

The Role of the Ontario Municipal Board in Adjudicating Agricultural Conflict*

1.0 Introduction

Land use conflict arises in communities because people have divergent interests and claims upon land. More fundamentally, land use conflict arises because of differing views about what is socially desirable. Inevitably, developing and implementing all public policy (including land use policy) is about making choices between competing claims regarding social well-being (Vira, 2001).

In Ontario, the Ontario Municipal Board (OMB) is a central part of the planning process, being the regulatory body that adjudicates conflict related to municipal and land related matters. This paper explores the role of the OMB in adjudicating conflict specifically related to agriculture. Before considering specific OMB decisions, Section 2 outlines the history of the OMB, the role of the Board, and describes the process the Board uses.

The paper uses two approaches to consider the role of the OMB. Section 3 analyses OMB hearings related to agriculture which were heard in 2000 and 2001. The discussion summarizes the stakeholders participating in hearings and the types of conflict that precipitated OMB hearings in an attempt to understand the impact of the hearings on communities, and the role of the OMB in adjudicating conflict.

Section 4 delves into three specific OMB hearings. It relies on conversations with the main players in each of these cases to explore the community perception of the OMB, the effectiveness of the OMB in resolving the dispute, and the impact of the decision on broader policy. The divergent perspectives regarding the hearings, the process, and the decisions offer a wealth of anecdotal insight into the competing interests and inescapable conflict that exists in all communities.

Using the material collected from the summary review of 2000 and 2001 hearings and three individual case studies, the paper attempts to identify the role of the OMB in implementing and influencing policy. Section 5 discusses trends in OMB decisions and the manner in which the Board uses municipal and provincial policies to arrive at

decisions. It also considers the potential impact of OMB decisions on subsequent land use policies at the municipal and provincial level.

Conflict is an ever-present reality of all land use planning. The following analysis of agricultural conflict attempts to understand the role the OMB play, and the impact it has on communities. Bhaskar Vira (2001) makes an excellent point with regards to conflict and policy decisions. “The most difficult decision about rights involves both the recognition of specific claims and the rejection of others.”

2.0. Role of the Ontario Municipal Board

This section of the paper provides an overview of the role of the Ontario Municipal Board. The history, structure and function of the Ontario Municipal Board are presented.

2.1. History of the Ontario Municipal Board:

The Ontario Municipal Board is a quasi-judicial, adjudicative tribunal which resolves appeals on a wide range of municipal and land related matters (OMB, 2001). The Ontario Municipal Board was originally created in 1897 and is the province’s oldest regulatory and adjunctive tribunal. Its original purpose was to supervise account keeping by municipalities. In 1906, the Ontario Railway and the Municipal Board was created, with the added responsibility of supervising the mode of transport within and between municipalities (OMB, 2001).

The Board was renamed the Ontario Municipal Board in 1932. Since 1932, the powers of the OMB have been expanded. Currently, the Board draws its jurisdiction from more than 180 statutes (OMB, 2001). While the Board’s jurisdiction is drawn from a large number of Acts, most if its work arises from the *Planning Act* (OMB, 2001) (Refer to Table 2.1).

* This paper was researched with the assistance of Claire Weir and Susanna Reid.

2.2. Members of the Board:

The Board is comprised of a number of Board members. At the end of 1999-2000, there were 27 full-time and six part time appointees to the Board. These members conduct tribunals held by the OMB (OMB, 2001).

Members participate in an interview process. Successful candidates are appointed by the provincial government in power to serve a three-year term (OMB, 2000). The membership includes a variety of professions: lawyers, planners, engineers, accountants, economists, farmers, teachers, professors, municipal politicians and administrators (OMB, 2001).

Members receive formal training and orientation. This training includes practicing with an experienced Board member. The Board has been offering this type of training over a number of years. Experienced Board members act as mentors (OMB, 2001). Ontario Municipal Board members also attend monthly workshops on a variety of topics, including changes in legislation, recent court decisions, and all aspects of conducting hearings and other proceedings (OMB, 2001). This training is provided to keep members abreast of recent changes that may affect their decision-making authority. The training also introduces techniques for members to use in conducting a hearing and mediation.

2.3. Purpose of the Board:

The purpose of the Ontario Municipal Board is to act as a quasi-judicial tribunal which resolves appeals on a wide range of municipal and land related matters (OMB, 2001). While the OMB has jurisdiction under many Acts, most of the hearings conducted by the Board are through the *Planning Act*. The OMB deals with a variety of planning

tools including: official plans, zoning by-laws, plans of subdivision, consents to convey land, minor variances from local by-laws, development charges, aggregate licences, compensation for expropriated land, and applications for gravel pit licences (OMB, 2001).

Table 2.1 demonstrates the type and frequency of applications, appeals or referrals received by the OMB between 1997 and 2000. Over this period, the OMB saw some fluctuation in the number of applications/appeals received. In 1997-1998, there were 4,189 applications/appeals received. In 1998-1999 and 1999-2000, the number of applications/appeals was reduced by almost half to 2,164 in 1998-1999 and 2,104 in 1999-2000. The significant reduction in the number of applications/appeals may be explained by the fact that 1997 was the last year that the OMB heard appeals under the *Assessment Act*. The majority of applications/appeals received by the OMB from 1998-1999 (82%) and 1999-2000 (84%) were heard under the *Planning Act* (zoning by-laws, appeals from council, minor variances, consent appeals, official plans and plans of subdivision). Due to the large number of assessments in 1997, only 46% of the applications/appeals were received under the *Planning Act*.

Table 2.1: Type and Frequency of Applications, Appeals or Referrals Received by the OMB - 1997-2000

Application, Appeals or Referrals Received by Type	1997 to 1998		1998 to 1999		1999 to 2000	
	#s	%	#s	%	#s	%
1 Assessments	2,100	50%	266	12%	2	0%
2 Capital Expenditures	24	1%	12	1%	15	1%
3 Zoning By-laws	339	8%	291	13%	306	15%
4 Appeals from Council	186	4%	184	9%	188	9%
5 Minor Variances	601	14%	575	27%	595	28%
6 Consent Appeals	454	11%	358	17%	357	17%
7 Official Plans	261	6%	241	11%	227	11%

8 Plans of Subdivision	107	3%	99	5%	89	4%
9 Miscellaneous	87	2%	95	4%	115	5%
10 Land Compensation	24	1%	32	1%	31	1%
11 Consolidated Hearings	1	0%	3	0%	3	0%
12 Development Charges	5	0%	8	0%	176	8%
Total	4,189	100%	2,164	100%	2,104	100%

From Ontario Municipal Board Annual Report 1998-2000

The following discussion will be limited to what the Ontario Municipal Board does under the jurisdiction of the *Planning Act*, as the focus of this paper is the role of the Ontario Municipal Board in adjudicating agricultural conflict. A majority of conflicts heard by the OMB involving agriculture are the result of an appeal under the *Planning Act*.

2.4. How Does the Ontario Municipal Board Become Involved?

In Ontario, councils and committees at both the local tier and the county/regional level of government have the authority to make decisions under the *Planning Act*. Prior to making a decision on an application, a notice will be circulated to stakeholders making them aware of the pending decision. Council is required to hold a public meeting under the *Planning Act*. At this meeting, the public and the applicant are able to voice their concerns/support for the application. Following this meeting council makes a decision on the application. Any stakeholder has the right to appeal the decision. The OMB is the body that hears the appeal. “The Board listens to the appeals and concerns of people, public bodies, or corporations who object to the decisions of public or approval authorities such as local or regional councils, committees of adjustment, land division committees, the Minister of Municipal Affairs and Housing or an expropriating authority” (OMB, 2000). Any individual person, public body or incorporated group can appeal either a decision of a municipality or a failure to make a decision to the Board

(OMB, 2000). Appeals can be entered under different sections of the *Planning Act*. Appendix 2 provides a description of the appeal process.

2.5. How Does the Ontario Municipal Board Hear Appeals?

The Ontario Municipal Board hears appeals through a variety of processes. The most common processes for hearing appeals include mediation and a formal hearing, which may or may not include a prehearing. Refer to Appendix 1 for further details on who can appeal to the OMB and how.

2.5.1. Prehearing Conferences:

The Board may hold a prehearing before a full hearing where the matter is expected to be long and complicated. The most important reason for holding a prehearing is to identify the issues. “Often this leads to possible agreements, so that some or all of the issues need not be addressed at the hearing” (OMB, 2000). Prehearings are never conducted in isolation; they are always a precursor to a formal hearing process.

2.5.2. Formal Hearing:

Once an appeal is filed, the Board expects the parties to be prepared for a hearing. Board hearings are less formal than a court proceeding but are more formal than a Committee or Council meeting. For example, testimony (evidence) is given under oath or affirmation, and those opposed may cross-examine (OMB, 2000).

A hearing requires all the issues be presented anew. The Member looks at each application or appeal from the beginning as if no decision had been made by a previous authority, such as by a municipal council, committee of adjustment, or land division committee. The Board can make the same decision that an earlier authority made or the decision may be different. The Board makes its decisions from the evidence heard and

presented at the hearing, within the framework of the applicable legislation (OMB, 2000).

Generally, legal council will represent the parties. Expert witnesses may be called to testify on behalf of a party. Commonly, testimony is heard from local planners, the applicants, any consultants, provincial ministry staff, neighbours and concerned citizens. The party which goes first gives all their evidence, followed by other parties who support that view. The parties who oppose that position then give evidence (OMB, 2000). There is the opportunity for cross-examination during questioning. At the end, both parties may provide final arguments.

