ONTARIO STONE, SAND
& GRAVEL ASSOCIATION

Essential materials for building a strong Ontario

Dec 16, 2016

Ontario Municipal Board Review
Ministry of Municipal Affairs
Provincial Planning Policy Branch
777 Bay Street, 13th Floor
Toronto, ON M5G 2E5

Mr. Ken Petersen:

Re: Ontario, Stone, Sand & Gravel Association ("OSSGA")
Comments on the Ontario Municipal Board Review Public Consultation Document
EBR# 012-7196

Introduction

OSSGA is a not-for-profit association representing over 280 sand, gravel and crushed stone producers and suppliers of valuable industry products and services. Collectively, its members supply the substantial majority of the more than 160 million tonnes of aggregate consumed each year in the province to build and maintain Ontario's infrastructure. OSSGA works in partnership with the public and government agencies at all levels to promote a safe and competitive aggregate industry, contributing to the creation of strong communities.

OSSGA is pleased to provide input on the reforms under consideration in response to the Province's public consultation document on the OMB Review (the "Consultation Document"). The Ontario Municipal Board plays a vital role in our planning system. In light of the importance of aggregates in the development of Ontario's infrastructure and the particular dynamics associated with *Planning Act* and *Aggregate Resource Act* applications to permit aggregate resource extraction, OSSGA has a unique perspective on many of the issues raised in the Consultation Document.

Comments

1. Additional Limits on Appeals of Official Plan Decisions Would not Adequately Protect the Province's Interest in Aggregates

The Consultation Document notes that the Province is considering prohibiting appeals of certain parts of its decision on official plans. In OSSGA's view, such a change could jeopardize long standing provincial objectives in regard to mineral aggregates.

The Province has a clear, consistent and long-standing interest in securing the protection and availability of mineral aggregates. This provincial interest has long been reflected in Provincial

Policy Statements, and was recently affirmed in the 2014 Provincial Policy Statement (the "2014 PPS"), which provides that aggregate resources shall be protected for long-term use, and made available as close to markets as realistically possible. In order to ensure that this provincial directive is properly implemented, decisions on municipal official plans must be subject to scrutiny through the appeal process.

In our experience, municipal decision-makers can be susceptible to focusing on local interests at the expense of broader provincial interests when it comes to aggregates. Despite the importance of aggregates to the Province as a whole, individual communities or local stakeholders may prefer that the extraction of such resources take place elsewhere. In these circumstances, appeals to the OMB are essential, as the politically expedient decisions of a municipal council or approval authority, may not represent good planning in regard to the provincial interest in aggregates.

Furthermore, in our experience, the OMB process often allows for productive dialogue that ultimately leads to better planning policies. Aggregate matters are complex and highly technical. The OMB process is often the best way to bring the different perspectives and sources of expertise together to refine official plan policies to appropriately protect aggregate resources as required under the 2014 PPS while also satisfying municipal planning objectives. Appeals to the OMB provide a useful platform to allow this constructive process to play out.

2. Implementing a Reasonableness Standard of Review in OMB Hearings will Likely Lead to Poorer Planning Decisions in Regard to Aggregate

In an effort to give more weight to municipal and provincial decisions, the Province is considering moving away from de novo hearings. As a potential alternative, the Consultation Document suggests requiring the OMB to review municipal/approval authority decisions on a standard of reasonableness. In OSSGA's view, this approach will likely lead to poorer planning decisions.

Generally speaking, a reasonable decision is one that falls within a range of defensible outcomes, in light of the facts and law (or in this case, planning policy). Under this standard, municipal/approval authority decisions that do not fulfill the full promise of provincial policies, and do not protect aggregate resources to the appropriate extent, could nevertheless be considered reasonable, and thus upheld at the OMB.

The Province has invested significant time, energy and resources into developing a planning framework that promotes its vision of building strong, sustainable communities through efficient development. As discussed above, protection of aggregates is a key component of that framework. In order to safeguard the Province's vision with respect to aggregate protection, municipal/approval authority decisions must be consistent with provincial policy; *reasonable* consistency is not sufficient.

3. Requiring the OMB to Send a Matter Back to Council When New Information Arises would be Inappropriate

The *Planning Act* currently permits the OMB, on its own initiative or on motion by a party, to send a matter back to municipal council for reconsideration where significant new information arises in the course of a hearing. The Consultation Document indicates that the Province is contemplating making such reconsideration mandatory.

