.**
It is obvious...
We all agree...
We believe...
The fact that you believe something to be obvious does not make it so without proof that it is so. The fact you all agree does not make it any more true than if none of you agree. It is likely that the other side does not agree, and the Board can agree with the other side. The fact you believe is not proof of a fact.
8. **FACTS AND NOTHING BUT THE FACTS,** to quote Sergeant Friday from Dragnet. You need to have facts supporting your position. If properly gathered your facts, are as good as the expert's facts, and could prove to be better.
9. As an example, saying there is a traffic problem adds nothing. Several people repeating the same point adds nothing, but may annoy the Board member and could put you and your group at risk for costs.
10. **Gather facts sooner rather than later.** Make Freedom of Information Requests for traffic accidents and studies. If other developments have been approved in the area at other OMB hearings, then look at those other OMB files to see if traffic studies were filed. Compare the numbers and assumptions in those studies to the ones in the report you have for the application you are opposing. . Do your own counts.

11. **Do not wait until the Council has made a decision** to approve or refuse the application. If you know the applicant will be appealing, if Council refuses, then start preparing for an OMB hearing sooner rather than later. Assemble your information.
12. You may not be able to afford an expert to do a study but *you may be able to afford to have an expert review the other expert's study* (if you can lay your hands on it) and to advise you if there are problems with its facts or assumptions.
13. **Remember if experts were the end all and be all, then there would be no need for a hearing.**
14. You may be able to make points, and in unusual circumstances you may win or at least win key changes in the proposal; but you must decide what your best case is. Long hearings cost more money. Pick your key points, provide proof in support of your position, and do not work on the assumption that the more issues you raise, the better your odds are. By concentrating on the key issues and dropping ones you cannot win, you will shorten the hearing and reduce your costs and the risk of having costs awarded against you.
15. **You are better to concentrate on the key weak points in the applicant's case which you on your own or your consultants have identified, and build your case around those.**
16. **Preparation, preparation and more preparation** must be your modus operandi. You need to prepare tables, photo boards and charts to illustrate your position. Have several copies for the OMB and the other parties (or their lawyers/agents). [You need to keep your rough data (e.g. Traffic counts, etc.) in case you are asked to produce it.] Practice what you want to intend to say. Keep it crisp and on the point you want to make. Preferably the tasks should be split among several speakers, who each can touch on a key point or key aspect of each key point while adopting the points of other speakers and confirming their own reasons for objecting. The greater effort in preparation you make, the more the OMB is likely to listen, although there is no guarantee.

LIST OF CASES

Re City of Mississauga Official Plan Amendment 174 and Zoning By-laws 695-90 and 696-90 (No. 1) (1991) 27 O. M. B. R. 110 – anecdotal accounts of traffic delays was countered by expert evidence to show that the developments would not be the cause of the problems – and on other matters the residents did not seek documents or witnesses to support their case. [note in Re City of Mississauga OPA 174 and Zoning By-laws 695-90 and 696-90 (No. 2) (1991) 27 O. M. B. R. 113 refused costs but gave warning that the Board might do so under similar circumstances in the future.]

Re Sorokolit et al. and Regional Municipality of Peel et al. (1977) 16 O. R. (2d) 607 (Divisional Court) – dealt with section 63 (then 62) of OMB Act and a zoning application. Board had approved the application subject to the payment of special lot levies. The court held the OMB did not have the power to impose such levies and sent the matter back to the OMB to reconsider it. Section 63 states that the OMB can consider financial implications of any approval. [Note: When the matter went back to the Board it refused the application on the basis it would not force the costs related to the development on the general tax base. The applicants then went back to the courts and lost.]

Tabassum et al. V. City of Toronto (2006) 55 O. M. B. R. 50 (O. M. B.) – held that one cannot be both an expert witness and an advocate. The two roles are not compatible. The responsibility of an expert is to give independent and impartial evidence. The level of independence and impartiality goes to weight.

Re 251555 Projects Ltd. and Morrison (1979) 5 O. R. (2d) 763 (Divisional Court) – confirmed there were four tests for minor variances and also held the fact that the planning staff of the local municipality has approved it is not decisive since then there would be no need for the Committee of Adjustment or the OMB.

Re McNamara Corporation Ltd. et al. and Colekin Investments Ltd. (1977) 15 O. R. (2d) 718 – found minor is not a mathematical calculation – found that proposed variance was equal to or superior to the by-law requirement

Vincent v. Degasperis (2005) 51 O. M. B. R. 1 (Div. Ct.) – reconfirmed the four tests and outlined how each test should be viewed.



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