The Board member will issue a decision either orally at the conclusion of the hearing or in writing following the hearing.

2.5.3. Mediation:

Recently, there is a concerted effort to settle disputes prior to a hearing so that the expense and formality involved in this more court-like procedure are avoided or at least reduced (OMB, 2002). The Ontario Municipal Board has been attempting to resolve disputes through the process of mediation. The definition of mediation used by the OMB is as follows: “Mediation...is a process in which means of settlement is proposed to the known parties to a dispute by a neutral and knowledgeable third party, in this case a Board member”(OMB, 2002, p.1). Mediation differs from a hearing in that it is usually held with the parties only and does not include the public (OMB, 2000).

The OMB does not attempt to resolve all disputes through mediation. A Board member selects cases for mediation when it can be deduced from reviewing a file that there are only a few issues that separate the parties (OMB, 2002). Mediation is usually

arranged before a hearing is scheduled. Mediation usually takes place within three months of the receipt of the appeal. While a mediated session is arranged, the Board continues to process the matter during mediation so that no time is lost for the parties if it fails to settle (OMB, 2002).

As with a hearing, Board staff sends notice of the mediation to the parties who appear from the Board file to have had an interest in the matter at a local level or are otherwise parties in law. The purpose of the meeting is to have the known interested parties reach a solution themselves (OMB, 2002). Due to the fact that only those who are directly involved in the appeal participate in the mediation, other interested members of the public may not be aware of a subsequent hearing beyond the mediation. As a result, Board staff provide full notice of any subsequent hearing so the public have an opportunity to comment. Participation in the mediation process is voluntary although it is rare that parties refuse to attend (OMB, 2002). The mediation meeting can occur either in person or via a conference call (OMB, 2002).

The Board member begins with summarizing the issues in the appeal. The next step is to describe in general the substantive requirements that apply in the application or appeal (OMB, 2002). In addition, the Board member conducting the mediation provides the parties with a probable outcome if the dispute were to go to a hearing (OMB, 2002). After hearing everyone's concerns, the member usually proposes a means of settlement (OMB, 2002). A report is made of the settlement discussion (OMB, 2002).

Depending on the outcome of the mediation meeting, there are a variety of steps that may be taken by the Board. If the parties settle and if the conclusion is that no hearing appears to be needed, the Board will issue a draft order. This order is sent to all

the usual parties notified of a hearing, and not merely those who participated in the mediation. If, after 21 days, no objections are received, the order will be issued in the form proposed (OMB, 2002). If no settlement is achieved then the case goes to a hearing. A hearing is held by another Board member (not the member who conducted the mediation) (OMB, 2002).

The Ontario Municipal Board has proven that mediation has reduced hearing time and even resolved some fairly major matters prior to a full hearing (OMB, 2001). Stakeholders have also endorsed mediation. According to the OMB (2001), the mediation caseload has continued to increase as many parties and municipalities have requested mediation instead of a hearing when filing appeals (OMB, 2001). In a recent survey of those who had participated in the mediation process, 92% of those surveyed said the results were very positive (OMB, 2002).

2.6. How Does the Board Give Decisions?

Following the conclusion of a hearing, the adjudicating Board member issues his/her decision. This decision may be issued orally at the end of a hearing or it may be issued in writing at a later date. The Board member who hears the matter must deliver or write the decision (OMB, 2000). A decision is sent to all those in attendance at the hearing or mediation and those who requested the decision in writing. In the case where a settlement is reached through mediation, a report is sent to stakeholders, and the member conducting the mediation issues an order.

The decision of the Board is considered final. Other than divisional court, there is no alternate body that will hear an appeal. The Board may grant a review of the hearing process but this is rare and is only conducted in exceptional cases. In order for a review

to take place, a person must submit an affidavit proving that: there was an obvious error in fact or law; new facts have arisen, someone misled the Board, or there was a failure in natural justice (no notice of hearing circulated) (OMB, 2000).

3.0. The Role of the OMB in an Agricultural Context

Section 3 summarizes the 2000 and 2001 OMB hearings related to agriculture in light of the above considerations. Evaluating recent cases related to agriculture offers insight with regards to the types of disputes considered, who the stakeholders are, and who is initiating the process. A synopsis of the 2000 and 2001 OMB hearings related to agriculture, including issues of conflict, location, parties involved and decisions are included in Appendix 5.

The discussion considers 34 OMB hearings that dealt with agricultural related conflict. This is a relatively small sample size, so it is not possible to make any concrete conclusions. Instead, the following is considered a case study, outlining general trends from two years of hearings.

Thirty-four hearings is also a small number relative to the total number of OMB hearings in 2000 and 2001. Table 2.1 shows that the OMB considers approximately 2000 hearings per year.

3.1. What causes conflict in agricultural communities?

A central goal of municipal policies in Official Plans and Zoning By-laws is to regulate development and minimize conflict between different types of land use. Some common adjoining land uses (i.e. agriculture use and residential use) set the stage for potential conflict. Conflict also occurs between members of the public and the

municipality when Official Plan policies are either too restrictive (from the perspective of the proponent of a development) or too permissive (from the perspective of the opponent to a development). Finally, conflict can occur between different levels of government when considering any development project. Lower tier municipal governments, county level governments and provincial governments interpret policy in different ways, which can result in Board hearings.

In an attempt to understand the root causes of conflict in agricultural communities, Table 3.1 summarizes 2000, 2001 OMB hearings according to the issue that created conflict and resulted in an OMB hearing. (For the specific cases referenced in Table 3.1, see Appendix 3). Often there is more than one reason why a case goes to the OMB. As we are attempting to identify root causes of conflict in agricultural communities, individual cases are counted in as many categories as are relevant.

Table 3.1: Issues causing conflict resulting in agriculture-related OMB hearings, 2000, 2001

Issue	Number of OMB Hearings due to Issue
Livestock operations	Total # of hearings: 8 of 34 (23%)
Agriculture related Development Charges By-law	Total # of hearings: 1 of 34 (3%)
Tax Assessment	Total # of hearings: 1 of 34 (3%)
Golf course	Total # of hearings: 2 of 34 (6%)
Zoning amendment, Temporary Use By-law	Total # of hearings: 8 of 34 (23%)
Interim Control By-law	Total # of hearings: 2 of 34 (6%)
By-law infraction	Total # of hearings: 1 of 34 (3%)
Minor variance	Total # of hearings: 7 of 34 (21%)
Severances: Farm land	Total # of hearings: 7 of 34 (21%)
Severances: Residential development	Total # of hearings: 7 of 34 (21%)
Official Plan Amendment	Total # of hearings: 8 of 34 (24%)
Water-taking for bottling and resale	Total # of hearings: 1 of 34 (3%)
Greenhouses	Total # of hearings: 1 of 34 (3%)

This analysis outlines several planning processes that can result in OMB hearings. Consent applications to sever land both for farm and residential use is the single most common cause of agriculturally related OMB hearings, with a total of 41% of the OMB cases heard in 2000, 2001 related to severance applications. An equal number of hearings (21%) are with regards to zoning amendments and minor variances restricting or permitting land use. Slightly more hearings (24%) result from Official Plan Amendments.

Livestock operations are the most significant “farm issue” causing conflict and thus result in 21% of the 2000, 2001 agriculturally related OMB hearings. It is possible to identify a few other issues that cause conflict, specifically, golf courses, water-taking for resale, greenhouses, tax assessment and development charges. Relative to livestock operations, these concerns appear to be minor.

3.2. What provincial authority permits the appeal?

As well as classifying the issues of conflict that have resulted in OMB hearings, it is helpful to identify which provincial legislation allows parties to appeal a decision to the OMB.

Table 3.2: Provincial Legislation used to appeal decisions to the OMB

Planning Act Section	# of Hearings	% of Hearings
17(24): Right to appeal an Official Plan	1	3%
17(36): Right to appeal the decision of an approval authority regarding an Official Plan	2	6%
17(40): Right to appeal the decision of an approval authority if the authority has not announced the decision related to an Official Plan within 90 days	1	3%
22(7): Right to appeal a requested Official Plan amendment	2	6%
34(11): Right to appeal a requested zoning by-law amendment	4	12%

34(19): Right to appeal a zoning by-law amendment	6	18%
38(4): Right to appeal an interim control by-law	2	6%
45(12): Right to appeal minor variances	7	21%
53(19): Right to appeal provisional consents	11	33%
51(34): Right to appeal application for a plan of subdivision if the decision is not made within 90 days	1	3%
Assessment Act Section	# of Hearings	
40	1	3%
Development Charges Act Section	# of Hearings	
14	1	3%

Table 3.2 echoes the conclusion of Table 3.1, that consent applications are the leading impetus for OMB hearings, as 33% of the 2000, 2001 cases were pursuant to Section 53(19) of the *Planning Act*. The number of cases that are appealed with the authority in Sections 34(11) and 34(19) indicates that many hearings (30%) result from conflict around zoning by-laws. Disagreement about minor variance decisions resulted in 21% of the hearings in 2000 and 2001.

Sections 17(24), 17(36), 17(40) and 22(7) of the *Planning Act* are used to arrange OMB hearing when there is conflict over Official Plans and Official Plan Amendments. In 2000, 2001 this resulted in 18% of the hearings.

