Fixing the Planning System

Marc Denhez [1]: Presentation to the Federation of Citizens' Associations, June 15, 2017

Introduction

Broadly speaking, the planning process – and planning disputes – are three-sided. The typical three interests are owner/developers, the municipality, and the neighbourhood. And we've all heard the epithets. Those "nasty developers". Those "slippery municipalities". Those "rabble-rousing NIMBY's".

I must tell you. Before I joined the Board, my largest client was the development industry. The second-largest were governments. And as for those associations that rouse rabbles, *I headed one*.

But since I served on the OMB for over 12 years, you probably expect me to say two things. First, how developers are vitally *important to our economy*. Second, that the state of planning in Ontario *isn't as bad as it sometimes appears*.

Correct… *up to a point.*

First, the construction industry is indeed vital. It's 7% of Canada's GDP -- one out of every 13 jobs (over 1 million). It's $242 billion annually.

Second, the planning system isn't as bad as portrayed. The question is whether it's *better* – or *worse*. You can decide. Here's a quotation from Stephen Lewis, never the greatest admirer of developers. He said he'd originally figured he knew who was right, and who was wrong – but on closer analysis, he concluded that "the skulduggery was more widely spread."

So here are my three points:

1. A "planning system" is *only as good as its criteria* – the framework of underlying principles that motivates its decisions. Without sound principles, you can't call the system "planned". Yet ironically, that's how the *Planning Act* was set up, for almost 50 years. It wasn't the *Planning Act* – it was the Non-*Planning Act*.
2. Finally, about 20 years ago, criteria started to be introduced – then multiplied. Today, there are binding criteria everywhere – but some are *controversial*, and there was *no public buy-in*.
3. Recent measures are an improvement, but the underlying malaise is more fundamental, and will take longer to solve. It's about *making planned development work*. (At present, it *isn't* working for many developers, municipalities, or community groups).

I'll start with a brief history of our planning system. I'll then discuss who the players are. I'll review the latest governmental initiative. I'll outline what I believe the fundamental issues are – *uncertainty* and *economics*. Finally, I'll offer thoughts on where associations go from here.

Early History

Ontario was among the last Provinces to adopt planning legislation. It passed the *Planning Act* in 1946, and expanded it in 1949, under the Conservative government of George Drew and Leslie Frost – on the insistence of municipalities, which had started doing planning in earnest during the war.

But the Cold War was a difficult time, and there were cries of an invasion of private property – "planning" was something done by others, not us. The 1949 Act contained two overt reservations:

A. An owner could demand a rezoning anytime – with a right of appeal if Council refused (or failed to decide within a specified time). So a Council could go through a huge consultative process, and scads of appeals – but the day after the by-law came into effect, any owner could walk off the street and demand to *change* it.

B. The government of the day wouldn't allow any zoning to come into force, unless *approved* by its own Cabinet appointees. These appointees would sit on a "Board" (already set up for other duties in 1906). It was the OMB. Since it wasn't called a "tribunal" but a "Board", some observers inferred that it would be like a Board of Directors, for planning policy in Ontario.

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If someone wanted a variance, severance, subdivision, or rezoning, they'd apply to the municipality. Or maybe Council wanted to rezone. The dance would begin, with many steps. If there was a dispute, it went to the Board, comprised of appointees of Mr. Frost and his cabinet. If the Board made a *legal* error, it was naturally appealable to Court. But for an alleged *policy* error, the 1949 Act said it was appealable directly back to Mr. Frost and his cabinet.

And all of this was called the "*Planning Act*".

"Planning"

The first question is: what does "planning" even mean?

It wasn't defined. It still isn't. Yeah, the Act is about "planning", but they didn't *plan* enough to bother with a definition. The closest they came was to say that it was about doing a "program of development" mindful of "the public interest", but no one much knew what that meant either.

In the absence of a statutory definition, it's not unusual to rely on the dictionary definition in common usage. I've used the *Concise Oxford Dictionary*'s definition: "*To arrange beforehand*". "Planning" is all about *predictability*. Or at least it is in common English.

But that leaves the question: just *what was* "arranged beforehand"?