In OSSGA's view, a uniform rule mandating reconsideration would be inappropriate. As noted above, OMB hearings regarding aggregate resources are highly technical and can involve significant amounts of scientific information. While an application for aggregate development would involve the submission of appropriate technical reports to Council and often a peer review of those reports, in OSSGA's experience, interactions between technical experts in the course of the hearing process can lead to requests for additional technical information or clarifications. There may be times when that new information warrants reconsideration by council, but there are many times when it will not. In OSSGA's view, the presiding board member is in the best position to determine whether reconsideration is warranted on a case-by-case basis, in light of the particular facts. Mandatory reconsideration would consume significant council resources dealing with matters already addressed, while delaying OMB hearings.

Furthermore, it does not appear that the existing ability for a party to ask the OMB to send a matter back to council as a result of new information, is widely used today in the aggregate context based on OSSGA's experience. This suggests that the reform under consideration may be an attempt to provide a solution to a problem that may not exist.

4. Prohibiting Appeals of Interim Control By-laws would Likely Lead to Abuse

The Consultation Document suggests that the Province is considering prohibiting appeals of interim control by-laws. In OSSGA's view, such a change would be inappropriate. Interim control by-laws can be an effective and legitimate planning tool. However, without appropriate constraints, interim control by-laws are susceptible to abuse.

In OSSGA's experience, the potential for an OMB appeal serves as a useful check on municipalities' interim control by-law powers. Without an appeal mechanism, municipalities would be much more likely to enact interim control by-laws to satisfy local interests, without sufficient planning justification. In light of common local perspectives on aggregate resource extraction, the potential for such abuse is especially concerning to OSSGA. In OSSGA's view, given the Province's recognition of aggregates as a protected resource, the potential for such abuse should be equally concerning to the Province.

5. The OMB's Existing Approach to Transition and the Use of New Planning Rules Strikes an Appropriate Balance

Planning policies evolve and change over time. Sometimes these changes occur while an application is in the middle of the approval process. Such mid-stream policy changes are especially common in aggregate applications, as the approval process can span years. Furthermore, given that aggregate applications can be locally unpopular, they are susceptible to targeted policy amendments specifically aimed at thwarting in-process applications.

In OSSGA's view, the approach to addressing policy changes set out in the OMB's jurisprudence and the *Planning Act* appropriately balances the myriad considerations at play. OMB case law has long recognized that there is unfairness associated with changing the "rules of the game" in the middle of the approval process. Accordingly, the Board generally assesses applications against the policy documents in place at the time the application was made. This is more than just a matter of OMB policy; it is a principle of natural justice and procedural fairness. As one OMB decision put it:

> It is well-settled law that natural justice and procedural fairness require that a party know the case it must answer and be permitted to answer that case. If, in the context of planning law, the policy regime were a moving target, natural justice would be absent.[1]

Despite this general principle, OMB case law recognizes that a strict application of the principle is not always justified. Accordingly, the law allows for relaxation of the principle in appropriate circumstances, such as when the revised policies were publicly available as proposed policies well before the application was made, even if they were not yet in effect. The considerations of fairness in any given case require a nuanced and fact-specific analysis. The Board member presiding over the hearing is best placed to make this assessment.

A hard-and-fast rule mandating that all matters be decided in accordance with the municipal policies in effect at the time of the decision is especially concerning to OSSGA and could undermine the provincial objective of protecting aggregate resources and making them available as close to markets as possible.

The existing provisions of the *Planning Act* contribute to the balanced approach reflected in the existing legal framework. The *Planning Act* currently provides that the provincial policies and plans in effect at the time of the decision, rather than the time of application, govern. This rule recognizes the paramount role of provincial policies and plans in our hierarchical planning framework. As described above, giving municipal policies the same status would make them susceptible to abuse to the detriment of fairness, natural justice and good planning.

[1] *Sun Life Assurance Co. of Canada v. Burlington (City)*, [2007] O.M.B.D. No. 1277 at para. 32.

6. The Role of the Citizens' Liaison Office Should be Expanded

While OSSGA believes that funding citizen groups would not be an appropriate use of resources, it strongly supports the expansion of the Citizens' Liaison Office to provide a greater depth and array of resources to the public. Well-informed parties and participants improve the hearing process for all concerned, and often facilitates a better planning outcome.

Conclusion

OSSGA appreciates the opportunity to provide its input as part of the OMB Review. We hope to continue to participate in the process as it unfolds. To that end, we would be happy to discuss any of the issues raised in this letter further.

Thank you again for the consideration of our comments. Should you have any questions or concerns please do not hesitate to contact me at nscheesman@ossga.com or 905-507-0711.

Sincerely,
ONTARIO STONE, SAND & GRAVEL ASSOCIATION

Norm Cheesman
Chief Executive Officer