3.3. Who initiates OMB hearings?

Making an appeal to the OMB is an avenue that is available to any potential stakeholder: municipal, county, or provincial government, developer, farmer, and member of the public. Further insight into the role of the OMB in an agricultural context is gained from reviewing the cases heard by the Board and identifying the appellants.

Table 3.3 categorizes the 2000, 2001 cases heard by the OMB according to the party that requested the Board hearing. In some cases, more than one party requested the

hearing. In the case of multiple appellants, all are noted (i.e. there are more appellants than cases). A complete listing of the individual cases for each category is included in Appendix 4.

Table 3.3: Stakeholders Initiating OMB Hearings

Appellant	Number of Hearings
Local Government	1
County Government	2
Provincial Government	1
Proponent of Development	21
Opponent of Development	11
Other	2

While the above data represents only two years of OMB hearings, it suggests that it is unusual for any level of government to appeal a decision to the OMB. Further, it is approximately twice as likely for a proponent of a development to request an OMB hearing than an opponent of a development. ‘Development’ in this context is defined as any change in land use, and does not necessarily involve buildings. For example, a severance of agricultural land is considered as a development.

This information suggests that the primary role of the OMB is to respond to concerns of the public, as opposed to conflict between different levels of government. The subset of the population most likely to appeal a municipal decision to the OMB is those who are unable to proceed with a proposed land use due to a municipal decision. Although less frequent, one third of the agricultural hearings in 2000, 2001 were requested by stakeholders who were opposed to development.

3.4 Who is involved in OMB hearings?

The role of the OMB can be explored by considering which stakeholders in a community are represented at hearings. Table 3.4 below summarizes the stakeholders at OMB hearings related to agriculture in 2000 and 2001. A complete list of the respective case for Table 3.4 is listed in Appendix 5.

Table 3.4: Stakeholder Involvement in OMB Hearings Related to Agriculture 2000, 2001

Stakeholder	Representation at OMB Hearings
Local Government	Present at 28 of 34 hearings: 85%
County Government	Present at 8 of 34 hearings: 23%
Provincial Government	Present at 2 of 34 hearings: 6%
Ontario Property Assessment Corporation	Present at 1 of 33 hearings: 3%
Proponent of Development	Present at 31 of 34 hearings: 91%
	Due to multiple proponents at hearings, there were a total of 35 parties at 30 hearings representing proponents of development; an average of 1.2 proponents per hearing that had proponents of development.
Opponent of Development	There was opposition to a proposed development at 14 of 34 hearings: 41%
	Due to multiple opponents at hearings, there were a total of 33 parties at 13 hearings representing opponents to development; an average of 2.5 opponents per hearing that had opposition.

Other	Present at 3 of 33 hearings: 6%
	This category includes a complainant re: tax assessment and complainants re: development charges.

The most common participants at an OMB hearing are proponents of development, with representation at 90% of the OMB hearings related to agriculture in 2000, 2001. This is interesting but not too surprising, as proponents of developments will usually stand to profit from a decision in their favour. Thus it is often in their financial interest to participate at a hearing. Further, land use development is often implicated in OMB hearings. No matter which party is the appellant, a proponent of development will choose to be involved. This observation would suggest that one impact of the OMB is to provide a community forum to discuss proposed development.

The second most frequent participants at OMB hearings are municipal governments, present at 81% of the hearings related to agriculture in 2000, 2001. This is logical as most hearings will be considering decisions made by local governments, so it is important for these bodies to be represented. The OMB hearing changes the status of the local government from a decision-making body to a stakeholder on the same level as the other parties participating.

Opponents to development are not as common, being represented at only 39% of the hearings. However, when opposition to development is present at a hearing, it is likely that there will be more than one party. At the 13 hearings related to agriculture in 2000 and 2001, that had opposition, there was an average of 2.5 parties opposing development at the hearings. This is more than twice as many as the average number of

development proponents (1.2 parties) at OMB hearings where there were proponents to development present.

This would suggest that if there is opposition to a development, it is likely to come from more than one party. A role of the OMB then is to provide a forum for members of the community opposed to a development to present their case.

It is less common to see county level government represented at agriculture related OMB hearing (21% of 2000, 2001 hearings), and even more infrequently is the province represented at agriculture related OMB hearings (3% of 2000, 2001 hearings). This would suggest that agriculture related conflict is more likely to involve local governments than upper tier municipal or provincial bodies. This makes sense, as local governments make most of the land use decisions in a municipality.

It also indicates that disputes between different levels of government are not as common as between government and the public. This is a positive trend, as it is appropriate for all levels of government to be working together to develop and implement policy, rather than through disputes at costly OMB hearings.

4.0. Case Studies

What is the impact of an OMB hearing in an agricultural community?

The following discussion considers three OMB hearings in more detail:

- 1) Township of West Perth Zoning By-law 100-1998
- 2) Amendment No. 212 to the City of London Official Plan
- 3) Nichol vs. Township of Plympton, Lambton County

For each case, the central stakeholders who participated in the hearing were interviewed and press coverage related to the hearing was reviewed. The names of the stakeholders interviewed have been changed for the purpose of protecting the identity of individuals. To obtain additional information about the OMB hearings reviewed in this paper please either contact the Ontario Municipal Board via their website www.omb.gov.on.ca (actual OMB decisions are posted at this site) or contact the researchers.

Part of understanding the role of the OMB is identifying the impact of a hearing on the local community where the hearing is held, the larger policy impact, and the perception of the local community of the Board. Our analysis intends to understand the impact the OMB hearings have had in the three respective local communities, on the larger provincial agricultural community, as well as any impact on policy related to the issue at the hearing.

4.1. Township of West Perth Zoning By-law 100-1998
Board Case No. PL 000064

4.1.1. Overview of the Case

The Municipality of West Perth is a rural municipality located within the County of Perth, in Southwestern Ontario. Agriculture is a central component of the local economy. In 1991, 91% of the total land area in Perth County was being farmed, with \$360.4 million in gross farm receipts (Harron, July 18, 2000).

In 1998, the Municipality of West Perth passed a comprehensive zoning by-law that included provisions to restrict large livestock operations. The by-law was appealed to the Ontario Municipal Board by the Ministry of Municipal Affairs on behalf of the Ministry of Agriculture and Food, and a local beef farm operator.

The province and the local farmer appealed the following three provisions:

- 1) prohibiting farm operations from having more than 600 animal units per site;
- 2) requiring that an operation own at least 30% of the land base required for manure disposal; and
- 3) limiting the maximum hauling distance of manure from a livestock facility.

The appellants also questioned Perth County's jurisdiction to pass a nutrient management by-law.

4.1.2. Ontario Municipal Board Decision

The Board stated that large factory farms are a new phenomenon on the agricultural landscape and they bring new problems and risks. The municipality needs

planning tools to regulate these large-scale operations. In response to arguments made by the appellants, the Board considered the municipality's authority to regulate the livestock nutrients (Harron, July 18, 2000).

The OMB decision notes that spreading manure is a use of land. Section 34(1) of the *Planning Act* prohibits "the use of land for, or except for, such purposes as may be set out in the by-law within the municipality and for prohibiting the erecting, locating or using of buildings or structures for, or except for, such purposes as may be set out in the by-law" (Harron, July 18, 2000). The municipality's authority to pass the by-law is further supported because the Perth County Official Plan includes a policy to do so. The Board decided it is within the jurisdiction of a municipality to set the number of animal units at a site because it is both a "use of land" and "a use of a building or structure".

The OMB concluded that the *Planning Act* does not give the municipality jurisdiction to permit a municipality to regulate manure-hauling distance. This is regulated by the *Highway Traffic Act*, R.S.O., 1990.

The appeal was allowed in part. The Board decided the municipality had the authority to limit the number of animal units per site and require that an operation own at least 35% of the land base required for manure disposal. West Perth was directed to remove the section that limited the maximum hauling distance of manure from a livestock facility.

The OMB's decision was appealed by George Grant to the Ontario Lower Divisional Court. The Lower Divisional Court upheld the OMB decision and awarded costs to the Municipality of West Perth.

4.1.3. How did the OMB case impact the community?

In order to understand the impact of the West Perth hearing, we contacted several stakeholders involved in the hearing. Specifically, we spoke¹ to:

- Ken McGuire, West Perth Mayor;
- Jane Smith, Rural Planner, Ontario Ministry of Agriculture and Food;
- Susan Brown, Nutrient Management Policy Division, Ontario Ministry of Agriculture and Food;
- James Sutherland, president of both the Ontario Pork Producers and the local Agriculture Peer Review Committee;
- Jeffrey Engles, County Planner;
- Brian Davies, chair of the Perth County chapter of the Christian Farmers Federation of Ontario; and
- George Grant, local beef farmer and appellant.

Press coverage in *The Mitchell Advocate* and *The Ontario Farmer* was also considered.

In essence, the challenge an OMB member is presented with was replicated by the process of speaking to the various interests represented at a hearing. While there was general agreement amongst the various stakeholders that the hearing was equitable and the decision fair, parties remain committed to their initial viewpoint. The OMB hearing and subsequent appeal was successful in adjudicating the conflict and arriving at a conclusion. However, comparing the notes from the hearing to the recent conversations with key stakeholders suggests that none of the stakeholders' perspectives have been significantly altered due to or since the hearing. As noted in the hearing summary, everyone who presented at the hearing wants to farm in an environmentally safe manner and protect the quality of the water. The disagreement arises from a difference in opinion

¹ The names have been changed to protect the identity of the individuals interviewed.

as to how this can be accomplished within a free enterprise system where farmers can expand their operations as they see fit in order to compete domestically and on the world market (Harron, July 18, 2000).