In any decision-making system – particularly something that calls itself a "planning" system – *the process is only as good as its criteria* – the principles which guide it. That's the key to what makes a system predictable. That's what makes it "*planned*".

In contrast, the 1949 Act legislation specified no clear criteria on which the Board was expected to render its decisions. Everything was "discretionary": the Board was assigned to fly by the seat of its pants. Applications before the Board were a leap into the void. In the absence of any criteria arranged beforehand, some might argue that the early legislation wasn't about "planning", but about "non-planning". The Act was arguably 1% content, and 99% procedure. It still is.

It's not unusual for governments to give statutes a cute name that's misleading. One view is that the "*Planning Act*" had *nothing to do with arranging anything beforehand*: it was about putting everything under the direct supervision of what was affectionately called "The Big Blue Machine" – the Conservative Party hierarchy, which ran Ontario for over 40 years.

In time, some planning patterns did emerge in practice. For example, there was a fixation with parking. In some districts, 40% of the land was covered in asphalt. I wrote in one decision that, when archaeologists of the future unearthed the planning archives of our time, they'd exclaim: "This was a civilization that did little but eat burgers and have their mufflers fixed; but they sure knew how to park."

The Sixties and Beyond

By the sixties, the Board no longer vetted every zoning by-law; but it became insistent that "planning" *had* to be guided by transparent policies, not pure "discretion". The Board started to codify its own "principles", on which to base its decisions.

That was slapped down by the Ontario Court of Appeal. In a case called *Hopedale*, the Court held that, even if the Board laid down such "principles", it shouldn't *insist* on them. Saying that a developer "must comply with them before the Board will allow the application is clearly wrong and the Board, *if it so fettered its discretion, would be in error*."

The Court of Appeal elaborated, in a case called *Cloverdale*. The Court held that, in terms of discretionary authority, the Board "is to be regarded as being *the Minister himself*." The Board was subsequently referred to as "standing in the shoes of the Minister."

If you thought that could compromise the "predictability" of the process, look at another case, called "the *Farlinger Rule*". In 1975, the Court of Appeal held that, for monetary purposes,

- the "*highest and best use*" of property was *not* what the Official Plan said it was, let alone the zoning by-law;
- but rather its value *after a hypothetical rezoning*, as long as that rezoning was "within a reasonable expectation".

In other words, said *Farlinger*, neither the Official Plan nor the Zoning By-law are definitive, in telling you what the "highest and best use" of the property is.

There was an attempt to appeal *Farlinger* to the Supreme Court, but the Supreme Court rejected it.

But hang on: *Farlinger* was supposed to be only about *land compensation* on an expropriation – not about planning generally. But that didn't stop people from using the same argument everywhere – for the simple reason that it's been *accepted wisdom* throughout the industry for generations. I'll get to that later.

It's also widespread in the public sector. It's how public authorities told owners of a prominent golf course that, for *property tax* purposes, their land should be assessed *as if* it had a subdivision on it.

- The owners replied that the Official Plan called it a golf course, the zoning called it a golf course, and the owners intended a golf course (no immediate plans for a subdivision),
- but the public authorities responded that – *hypothetically* – if a subdivision *were* applied for, it was "within a reasonable expectation" that the subdivision would be approved. Ergo, the tax assessment should be increased.

Back to the chronology. In due course, policy appeals to Cabinet were phased out.

In 1983, the Bill Davis government amended the *Act*, to permit municipalities to *sell upzoning* and Official Plan Amendments. If a developer offered enough cash or "community benefits", Council might change the rules. This is now called s. 37 of the Act. The result, according to some authors, is called "Let's-Make-A-Deal Planning".

But it came at a cost, in credibility. Henceforth, when a Council adopted zoning or an Official Plan, neither developers nor neighbours knew (for sure) whether Council actually "meant it", or whether the Council was intentionally lowballing the figures, to maximize its bargaining position for ensuing monetary negotiations.

Let me explain. In cities which made extensive use of s. 37, many developers presumed that Council had a certain density target in mind – but that it lowballed that target, in its Official Plans and zoning, to position itself to collect s. 37 benefits -- whenever a developer proposed what Council secretly expected in the first place. So when that Council adopted land-use controls, the industry said it didn't know if Council "meant it", or was just looking for "a piece of the action".

In some municipalities, councils adopted what were commonly called "Placeholder" by-laws, with overtly fictional requirements – to apply to the property until someone proposed something Council could really sink its teeth into. In the meantime, the by-law wouldn't say the place was zoned for a banana plantation – *but close*.

Parenthetically, the municipalities that made the most use of s. 37 also appear to have had the *highest rate of developer appeals* of their land-use controls. Of course, that may be just a coincidence.

So let's recap up to this point. As of the 1980's, it was established law in Ontario that Official plans and zoning were not conclusive in defining the 'highest and best use" of property. And even if they had been, the system was arguably still for sale. And it gets better.

The PPS

But first, in the *rest* of the world, the U.N.'s Brundtland Commission reported in 1987 on the importance of "sustainable development".

The next government initiative was significant. Let me ask a question.

(How many people here know that Ottawa has an Official Plan? Were any of you involved in its preparation – Ottawa 20/20 – or part of the consultative process? I know I was.) (OK, how many people know about the Provincial Policy Statement?) (It's the closest thing to a Provincial Official Plan, and most people have never heard of it).

In 1996, at the height of the "Common Sense Revolution", the government of the day issued the Provincial Policy Statement, or "PPS", for all municipal and Board decisions under the *Planning Act*. It said nothing about sustainability. But it did recommend that all urbanisation should "*intensify".* Lest anyone miss the point, it said so 19 times.

Furthermore, it declared (up front, at s. 1.1.1) that the Province's *first* stated intent was to "promote… cost-effective *development*". This led to the opinion, fashionable in some circles, that intensification was the Province's *only* interest. That opinion was clearly wrong – the PPS contained a wide variety of principles, which it insisted be "read as a whole." – but that changed nothing. I heard so-called "experts" testify that, as long as the project was an intensification, "the Provincial interest has been satisfied." In one intensification case, where I asked more questions about planning compliance than the developer's lawyer liked, he asked me: "Mr. Chair, what is it about Provincial policy that you don't understand?"

And let's be clear about the implications. When someone appeals a local Official Plan, they typically do so on the ground that there's a perceived inconsistency with Provincial documents – like this business of intensification. And yes, from time to time, the local Official Plan would get trumped. (I use the word "trump" with hesitation, but you get the picture). The municipal Plan didn't allow for *enough development*.

The 1996 PPS also announced that Ontario's planning system should be "policy-led" – but *stopped short* of saying its terms were *binding*. Councils and the Board were required to "have regard" for the PPS – like it was *recommended* -- but the wording was coy about whether it was obligatory. Like a U.S. President telling an official "I *hope* you do something."

That's what the PPS said. Of equal importance is what it *didn't say*. Although Brundtland had called for "sustainability" to be incorporated into all the world's planning systems, the PPS said essentially nothing on that score. Nor did the PPS say much about quality of life, like whether communities should look half-decent. On the contrary, the strongly-held view, in some circles, was that the Province had dictated that municipal attention to aesthetics was not only unwise, but outright *illegal. Banned*. This "right to be ugly" supposedly meant that a Council could not even think about it, for fear of "tainting"

their by-law with an *illegal consideration*. That view was entrenched in some legal circles, until a contrary Board decision, only three years ago.

Moving forward, 2005 was a watershed year. The PPS was changed, And more importantly, the *Act* was amended, to say that the PPS would now be not only r*ecommended*, but *binding* on all *Planning Act* decisions.

So the situation that had prevailed for 50 years was now reversed 180 º. The *Hopedale* discretionary notion was dead. Instead of *discretion* vested in government appointees, who had as much leeway as the Minister did, the Board was now bound by written criteria. Its role would henceforth look more like a court, under instruction to apply pre-established principles, like judges applying the Rule of Law, on an objective basis, rather than depending on what side of the bed they got out of, that morning.

Follow-up and Today

In due course, the Province finally changed the old rule that anyone could challenge an in-force Official Plan anytime, even before the ink was dry. Now you have to wait at least two years after it comes into effect. There were more amendments to the PPS in 2014.