The following discussion summarizes stakeholders' perceptions of the impact and role of the OMB, and the impact of the West Perth hearing on related policy development in other jurisdictions. Conversations with stakeholders revealed concerns related to the actual by-law, and discussions about whether or not the municipality or the province is responsible for regulating large livestock operations. As the focus of this paper is the role of the OMB, these issues are not discussed here.

4.1.4. A Central Component of the Planning Process

The Ontario Municipal Board plays a central role in Ontario's planning process. It provides an objective sounding board for resolving local conflict related to land use. Mayor Ken McGuire indicated that, while the OMB is a critical component of the process, Council does not perceive it as an alternative to deciding difficult issues.

The five-day hearing in Mitchell was thorough and provided an opportunity for all interested parties to present their perspective to an external adjudicator. The presence of an external adjudicator alters the role of the municipality from a local leader and decision-maker to one of stakeholder in opposition to the appellants.

4.1.5. Local community's perception of the OMB

Most people are unfamiliar with the Ontario Municipal Board. Sutherland identified that people tend to become introduced to the Ontario Municipal Board when it arrives in town to consider a case they are interested in (Personal communication with James Sutherland, July 19, 2002). The OMB hearing has a larger impact of publicizing

the issue at hand, as the media coverage of the event attracts attention and educates the general public.

Mayor McGuire stated that the OMB did not significantly impact the local community; it was the actual zoning by-law that impacted the local community. The hearing was just part of the process to arrive at the by-law.

Jeffrey Engles responded that, while the farm community was divided on the issue, he thought the Board was perceived as logical and offered an impartial decision based on the information presented. Farmers who presented at the hearing were not as positive. George Grant felt that the decision was not logical and was heavily influenced by the Walkerton crisis. Brian Davies is of the opinion that the OMB is “pretty autocratic” and did not listen to the local needs. Davies’ perspective seems to be rooted in a belief that the issue is a local concern and regulation should come from the agricultural community. The dynamic between provincial and local interests is discussed in more detail below.

4.1.6. A Tool for Conflict Resolution

As noted above, the OMB offers a critical process for resolving conflict around local planning issues. Individuals representing the proponents of the by-law (Jeffrey Engles, Mayor McGuire) indicated that the process was an effective means of resolving the dispute. As the decision was appealed, the Board decision was not final although the Lower Divisional Court upheld it.

However, the appellants and the farming community were not as clear that the process was entirely effective. George Grant, the appellant, was frustrated with the cost of the process. He believes that his appeal was necessary to contribute to the policy

discussion of the usefulness and legality of animal caps in the municipality. However, he is frustrated that many people participated in the hearing without contributing to the legal cost of the hearing.

Jane Smith, rural planner for OMAF and James Sutherland, President of Ontario Pork Producers both thought that a pre-consultation or mediation session would have been beneficial. Stakeholders would have had the opportunity to share perspectives in a non-confrontational setting and arrive at a more amicable solution.

Brian Davies' concerns were even more fundamental. He indicated that the agricultural community more appropriately addresses the issue. Further, he believes that the process was time consuming, expensive and not very effective because in his opinion the resulting by-law has no enforcement mechanism.

4.1.7. Provincial/Local Dynamic

Several stakeholders discussed issues related to the provincial/local government relationship.

It is the responsibility of the municipal government to protect provincial interests at the local level. As one of the appellants, OMAF was of the opinion that West Perth Council did not consider the Provincial Policy Statement guidelines to protect agricultural lands when they approved the zoning by-law in question (Personal communication with Jane Smith, July 19 2002).

The Province of Ontario's new "one-window planning" process means that revised Comprehensive Zoning By-laws implicating agriculture are not sent to OMAF for review. Instead, municipalities circulate proposed by-laws to the Ministry of Municipal Affairs, which is required to forward them to OMAF. According to Jane Smith, this

process is not always efficient. Because OMAF is not necessarily provided the opportunity to comment on by-laws before they are passed, they are required to appeal by-laws that do not conform with the provincial policy to the OMB.

It is also important to consider the merits of a provincial versus local dispute-resolution body. Perth County has an Agricultural Peer Review Committee, which is comprised of local farmers who volunteer to mediate conflict between neighbours. James Sutherland indicated that he prefers this body as an alternative to the OMB with regards to resolving agriculturally related conflict.

4.1.8. Impact on Policy in Other Jurisdictions

As many communities are wrestling with policies for large livestock operations, it is conceivable that one impact of OMB hearings is to influence policy direction in other municipalities and at a provincial level. However, Mayor McGuire is clear that the intent of the West Perth Council was to only direct local policy. Further, he believes that because of the diverse characteristics of local communities, it is appropriate for local councils to determine policy direction related to large livestock operations rather than the province.

Respondents were divided as to how influential this case was on policy in other jurisdictions. Jane Smith did not think the case had any impact on provincial policy direction. Her perspective is significant because she works for the province. Jeffrey Engles did not share this opinion and thought that the case was influential in spurring the province to develop policy. *The Mitchell Advocate* echoed this opinion with a strong headline, “OMB Decision will have Provincial Scope”. The article quoted the Board Chair, Harron, as saying, “No doubt in my mind this is a provincial issue. This has

implications further than West Perth” (Harron in Bader, April 5 2000). The potential of the hearing implicating policy in other jurisdictions is supported by coverage in *The Ontario Farmer* (Kelly, October 10 2000).

Several stakeholders interviewed made mention of the crisis in Walkerton which happened about the same time as the hearing. Thus it is conceivable that this OMB hearing was just one of several incidents that encouraged the province to develop policy.

Jeffrey Engles, Ken McGuire, James Sutherland and George Grant all thought that other municipalities were influenced by West Perth’s by-law. From the perspective of other municipalities, it is conceivable that, because the OMB decision supported a substantial component of the West Perth By-law, others would be satisfied that they had the authority to pass similar by-laws and therefore might take a similar approach.

The broader impact of the hearing was also acknowledged in the decision prepared by Harron. He was clear that, because the hearing might effect an area greater than West Perth, all interested individuals were permitted the opportunity to express their concerns to the Board (Harron, July 18, 2000).

4.2. Amendment No. 212 to the City of London Official Plan Board Case No. PL010226

4.2.1. Overview of the Case

The City of London has grown significantly over the past decade. In 1991, the population of London was 311,805. In 2001, the population had increased to 336, 539. The growth of the City has put pressure on the agricultural land around its boundaries. In an attempt to moderate the impact on agricultural operations, the City has designated an

urban growth boundary. The City has lands designated 'Urban' to supply its needs until 2016.

According to the Board, the central question at the hearing was, to what extent should the City of London protect agricultural land from urban expansion through policies in their Official Plan (Daly, July 30, 2001).

Ministry of Municipal Affairs and Housing, as well as a local agricultural landowner, appealed the approval of Official Plan Amendment No. 212 to the City of London Official Plan which had the effect of modifying Policy 9.2.10 dealing with Minimum Distance Separation Requirements (MDS) between urban and agricultural uses (Daly, July 30, 2001).

The policy which the City had adopted provided for some exemptions to MDS application in controlled circumstances. The policy meant that, if residential development occurred within or adjacent to the urban growth boundary, the presence of an agricultural operation could not freeze development. The development would not be frozen because the City could waive the Minimum Distance Separation (MDS) requirements between residential and agricultural use. For the appellants, this did not adequately protect agriculture, hence their appeals.

The City met with parties prior to the commencement of the hearing in an effort to settle. They believed they could reach a resolution. The parties did not go through the OMB's formal mediation process. The parties entered into this settlement through their own means. The parties agreed to a new policy through settlement discussions (Daly, July 30, 2001). The parties settled on a policy that allows some exemptions to MDS application within the urban growth boundary but normal application of MDS would

apply where there was an agricultural operation with livestock adjacent to the urban growth boundary.

The parties brought the settlement to the Board on the day of the hearing. At the beginning of the hearing a development company requested party status before the Board (Daly, July 30, 2001). The three parties who had come to a resolution were in opposition to this. The Board added the development company as a party because the only reason why they did not appeal the original decision was because they were prepared to accept it. The proposed modifications, however, caused them concern.

As a result of the new party being added to the case, the Board tried the hearing from the beginning. At the Board hearing, the development company became the appellant and the MMAH, the local agricultural landowner and the City represented their settled position.

A significant portion of the hearing was spent defining what it meant for the City of London to “have regard to” provincial policy. The Ministry planner also saw no reason for the MDS guidelines not to be applied in the City of London as contemplated in the revised policy. The Development Company focused their arguments on the impact the policy might have on the development of these lands.

4.2.2. Ontario Municipal Board Decision

The Board agrees with the Ministry planner in his assessment of the steps necessary to have proper regard for provincial policy. “To approve something other than the modified policy forwarded by the City, MMAH and the landowner, would result in disregard for the goals and objectives of the PPS and a lack of adequate protection for agriculture that the PPS demands” (Daly, July 30, 2001).

The Board stated that they were satisfied that the revised policy meets the intent and objectives of the PPS, and does not create a conflict between City policy and provincial policy.

Mr. Daly stated, “To suggest that MDS should not apply to development in Urban Reserve Areas where they abut lands outside the urban growth boundary undermines this intention to protect and minimizes the clear importance of urban growth boundaries in protecting and providing for ongoing agricultural operations” (July 30, 2001).

The Board acknowledges that the general policy application may have implications for certain individuals in certain locations. Mr. Daly stated, “that is the reality of planning” (July 30, 2001). The Board identified that in this circumstance the overall goal and need to protect farmland from potential conflicting land uses represents the best planning approach.

The Board finds that the modified policy provides adequate protection for agriculture, has proper regard for provincial policy; and is in keeping with the Provincial Policy Statement. The Board allowed appeal in part and directed the City to adopt Official Plan Amendment No. 212 with modified wording for policy 9.2.10.

4.2.3. How did the OMB case impact the community?

In order to understand the impact of Amendment No. 212 to the City of London Official Plan hearing, we contacted several stakeholder involved in the hearing. Specifically we spoke² to:

- Wayne Scott, Planner, Ministry of Municipal Affairs and Housing;
- Jennifer McNeil, Planner, City of London; and,

² The names have been changed to protect the identity of the individuals interviewed.

- John Graham, local farmer and appellant

Attempts were made to contact:

- New Homes Development Inc

No staff members at New Homes Development Inc. were aware of their company's involvement in the case and as such declined to comment. As a result, the discussion below is limited to the stakeholders interviewed.

There was a general impression that the various stakeholders interviewed saw the OMB hearing as a fair and equitable process.

All the stakeholders interviewed questioned how much knowledge those outside the case had about the hearing and the decision. Often, in order for the community to become aware of the case, there must be widespread publicity or press coverage. This case did not receive any press coverage.

The City of London planner, Jennifer McNeil, and the Ministry of Municipal Affairs and Housing planner, Wayne Scott, both believed the impact of this decision was limited to the farming and development communities. Wayne Scott identified that this decision provides certainty to the existing farming operations with livestock surrounding the City. He also believes this decision provides certainty to the development community (Personal communication with Wayne Scott, July 23, 2002). Jennifer McNeil made similar comments as Wayne Scott, and also added that this policy makes developers more aware of their surroundings.

Mr. Graham also believes the decision provides some protection for the farming community, although he did not think that the average farmer was aware of the policy or the OMB decision (Personal communication with John Graham, July 25, 2002).

With regard to this decision having impact beyond the local farming community, there were mixed responses between stakeholders. Jennifer McNeil did not believe that this decision had much impact beyond the local community (Personal communication with Jennifer McNeil, July 23, 2002). Whereas Mr. Scott identified that there are other jurisdictions with similar concerns as the City of London, and that other municipalities have made reference to the decision (Personal communication with Wayne Scott, July 23, 2002). Mr. Graham believed that the decision made by the OMB gave farmers some power over developers and hoped this decision would be referenced elsewhere (Personal communication with John Graham, July 25, 2002).

4.2.4. A Central Component of the Planning Process

While all stakeholders interviewed feel that the OMB is an important part of the planning process, in this case the initial stakeholders (MMAH, John Graham and City of London) came to a resolution without the intervention of the OMB.

It was originally anticipated that the role of the OMB in this hearing would be to provide formal sanction to the agreed upon settlement between MMAH, John Graham and the City of London.

The initial stakeholders had entered into a settlement prior to the scheduled hearing. According to the City of London planner, the time and cost associated with the OMB provided all parties with the “drive needed” to engage in settlement negotiations (Personal communication with Jennifer McNeil, July 23, 2002). Wayne Scott (MMAH) and Jennifer McNeil (City of London) said their respective employers often engage in these types of discussions/settlement prior to formal hearings. Based on her experience, Jennifer McNeil believes that mediation should always be attempted prior to a hearing.

This case took an interesting twist from what was originally anticipated to occur. The morning of the hearing, a lawyer representing some development firms in London arrived at the hearing and requested the Board's permission to be added as a party at the hearing. The OMB granted this request.

All the other stakeholders said the last minute intervention of the developers took them by surprise. Instead of the hearing being a few hours, it lasted three days. The case was retried from the beginning. Some of the initial stakeholders were somewhat annoyed that the developers were allowed in at such a late stage in the process but they understood that the Board had an obligation to hear the developers' concerns. This twist in the case meant that the Board ended up being the full adjudicator of the issue.

4.2.5. Local Community's Perception of the OMB

Due to the fact that there was little publicity around this hearing, most stakeholders do not think that the community as a whole was aware of this hearing or the subsequent decision. Both the planner for the Ministry of Municipal Affairs and Housing and the planner for the City of London were very familiar with the Ontario Municipal Board prior to this hearing. John Graham had previously heard of the OMB but he had not been involved in an OMB case before.

In this particular case, the stakeholders interviewed believed the OMB to be an impartial decision-maker. All the stakeholders interviewed found their experience with the OMB at this hearing to be favourable. Jennifer McNeil and John Graham acknowledged that this is probably because the OMB ruled in their favour.

A Tool for Conflict Resolution

All of the stakeholders who were interviewed and involved in the hearing felt that the OMB was an effective means of resolving the dispute between themselves and the developers.

Wayne Scott said that the negotiation between the original stakeholders (MMAH, Graham and City of London) was the effective resolution of their conflict and, in this case, the Board would provide formal sanction (Personal communication with Wayne Scott, July 23, 2002). McNeil made the comment that the looming OMB hearing gave the parties the impetus to enter into negotiations (Personal communication with Jennifer McNeil, July 23, 2002). In negotiations the parties still had a level of control in reaching a decision rather than passing that control over to an impartial third person.

4.2.7. Provincial/Local Dynamic

There was some discussion by the Ministry of Municipal Affairs and Housing planner, Wayne Scott, about the provincial/local dynamic.

The main reason why MMAH appealed the City's original amendment was because they did not believe the City had "regard for" the Provincial Policy Statement. Policy 2.1.4. of the Provincial Policy Statement reads:

New land uses including the creation of new lots, and new or expanding livestock facilities will comply with minimum distance separation formula.

In the original amendment, it was perceived that it created opportunities for the exemption from the application of MDS requirements to new development at the discretion of the City (Daly, July 30, 2001).

This hearing established a clear definition of “regard for” as stated in the Provincial Policy Statement. Through negotiations, the City and the Province were able to settle on a policy that MMAH deemed to comply with the Provincial Policy Statement.

4.2.8. Impact on Policy in Other Jurisdictions

There was a mixed reaction between the parties as to whether this hearing would impact policy in other jurisdictions. The City of London planner, Jennifer McNeil, did not believe this decision had much impact in other jurisdictions. She felt that most municipalities deal with this type of issue on their own. To her knowledge, there had not been any inquiries from other municipalities about the hearing or decision (Personal communication with Jennifer McNeil, July 23, 2002).

The Ministry of Municipal Affairs and Housing planner, Wayne Scott, felt that this hearing and the subsequent decision had impact on other jurisdictions in a couple of ways. First, other municipalities are faced with a similar situation that London found itself in. After the hearing, Scott had several inquiries from other municipalities in Southern Ontario about the hearing and the subsequent decision. The second impact of this hearing may have on other jurisdictions, according to Scott is establishing what “having regard to”, as stated in the Provincial Policy Statement, means for local municipalities. Scott identified that this hearing has also made the City look more closely at the impact of policy on the surrounding agricultural community (Personal communication with Wayne Scott, July 23, 2002).

4.2. Nichol vs. Township of Plympton³, Lambton County Board Case No. PL990508

4.3.1. Overview of the Case

Consent applications to sever land both for farm and residential use are the most common cause of agriculturally related OMB hearings (refer to Section 3.1). The hearing between Nichol and the Township of Plympton is a common type of hearing.

Mr. Nichol sought a consent to create a non-farm residential lot to permit him to dispose of a surplus farm dwelling. The local committee of adjustment heard the application and chose to deny the application based on the very strong community opposition to allowing Mr. Nichol a surplus dwelling severance.

At the hearing, a County land use planner responsible for the Township of Plympton, reviewed the pertinent sections of the Provincial Policy Statement, the Lambton County Official Plan, and the Plympton Official Plan. Mr. Nichol's application to dispose of a surplus farm dwelling was in full compliance with all three planning documents.

Neighbours were concerned about the introduction of a non-farm residential use in the area. Their concerns relates to odour and other unpleasant attributes of hog farming which may result in complaints from a subsequent owner of the surplus dwelling (Emo, September 27, 1999). Mr. Nichol responded to his neighbours' concern by noting that he himself would be the first to hear complaints from an unhappy resident of the surplus dwelling should he not follow approved farm management practices.

4.3.2. Ontario Municipal Board Decision

³ The name of the appellant has been changed to protect the appellant's identity.

According to Mr. Emo, the issue is whether a *bona fide* farmer can rely on and use municipal, County and provincial planning policies established to support his profession or whether he should be bound by a higher standard, essentially predicated on “what if” fears by his farm neighbours (September 27, 1999).

The Board found that the application to create a non-farm lot containing a surplus farm dwelling was in compliance with Provincial Policy Statement, the Lambton Official Plan and the local Official Plan. Therefore, the Board allowed the appeal and gave provisional consent to the creation of a new lot.

4.3.3. How did the OMB Case Impact the community?

In order to understand the impact of the Nichol vs. Township of Plympton hearing, we contacted several stakeholder involved in the hearing. Specifically we spoke⁴ to:

- Michael Foster, County of Lambton Planner at the time of the hearing;
- Christine Mayer, Township of Plympton Zoning Administrator;
- Kyla Ardene, Committee of Adjustment Member;
- Tim Masterson, hog and beef farmer, neighbour of Mr. Nichol, and opponent;
- David Nichol, appellant and hog farmer.