Finally, last month, the Province announced changes to the OMB. The draft legislation was sent out two weeks ago. It's immense. It's called Bill 139 – the *Building Better Communities and Conserving Watersheds Act*. It's an umbrella statute in several parts. One part will be called the *Local Planning Appeal Tribunal Act*:

- The OMB will be renamed the "Local Planning Appeal Tribunal" ("LPAT").
- Instead of considering matters from scratch, the emphasis will be on proving whether the municipality *digressed* from the governing planning documents.
- A new body, called the "Local Planning Appeal Support Centre" will provide free advice on planning disputes, and even representation in certain cases. This is supposed to be available to "Ontarians" generally, on the model of the Human Rights Legal Support Centre. This could be extremely important, depending on how well resourced it is.
- There will no longer be a right to "oral" hearings for planning disputes – with witnesses in the witness box, being examined and cross-examined. The expectation is that most hearings will be in writing (like at the Court of Appeal), possibly assisted by affidavits.
- There will be new procedural limits on people who try to be added as parties or participants to a hearing. This could affect local groups who want their voice heard.
- There will be new rules exempting Official Plans and By-laws from appeal altogether, *if they intensify around transit hubs.*

To see Bill 139, go to the Legislative Assembly of Ontario website: www.ontla.on.ca

Comments on the proposed bill can be made through the Environmental Bill of Rights Registry at www.ebr.gov.on.ca

The Province also announced that it wanted more emphasis on Official Plans. That topic is key. By definition, in a "planning" dispute, the first question is: "what has been planned?" What do the *Act* and PPS say about this application? What about the Official Plan? Are there other planning documents which cast light on the issue? It's pivotal, because it provides the grounds for Board decisions. I sometimes faced a project which I thought hideous; but if I turned it down, I'd need firm evidence, straight from the planning documents; otherwise, I'd just get overturned on appeal. And yes, there were times when I just didn't find any. I found myself scrambling: the applicable criteria didn't allow me to turn the project down, but maybe I could find some grounds to mitigate it. The moral is that *the first task, for anyone appearing at the Board, is to give the Board the ammunition* – the legal justification to decide in their favour.

I always reviewed what the governing documents said – and I didn't particularly care if the texts were shown to me by the developer, the municipality, or the locals. In a proper hearing, the weight of an argument should depend less on who's making it than on the quality of the evidence. Not everyone shares that view, but I'll get to that.

The Parties

As mentioned, Board hearings are often a three-sided affair, though not everyone shows up. Sometimes the locals are aligned with the municipality against the developer. Sometimes they're challenging the municipality (and some Councils are as vocal, in calling local associations NIMBY'S, as developers are). And yes, there have even been cases where locals aligned with a developer against the municipality (I had one last year, where neighbours testified in favour of a project, because they liked it better than the polluted brownfield that was there before; but the municipality disagreed). Anything's possible.

As I said, the decision-making process should be based on the evidence. One of the most tedious things is when the parties spend their time impugning each other's motives. It is written that we can "never really understand other people's motives, nor their furniture." But it's not just that. It's utterly unhelpful. But that hasn't stopped litigants from accusing municipalities, for example, of "playing politics".

Right. Of course municipalities play politics. Do we really expect elected politicians to be oblivious to politics? If so, why did we elect them?

And how about you guys? You've heard it all before. You're NIMBY's. Or worse. You might be BANANA's, which stands for "Build Absolutely Nothing Anywhere Near Anything". Yeah, you're like the "*Immobulus*" curse in Harry Potter: freeze everything where it stands. You realize now what your accusers are trying to do: by painting you as "anti-development", they're trying to paint you as *anti-PPS*. And the worst thing you can do is let that label stick.

Then there are developers. "They're just in it for the money". Well, what did you expect them to be in it for?

But in the case of developers, it's more complicated. Countless times, people ask: why don't developers just stick by the rules? Why don't they all just build in accordance with the existing Official Plan and zoning – what's called "*as-of-right development*"? Here's some background.

Most developers can't afford to do land banking. They can't set aside land for years and decades, waiting for the right moment to develop. To stay in business, they usually have to buy prospective sites from someone, often a speculator or another developer. There's the rub. In urban Ontario, the public and private sectors have long grown used to the notion that upward adjustment to development was not only possible, but *expected* (via variances, rezoning, Official Plan Amendments, whatever). You saw the *Farlinger Rule*.