There was no press coverage in this hearing.

Most stakeholders involved in this hearing had little previous knowledge or experience with the Ontario Municipal Board. However, they were familiar with the ultimate function of the OMB – to make a final decision on the conflict before them.

⁴ The names have been changed to protect the identity of the individuals interviewed.

The stakeholders interviewed felt that this hearing had limited impact on the community. It did not receive much of a community profile nor did it receive any coverage in local media. Due to the fact that this hearing was site specific, only the people who were directly involved in the hearing (either as an appellant or opponents) were aware of the decision. All the stakeholders interviewed felt that, unless a person was involved in the hearing, the general community knew very little. There was also a unanimous feeling that, due to the nature of the hearing, it did not have a far-reaching, immediate impact on the community. With regard to the surplus house, it is still owned by the applicant, Mr. Nichol, and a hired man lives there. Mr. Nichol and Mr. Masterson both commented that the situation has not changed significantly since the lot was severed.

The impact on the community of this hearing and others like it can have a cumulative effect over the long term. The committee of adjustment member, Kyla Ardene identified that this hearing (and other similar hearings) may contribute to a push for the municipality to pass an Official Plan which does not allow any severances to be granted (Personal communication with Kyla Ardene, July 23, 2002).

The stakeholders interviewed did not perceive that this case would have much impact on other communities in the province. While this may be true, the ruling provided by Mr. Emo demonstrates the strength of planning policy.

4.3.4. A Central Component of the Planning Process

All of the stakeholders believe that the Ontario Municipal Board has an important role to play in Ontario's planning process. Ardene described the OMB as providing an avenue for those who dislike a local decision to appeal it to an impartial third party (Personal communication with Kyla Ardene, July 23, 2002).

The hearing between Mr. Nichol and the Township of Plympton was held on September 27, 1999 at the Township of Plympton-Wyoming Municipal Office. All parties in attendance were allowed to present their perspective regarding the surplus dwelling severance application by Mr. Nichol. While most opponents of the severance did not like the decision, they agreed that the Board was fair and allowed those in attendance to voice their concerns. It was noted that the OMB chair ran the hearing efficiently and expeditiously.

4.3.5. Local community's perception of the OMB

The perception of the community toward the Ontario Municipal Board and specifically, the perception of those who were interviewed, differed between stakeholders.

The appellant (who won the case), David Nichol, found that the process could not have been better and found the chair to be very professional. Nichol stated that much of the hearing was based on politics and bad feelings between farmers (confirmed by other stakeholders) and the chair was able to cut through the politics and deal with the real issues (Personal communication with David Nichol, July 24, 2002).

The opponents to the severance (who lost the case), Christine Mayer, Kyla Ardene and the Mastersons, generally felt the chair was too lenient with David Nichol and did not take into account factors beyond planning policy in his decision. While Ardene and Masterson commented that they thought while the Board was fair in letting people voice their opinion, they felt the decision was more or less decided prior to the hearing commencing.

The Lambton County Planner, Michael Foster, felt the OMB was fair and that all sides were allowed to make their arguments. Foster said the Board's hands were tied by planning legislation that permitted the applicant's severance. (Personal communication with Michael Foster, July 23, 2002)

While it was acknowledged by a number of stakeholders that the Ontario Municipal Board hearing served an important function, it was noted by all stakeholders interviewed that there was more vocal community opposition to the severance at the Committee of Adjustment meeting than at the OMB hearing.

When asked to reflect on the change in public participation between the two meetings, Kyla Ardene thought it was because the community felt comfortable voicing their concerns to the local Committee of Adjustment. When it came to the Ontario Municipal Board hearing, she felt that people lost their nerve and were too intimidated by the Board to voice their opinions (Personal communication with Kyla Ardene, July 23, 2002).

4.3.6. A Tool for Conflict Resolution

The end goal of an Ontario Municipal Board hearing is to resolve the conflict. A situation such as this is riddled with conflict. There is the conflict between the applicant who was denied the severance and the Committee of Adjustment, conflict between the applicant and those who voiced opposition to the severance, conflict between the appellant and the proponents, conflict between large and small-scale farmers. And there is the conflict that may result after the decision is made and the community lives with the impact of the decision.

In a formal Ontario Municipal Board hearing, there is only so much conflict that the Board can resolve. In this case, the Board was successful in resolving the conflict that surrounded David Nichol's severance application.

Through a formal hearing, the Ontario Municipal Board does not and cannot provide assistance to resolve all the underlying conflict that result in a hearing. Discussions with central stakeholders suggest that some conflict remains in the community.

The opponents of the severance (Masterson, Ardene and the Township of Plympton) are afraid that the Ontario Municipal Board decision paved the way for conflict to arise between farmers and non-farm neighbours. Tim Masterson indicated that the main reason they were in opposition to the severance was because it introduced the potential for conflict by creating a non-farm residence in an area where livestock farming is active (Personal communication with Tim Masterson, July 23, 2002). Opponents to the severance are afraid that new residents may complain about the agricultural operations. Also, the new lot puts restrictions on surrounding agricultural properties. The house is still in the ownership of David Nichol, and a farm hand is living in the house. So there have not been any problems yet but neighbours are still concerned about the potential.

This is not the kind of conflict that the OMB can resolve because the community permits this type of severance within their Official Plan. It is important to recognize that the OMB can only go so far in resolving agricultural disputes. It is the community's responsibility to develop effective land use policy.

Ardene, Masterson, Mayer and Nichol acknowledged that, if the community wants to resolve this particular conflict, they must take the onus on themselves and pass an Official Plan which does not allow severances.

4.3.7. Provincial/Local Dynamic

Unlike the OMB hearing in West Perth or the City of London, there was no provincial ministry present or involved in this hearing. The stakeholders identified the OMB as a provincial body and, as such, they made some comments with regard to the dynamic between local decision-making and decision-making by the Ontario Municipal Board.

Kyla Ardene felt that the OMB chair did not have a good sense of why the municipality denied the severance application. When considering the local and county Official Plans and the Provincial Policy Statement, there was no reason to deny the severance. According to Ardene, the Committee of Adjustment was under significant pressure from the community to deny the severance. At the Ontario Municipal Board, the community did not voice their opposition to the severance as actively as they had at the Committee of Adjustment meeting. Ardene felt that the Board did not feel the same pressure from the local community and so it was easier for the OMB to base their decision on policy (Personal communication with Kyla Ardene, July 23, 2002). The distance of the OMB from the community and the issue allows them to make decisions based on policy, while the local committee may have more community pressures to consider in a decision. The OMB is in a better position to cut through the local politics.

Tim Masterson pointed out that the OMB chair had little understanding of the impact of his decision on the physical and social community because the chair was not familiar with the local area.

David Nichol felt that, by taking the decision away from a local group of people who are strongly influenced by local opinion and by placing the decision in the hands of the OMB, it assured that the decision would be based on the rules and good planning principles – not local politics (Personal communication with David Nichol, July 24, 2002).

4.3.8. Impact on Policy in Other Jurisdictions

None of the stakeholders thought that this hearing would have an impact on other jurisdictions in Ontario. Neither Michael Foster (County Planner) nor Christine Mayer (Township Zoning Administrator) has had an inquiry about the decision from any other community.

All stakeholders interviewed thought this hearing, along with similar hearings, would eventually push the municipality to stop permitting severances. Some of the stakeholders are interested to see if the proposed regulations under the new Nutrient Management Act will influence whether municipalities continue to grant severances.

5.0. The Role of the OMB in Defining Land use Policy

The impetus for land use policy comes from any of a number of sources—such as a controversial new land use, sustained or escalating local conflict, political influence or motivation, or health concerns. Some controversial land uses, such as large livestock operations, urban sprawl, concerns about water quality or pesticides, move through Ontario municipalities like waves and are present in several municipalities, not isolated in a single municipality.

When a land use conflict in a local municipality is appealed to the OMB to adjudicate, it becomes the Board member's responsibility to interpret the various policies that guide local development.

The Board decisions, discussed in Section 3, offer some scope to analyse the manner in which Board adjudicators arrive at a decision. Reviewing the cases reveals the intention of the Board members to evaluate the conflict in light of policies that influence the land use in question. This would include policies in Official and Secondary Plans, municipal Zoning By-laws, as well as the Provincial Policy Statement.

5.1 The Impact of OMB Decisions on Policy within the Municipality

The OMB is expected to be an objective third party. The Board member considers the municipal Official Plan, and Zoning By-law (if relevant), and the Provincial Policy Statement. If there is other relevant policy (i.e. agricultural policy) it will be considered as well. From the review of the agricultural cases heard in 2000-2001 (Section 3) and the three in-depth case studies (Section 4), a third party review offers an impartial assessment of the situation. If the Board is considering a policy question, the decision effectively clarifies the policy direction.

The adversarial approach of the traditional OMB hearings often results in at least one party not being pleased with the Board's decision. From the perspective of designing policy for a local community, it is potentially unproductive to launch a new policy founded in confrontation and disappointment. For some policy decisions, incorporating mediation into the OMB decision would likely result in a more amicable decision.

5.2 The Impact of OMB decisions on Policy in other Municipalities

OMB decisions potentially impact policy in municipalities other than the community where the hearing is being held. The relevance of the decision to other jurisdictions is dependent on the nature of the land use conflict being considered. In the case of the West Perth Zoning By-law, several stakeholders believe that the case was influential in other municipalities, as many other rural municipalities have been wrestling with policy direction for large livestock operations. The Ministry of Municipal Affairs planner stated that several municipalities contacted his office following the hearing regarding the City of London Official Plan. However, the hearing of Nichol vs. Township of Plympton, Lambton County involved a consent application, the most common type of dispute in agricultural community. Stakeholders involved in this hearing reported that the OMB case did not have any impact on other jurisdictions.