The thing is that educated *sellers* are as familiar with "highest and best use" as buyers; so the potential for upzoning is *factored* into the asking price. *It's already been priced in*. So the broadly-held view was that a developer, who *restricted* projects to as-of-right development, would inevitably <u>*overpay*</u> for land acquisition, and be out of business in six months.

The supposed corollary was that the first business objective was to *outwit the planning documents* -- like upzoning to something *more* than what the seller had *already factored into the purchase price*. To some observers, this explains why, in the GTA, significant projects *typically* involve a Plan Amendment and/or rezoning. Sure, there's lots of development in Canada's largest market – but *almost none of the major projects stick to the original planning documents*.

By that reasoning, "planning" is a far cry from "arranging beforehand". Thanks to the various factors outlined, the best way to guarantee that a given vision would *never* materialize would be to entrench it in the planning documents.

One prominent Toronto lawyer went to the Divisional Court, saying the *Oxford* definition of "planning" was improper: in Ontario, planning wasn't about "arranging beforehand". No, no, no. *Au contraire*, the definition of "planning" was to provide a methodical way of *processing and approving what was <u>never</u> arranged beforehand*. Yeah, that's Ontario "planning" (or at least what some lawyers think it is). The Court turned him down, though on other grounds.

Some observers might think municipalities would consider this parade of planning applications problematic, or at least tedious. Not necessarily. You heard about municipalities collecting for upzoning, thanks to s. 37. Here's what a retired senior municipal official (in another city) testified:

> When the (Official Plan) says the (development) maximum is "X", and the zoning by-law says the maximum is "X", that doesn't mean the maximum is "X". "X" merely marks the spot where negotiations begin.

That opinion is today shared by many municipalities and developers alike. Aside from occasional glitches (which went to the Board), many municipalities supposedly had a comfortable symbiotic relationship with developers: councils would adopt land-use controls, *purportedly* with a planning vision, but these would be routinely finessed, in the words of one prominent real estate spokesman, by "smearing some money around."

A related view is that 1996 was a vindication – when the government of the day first published the PPS, with its emphasis on intensification.

- The *intent*, according to the official line, was that *forcing* cities to grow upward (instead of outward) would *control urban sprawl.* That might even be true. Maybe Mike Harris did lie awake nights, worrying about the encroachment of urbanization on farms, trees and chirping birds.
- But another view is that it was all about reinforcing *upward pressure on land-use controls* – and elevating that pressure from a business imperative to the status of a virtue. So persistent upzoning was not only legitimized: it was *codified*.
- For their own reasons, municipalities reputedly did not object. The "skulduggery was more widely spread".

Some Resulting Theories of Planning

So where does that leave Official Plans? And land-use controls? And "planning"?

According to some expert witnesses, the result was to "dumb down" leading policies – and "Plans" generally. I know one major planning firm, whose "experts" testified at every hearing that the "rightful" role of an Official Plan was to convey inspirational and uplifting thoughts, but certainly not to *specify* anything.

A related view is that, since Plans are *expected* to be mushy, they'll always require an "expert" to interpret and explain what they *really* mean. In this field, a person of normal intelligence is apparently incapable of reading a sentence, viewing a photo, or interpreting a map, without professional help.

An opposite school of thought says the "solution" is for Official Plans to become radically *more* specific, to the point of itemizing each building's length, width, and height, like a zoning by-law on steroids. But there's an obvious problem. If land-use controls are exclusively in volumetric terms – length, width, and height – then any developer who wants to *fill that buildable space* will likely build a cube. One cannot "sculpt" the building, without sacrificing buildable density – which most developers are loath to do. Not only does that approach exclude any architectural flourish: it guarantees the outcome will be shaped like a box. Planners may argue over where to put the box, or how big it'll be, or whether a squat box is better than a tall box; and they'll argue over parking and money (they do that); but the physical profile is already a foregone conclusion. It's a box.

Further Reflections

This sort of thing leads some people to believe that, in Ontario's current framework, neither great planning nor great architecture are feasible.

But it's easier to blame everything on that unelected "discretionary" body, the OMB. According to yet another school of thought, that is exactly what was intended. The view is that this blame game was *planned* long ago (one of the few things in the *Planning Act* that was).

During my first week on the job, my mentor walked me through the parameters – how we were bound by the *Act* (and later by the PPS); and how our job was to understand the guiding principles written into the applicable planning documents – written by the Province, and Councils. In short, we were supposed to apply what *they* had arranged beforehand. Yeah, they (and their predecessors) *created* the policies the Board was supposed to apply – and they fully understood that some were controversial, even unpopular.

According to at least one textbook, the main and longstanding purpose of Board decisions was to *deflect* public criticism for controversial policies *away from those who drafted them*.

If there were broad public support for those decisions, Ontario wouldn't be having this dialogue. There have been countless suggestions that the core issue was that the Board was biased in favour of developers, and against everyone else. Hang on. *Look at the Board membership*. During most of my time, the overwhelming majority *hadn't* come from the development industry: they came from *municipalities*. Out of twenty-ish adjudicators, five were former mayors; three city solicitors; two commissioners of planning; plus others who'd worked for local governments. There wasn't a single development lawyer there (at our salary level, they couldn't afford it). To my knowledge, only a single OMB adjudicator had ever been a member of the Canadian Home Builders' Association – and that was me. So if people thought there was a professional bias at the Board against municipalities, there's nothing to support that.

You'll notice that I haven't said anything about bias against *neighbours and community groups*.

OK, some groups have been easier to deal with than others. In another city, one Association president shows up routinely at Board hearings, to intervene in disputes far from that Association's turf. It's as if the Glebe Community Association fought minor variances in Rockcliffe Park. And you sit there thinking: "I wonder who's running for office."

But as I said earlier, my interest was more focused on *what* the planning documents said, than on *who* was showing them to me. I believe most of my peers felt the same way.

I said "my peers." I've said nothing about my superiors. It's best that I not comment on how that place has been run over the last few years, because we really would be here for 6 ½ hours; but I'll say this. One of them said his "life ambition" was "to crush NIMBYism". You can deduce what he thought of people like you – and he didn't hide it. Not all dinosaurs are in the Royal Ontario Museum. I can add, however, that he's no longer there. At the Board, I mean. Maybe in the ROM.

But we adjudicators are supposed to be independent – undaunted by that sort of thing, like judges in the court system. But like them, we often faced cases that were controversial.

Judges do too. But when their outcome is controversial, the public reaction is not to ask how an unelected official could have rendered such a decision. The more likely reflex is to ask:

1. Was there something wrong with the law?
2. Was there something wrong with the evidence?
3. Was there something wrong with the presentation?

But if courts were treated like the Board, the questions would almost *never* be the three above, but rather:

A. Why was the judge so prejudiced?
B. Why don't we just tear the courthouse down, and be done with it?
C. If that won't work, why don't we build our own courthouse?

Over the past 45 years, there's been one commission or inquiry after another. The current proposals arguably represent the most sweeping changes in decades. A few thoughts.

The Current Initiative

First, calling the organization a "*tribunal*" instead of a " Board" is way more accurate. The connotation is that it's court-like, in rendering decisions based on pre-established principles (instead of discretion, like a " Board of Directors", which the Board hasn't resembled in a generation). Indeed, in countries like Britain and particularly Australia, the counterparts are already called "courts".

Another feature is to shift the spotlight, in hearings, onto whether the municipality *digressed* from the law and the governing documents. It arguably *codifies* best practices.

One excellent step is the creation of this "*Local Planning Appeal Support Centre*". We already have other kinds of legal defense funds. I've had cases involving environmental organizations, with sometimes two (and even three) lawyers at a hearing. I never quite understood why we'd have legal support systems for the habitat of moose and beavers, but not the habitat of people. This step forward deserves close attention.

Some other aspects could make life more complex for community groups. It will certainly be more complicated to *opt into* a hearing. At present, all that people have to do is show up, at the start of the hearing or prehearing, and *ask* for party or participant status. Sometimes, that status is denied; but more often, it's granted on mutual consent. Last year, I had one prehearing where 43 participants signed up.