OMB hearings also impact the province's decision to appeal a municipal land use decision. According to Susan Brown, a member of the OMAF team working on provincial Nutrient Management policy, the West Perth decision means that OMAF will not appeal similar municipal by-laws in the future. Brown stated that in her experience, while OMB decisions are not supposed to be precedent setting, in practice they are (Personal communication with Susan Brown, July 25, 2002).

5.3 The Role of OMB Decisions in Influencing Provincial Policy

Analysis of stakeholder involvement in OMB hearings (Section 3.4) indicates that only a small number (6%) of OMB hearings involve provincial ministries. As discussed in Section 3.4, this would suggest that OMB hearings involve dispute resolution at a local level and are not very relevant to the province. The specific concern of the province is that planning policy be represented by the local level of government. Provincial appeals occur when it is believed that the Provincial Policy Statement has not been properly considered. Both the West Perth and City of London hearings are good examples of this.

Susan Brown of OMAF attended the West Perth OMB hearing. When asked if the West Perth OMB hearing would influence provincial nutrient management policy, Brown responded with an emphatic “no” (Personal communication with Susan Brown, July 25, 2002).

Further research could provide greater insight into the role of the OMB in influencing policy in other municipalities and at the provincial level. A first step would be to identify a series of landmark OMB cases; perhaps cases that consider new controversial land uses or cases that the Board member hearing the case suggests will impact policy in other communities. Following the identification of these cases, a survey with provincial policy direction and interviews of provincial policy-makers, as well as municipalities facing similar issues, would help construct any connection between OMB decisions and the impact on policy.

6.0. Conclusion:

The Ontario Municipal Board is a central component of Ontario's planning process, a formal adjudicative tribunal that resolves local land use conflicts. In this capacity, it fulfils a critical function of offering conflicting stakeholders the opportunity for an objective hearing by an impartial third party.

The small number of hearings related to agriculture, relative to the total number of OMB hearings, has many potential explanations. This may be due to the difference in population between rural and urban Ontario. It may suggest that land use conflicts are not common in the agricultural community or it may be because other levels of government, boards, agencies or the community adjudicate agricultural conflicts. Due to its prescribed jurisdiction, the OMB can only resolve an agricultural dispute where an application has been made under the *Planning Act*. Further research could explore which other agencies are adjudicating agricultural conflict and the relationship between the OMB and these agencies.

Of the 34 hearings involving agricultural conflict in 2000 and 2001, most (42%) involved consent applications to sever land for both farm and residential use. Creating new lots can cause considerable conflict in a community with an active agricultural industry because of restrictions on surrounding land through minimum distance separation. There is also a fear in the farming community, as illustrated by the *Nichol vs. Township of Plympton* case, that permitting non-farm residences allows people who are not connected to agriculture to settle in a farming community. Farmers anticipate that these residents will complain about agricultural operations. In the *Nichol vs. Township*

of Plympton case, the municipality is considering policy revisions to prevent severances due to the (potential) conflict associated with them.

Livestock operations are the most significant “farm issue” causing conflict, resulting in 21% of the agricultural cases heard by the OMB in 2000 and 2001. The expansion and establishment of livestock facilities is a pressing concern in rural Ontario. Many municipalities have been dealing with conflicts between large livestock operations and other community stakeholders while searching for legislative tools to manage large livestock facilities and the nutrients from these facilities. The hearing for the Township of West Perth Zoning By-law 100-1998 is an example of conflict arising from one municipality’s legislative efforts.

Because of the wide spread controversy about large livestock operations, the West Perth case received much attention and media coverage. In fact, the OMB hearing brought new community awareness to the issue. However, when OMB hearings address conflicts which are not of broad, popular concern, they receive little, if any, public or media attention. Likewise, while a Board decision is theoretically not precedent setting, in practice it can be - especially with regards to new land uses or exceptionally controversial issues. The West Perth case paved the way for other municipalities to confidently implement similar policies under the *Planning Act*. Board decisions regarding severance applications tend to have a far less reaching impact because they are so common.

Another trend identified in Section 3 is that the proponent of developments most often initiates an OMB hearing while stakeholders opposed to development are the second most likely to appeal a decision. The tendency for the proponent to appeal the

case to the OMB is probably driven by the fact that the proponent has the most (financially and emotionally) at stake and they obviously want the development to be approved. It is uncommon for any level of government to appeal a land use application involving agricultural conflict.

The OMB process emphasises the local government's responsibility to fairly interpret land use policy. Local decision-makers can be influenced away from policy in response to strong messages from the community, as the Nichol vs. Township of Plympton case demonstrated. A hearing allows local governments to present their position at the same level as other community stakeholders. A significant role of the Board is to weigh both provincial and local land use policies influencing the proposed use.

The three case studies provide some insight into the local perception of the Ontario Municipal Board. With the exception of municipal staff and planners, stakeholders interviewed had very little experience with the OMB. Many thought the hearing was run fairly and professionally and the OMB offered an impartial decision. Those who did not hold the same opinion were consistently party to the side that did not win the case. These observations suggest a person's opinion of the OMB may be tainted by the outcome of the hearing.

Despite the fact that the OMB has been using mediation to resolve disputes during the period 2000-2001, mediation was not attempted in any of the 34 hearings involving agricultural conflict. All conflicts were adjudicated through a formal hearing process. While most of the stakeholders interviewed found formal hearings to be successful in resolving the immediate conflict, several mentioned that the conflict could have been

resolved through mediation, thus saving time, money, and resulting in a more harmonious outcome. One planner thought that mediation should always be attempted prior to a formal hearing. Some of the stakeholders in the City of London case said they often try to reach a settlement on their own, prior to a scheduled hearing.

The OMB is successful in adjudicating land use conflict in agricultural communities. However, it can only play a role in resolving agricultural disputes appealed under the *Planning Act*. The agricultural community must rely on themselves, other levels of government, agencies or boards to assist them with resolving conflict which may arise in other situations.

7.0. References

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Appendix 1: Who can Appeal to the Board, and How?

The Board hears matters under more than 100 pieces of legislation. The legislation that applies to your situation states who may appeal and how appeals are to be made. See the Chart on the next page for more detail. The notice of decision usually tells you how to appeal. (Note that in some cases you must have taken an active part in the public meetings or the Board may be asked to dismiss your appeal)

Usually any person, public body, or incorporated group can appeal either a decision or a failure to make a decision to the Board. However, an unincorporated neighbourhood association cannot appeal in the name of the association. The association must appeal under the name of one of its Members.

You must pay a filing fee. The Board's Information Office will tell you the amount. Time limits for filing appeals are set out in legislation. **The Board cannot extend the time limit or accept late appeals.**

NOTE: ALWAYS INCLUDE APPEAL FEE WITH NOTICE OF APPEAL FOR PLANNING ACT APPLICATIONS

*Approval Authority could be the Minister of Municipal Affairs, Regional or Local Council - Check with your Municipal Clerk to determine which in your particular case.

The Planning Act has been amended from time to time and generally, the date that an application is made to a local authority will govern which version of the Act the application will be processed under. Call Board staff if your concern relates to a Planning Application made prior to May 22, 1996.

OFFICIAL PLANS

Type of Application	How to Get It to the Board	Time Limit for Appeals/Referrals	Who Sends Notice of Board Hearing	Who Usually Goes First at a Hearing
objecting to a decision on an official plan or amendment	Write to the Approval Authority*.	Within 20 days of decisions made by Approval Authority*	Municipality - if Plan/Amendment adopted by Council	Municipality
objecting to an Approval Authority's* failure to announce a decision on an Official Plan Amendment within 90 days of receipt	Write to the Approval Authority*.	No time limit.	Applicant - if Plan/ Amendment adopted	Municipality

ZONING BY-LAWS

Type of Application	How to Get It to the Board	Time Limit for Appeals/Referrals	Who Sends Notice of Board Hearing	Who Usually Goes First at a Hearing
appealing a municipality's by-law	File a letter of appeal with reasons, with the clerk of the municipality	Within 20 days after the date of the notice of the by-law	Municipality	Municipality (unless appellant is represented by Counsel)
appealing a municipality's failure or refusal to amend a by-law within 90 days of request	File a letter of appeal with the Board. A form outlining the required material is available free of charge from the Board	No time limit	Appellant	Appellant

PLANS OF SUBDIVISION

Type of Application	How to Get It to the Board	Time Limit for Appeals/Referrals	Who Sends Notice of Board Hearing	Who Usually Goes First at a Hearing
appealing a decision to approve a plan, withdrawal or refusal to approve a plan or appealing conditions imposed or changed	Write to the Approval Authority*	Within 20 days after the date of the notice of decision	Subdivider or Municipality	Subdivider or Municipality
appealing failure to decide		Within 90 days after receipt of application		

CONSENTS (severances)

Type of Application	How to Get It to the Board	Time Limit for Appeals/Referrals	Who Sends Notice of Board Hearing	Who Usually Goes First at a Hearing

appealing the decision of a body that grants provisional consents	File a letter of appeal with reasons, with the Secretary Treasurer of the Land Division Committee or Committee of Adjustment	Within 20 days of date of Notice of Decision	Board	Original Applicant
appealing conditions or changed conditions	Same as above	Same as above	Board	Original Applicant
appealing a Committee's failure to make a decision within 60 days of request		No time limit	Board	Original Applicant

MINOR VARIANCES

Type of Application	How to Get It to the Board	Time Limit for Appeals/Referrals	Who Sends Notice of Board Hearing	Who Usually Goes First at a Hearing
appealing a decision of a Committee of Adjustment	File a letter of appeal with reasons, with the Secretary Treasurer of the Committee of Adjustment	Within 20 days of the decision	Board	Original Applicant

OTHER LEGISLATION

Development Charges

Type of Application	How to Get It to the Board	Time Limit for Appeals/Referrals	Who Sends Notice of Board Hearing	Who Usually Goes First at a Hearing
appealing against a charge	File a letter of appeal with the municipal clerk.	Within 20 days after mailing of notice of decision or notice of passage of by-law	Board	Appellant
objecting to a front-ending agreement		Within 21 days of giving of notice		

Expropriation

Type of Application	How to Get It to the Board	Time Limit for Appeals/Referrals	Who Sends Notice of Board Hearing	Who Usually Goes First at a Hearing
asking for compensation for land taken to be determined	File the statutory form (Notice of Arbitration and Statement of Claim) with the Board.	No time limit	Expropriating authority	Claimant

Source: Ontario Municipal Board. October 2000. Your Guide to the Ontario Municipal Board. www.omb.gov.on.ca June 28, 2002.

Appendix 2: Issues causing conflict resulting in agriculture-related OMB hearings, 2000, 2001

Issue	Case Number	Date
Livestock operations	PL001007	05-Jan-01
Total # of hearings: 8 of 34 (23%)	PL010693	07-Nov-01
	PL010060	08-Jun-01
	PL010466	06-Sep-01
	PL01106	23-Feb-01
	PL000318	13-Jun-00
	PL000343	16-Nov-00
	PL00064	18-Jul-00
Agriculture related Development Charges By-law	DC990037	16-Nov-00
Total # of hearings: 1 of 34 (3%)		
Tax Assessment	963	16-May-00
Total # of hearings: 1 of 34 (3%)		
Golf course	PL990538	29-May-01
Total # of hearings: 2 of 34 (6%)	PL001218	22-Feb-01
Zoning amendment, Temporary Use By-law	PL000297	20-Feb-01
Total # of hearings: 8 of 34 (23%)	PL990212	12-Apr-01
	PL010147	13-Jun-01
	PL010317	30-Aug-01
	PL991028	13-Apr-00
	PL000420	15-Sep-00
	PL990538	29-May-01
	PL001055	24-Jul-01
	PL001085	02-Jan-01
	PL00064	18-Jul-00
Interim Control By-law	PL010060	08-Jun-01
Total # of hearings: 2 of 34 (6%)	PL01106	23-Feb-01
By-law infraction	PL010466	06-Sep-01
Total # of hearings: 1 of 34 (3%)		
Minor variance	PL001007	05-Jan-01
Total # of hearings: 7 of 34 (21%)	PL010693	07-Nov-01
	PL990538	29-May-01

	PL001218	22-Feb-01
	PL001149	26-Feb-01
	PL000318	13-Jun-00
	PL000343	16-Nov-00
Severances: Farm land	PL010244	12-Dec-01
Total # of hearings: 7 of 34 (21%)	PL001149	26-Feb-01
	PL010220	08-Aug-01
	PL000791	15-Nov-00
	PL010160	22-Jun-01
	PL991106	06-Sep-00
	PL000273	15-Sep-00
Severances: Residential development	PL000141	10-Jan-01
Total # of hearings: 7 of 34 (21%)	PL000320	01-Feb-01
	PL010160	22-Jun-01
	PL990780	19-Oct-00
	PL990212	12-Apr-01
	PL991030	27-Jan-00
	PL000791	15-Nov-00
Official Plan Amendment	PL001244	7-Sep-01
Total # of hearings: 8 of 34 (24%)	PL001144	11-Apr-01
	PL010226	30-Jul-01
	PL991030	27-Jan-00
	PL991106	06-Sep-00
	PL000406	19-Oct-00
	PL000273	15-Sep-00
	PL001055	24-Jul-01
Water-taking	PL001055	24-Jul-01
Total # of hearings: 1 of 34 (3%)		
Greenhouses	PL001085	2-Jan-01
Total # of hearings: 1 of 34 (3%)		

Appendix 3: Stakeholders initiating OMB Hearings

Appellant	Case Number	Date
Local Government	PL001144	11-Apr-01
County Government	PL010244	12-Dec-01
	PL010317	30-Aug-01
Provincial Government	PL010226	30-Jul-01
Proponent of Development	PL991030	27-Jan-00
	PL991106	06-Sep-00
	PL000791	15-Nov-00
	PL000273	15-Sep-00
	PL000343	16-Nov-00
	PL010466	6-Sep-01
	PL01106	23-Feb-01
	PL001218	22-Feb-01
	PL000297	20-Feb-01
	PL990212	12-Apr-01
	PL010147	13-Jun-01
	PL000141	10-Jan-01
	PL001149	26-Feb-01
	PL00320	1-Feb-01
	PL010160	22-Jun-01
	PL001244	7-Sep-01
	PL010226	30-Jul-01
	PL001055	24-July -01
	PL010220	08-Aug-01
	PL001085	02-Jan-01
	PL00064	18-Jul-00
Opponent of Development	PL000318	12-Jun-00
	PL991028	13-Apr-00
	PL000420	15-Sep-00
	PL000408	19-Oct-00
	PL990780	19-Oct-00
	PL001007	5-Jan-01
	PL010693	7-Nov-01
	PL010060	8-Jun-01
	PL990538	29-May-01
	PL010226	30-Jul-01
	PL001085	2-Jan-01
Other	963	16-May-00
	DC990037	16-Nov-00

Appendix 4: Stakeholder involvement in OMB Hearings related to
Agriculture 2000, 2001 by case

Stakeholder	Case Number	Date
Local Government	PL000318	13-Jun-00
Present at 85% of the hearings	PL991028	13-Apr-00
	PL991030	27-Jan-00
	PL000420	15-Sep-00
	PL991106	06-Sep-00
	PL000791	15-Nov-00
	PL000408	19-Oct-00
	PL000273	15-Sep-00
	PL000343	16-Nov-00
	DC990037	16-Nov-00
	PL001007	5-Jan-01
	PL010060	8-Jun-01
	PL010466	6-Sep-01
	PL01106	23-Feb-01
	PL001218	22-Feb-01
	PL000297	20-Feb-01
	PL990212	12-Apr-01
	PL010147	13-Jun-01
	PL010244	12-Dec-01
	PL010317	30-Aug-01
	PL000141	10-Jan-01
	PL001149	26-Feb-01
	PL010160	22-Jun-01
	PL010220	8-Aug-01
	PI001244	7-Sep-01
	PL001144	11-Apr-01
	PL001055	24-Jul-01
	PL010226	30-Jul-01
	PL00064	18-Jul-00
County Government	PL000343	16-Nov-00
Present at 23% of the hearings	PL010244	12-Dec-01
	PL000141	10-Jan-01
	PL000320	01-Feb-01
	PL010220	8-Aug-01
	PL001144	11-Apr-01
	PL001055	24-Jul-01
	PL00064	18-Jul-00

Provincial Government	PL010226	30-Jul-01
Present at 6% of the hearings	PL00064	18-Jul-00
Ontario Property Assessment Corporation	963	16-May-00
Present at 3% of the hearings		
Proponent of Development	PL000318	13-Jun-00
Present at 91% of the hearings	PL001028	13-Apr-00
	PL991030	27-Jan-00
	PL000420	15-Sep-00
	PL991106	06-Sep-00
	PL000791	15-Nov-00
	PL000408	19-Oct-00
	2 parties PL000273	15-Sep-00
	PL9900780	19-Oct-00
	PL000343	16-Nov-00
	PL001007	5-Jan-01
	PL010693	7-Nov-01
	PL010060	8-Jun-01
	PL010466	6-Sep-01
	PL01106	23-Feb-01
	PL990538	29-May-01
	PL001218	22-Feb-01
	PL000297	20-Feb-01
	PL990212	12-Apr-01
	PL010147	13-Jun-01
	PL010244	12-Dec-01
	PL000141	10-Jan-01
	PL001149	26-Feb-01
	PL000320	01-Feb-01
	PL010160	22-Jun-01
	PL010220	8-Aug-01
	3 parties PL001244	7-Sep-01
	PL001055	24-Jul-01
	PL001085	02-Jan-01
	2 parties PL01026	30-Jul-01
	2 parties PL00064	18-Jul-00
Opponent of Development	4 parties PL000318	13-Jun-00
There was some opposition	5 parties PL991028	13-Apr-00

to a proposed development at 41% of the hearings.		
	2 parties PL000420	15-Sep-00
	2 parties PL000408	19-Oct-00
	1 party PL990780	19-Oct-00
	1 party PL001007	5-Jan-01
	6 parties PL010693	7-Nov-01
	PL990538	29-May-01
	PL000320	01-Feb-01
	4 parties PL001244	7-Sep-01
	4 parties PL001055	24-Jul-01
	PL001085	24-Jul-01
	PL010226	30-Jul-01
	PL00064	18-Jul-00
Other	963	16-May-00
	2 parties DC990037	16-Nov-00