But under the *new* rules, there will be procedural hoops to jump through. More importantly, it's expected that many oral hearings will disappear, to be replaced by evidence submitted exclusively in writing. This reduction in oral hearings could affect the ability of some associations to make their views heard. Hypothetically, it's always possible that this problem could be offset, if those associations can get enough help and/or advice from the new "Support Centre"; that remains to be seen.

Eliminating most of the examinations and cross-examinations will have another effect. Sometimes, local groups can't afford expert witnesses; so their strategy, to introduce their own evidence, is to do so *via cross-examination* of someone *else's* witness. I've seen it often enough. It's risky, but on occasion it does work. Again, that problem *might* be offset by the Support Centre, which remains to be seen.

Finally, I'll mention the new rules exempting Official Plans and By-laws from appeal altogether, when they *intensify around transit hubs*. This will clearly affect any local associations which wanted to argue that it was an over-intensification in that location.

The Underlying Malaise

Now for the fundamental question. In fairness, neither developers nor municipalities created this system. Neither did the Province – at least not consciously – though that's where the seeds were planted, generations ago. Today, the question is whether the new system will *solve all of the longstanding problems* in Ontario's planning framework.

No one said it would.

I don't envy the Attorney General. He's trying to make the best of a difficult situation, which evolved over the course of almost 70 years. Previous governments revisited the subject every few years, for decades now, yet the malaise persisted. The core of the issue runs much deeper, and has (so far) eluded any definitive analysis, let alone resolution.

The basic conundrum is in two parts. The first is *chronic uncertainty*. Look at what this so-called planning system inherited – what was "arranged beforehand"? Granted, as for "guiding criteria", the cupboard is no longer bare, as it once was. But –

- you can't rely on the Official Plan and zoning to tell what the "highest and best use" is;
- we don't necessarily know whether that Plan and zoning were adopted in earnest, or instead as a bargaining position, in anticipation of something bigger and more lucrative for city coffers;
- And whatever those documents may say, we're under formal instruction from the Province to "intensify" it.

- Meanwhile, a branch of the planning profession itself swears that Official Plans shouldn't specify anything anyway; and even they did, it would be subject to "interpretation".

And people wonder why hearings take days and weeks, to figure out what's been "arranged beforehand". Not to mention that we've also inherited a cottage industry, of legal and planning experts, to argue over how to figure it out. *Myself included*.

The second part of the conundrum is economic:

- On one hand, all Ontarians are agreed on the importance of *planning for a better urban future*.
- On the other, no one has faced (let alone figured out) how a large part of the industry can *make money, building within the existing groundrules*, and not go out of business. Although "as-of-right development" works in much of Ontario, the real estate sector appears unanimous that, after decades of the *Farlinger Rule* (or equivalent) in urban downtowns and suburbs, *"as-of-right development" there is problematic*.
- In short, no one's figured out how to *get the development we want and plan for, without killing the goose that laid the golden egg.*

That, along with the uncertainties of everyone wanting a "piece of the action", helps explain the tortured dance which has characterized Ontario's planning system over the last many decades.

Conclusion

So where does that leave community associations?

Bill 139 is expected to become law around November. In the short term, you can review the draft, and offer comments on the website I mentioned earlier. Under the new system, you'll certainly want to monitor the *rollout of the Support Centre* closely.

In the long term, it's in your self-interest to take a hard look at the *criteria* on which these decisions are based. As I said, a decision-making system is only as good as its criteria. Ideally, they should reflect the values of Ontarians – and there should be a public, transparent *buy-in*. That could take years. But it just isn't good enough to rely on a direction which essentially came out of back rooms at Queens Park over 20 years ago.

And some day, we'll have to get around to the fundamental conundrum, about *making planned development work*.

Yes, I'm thinking ahead -- not only about *this* round of reform – but to reforms after that. No one ever suggested that fixing the planning system can be done in one fell swoop: it will require determined analysis, dialogue, and effort, possibly over the course of many years.

So to recap, here are my three points:

- It's about the *criteria* – the framework of underlying principles that motivates decisions.
- We need criteria that not only reflect Ontarians' *values,* but also have a public *buy-in*.
- Recent measures are an improvement, but the *underlying malaise may take longer to solve*.

Thank you.