POLICY-MAKING BY ADMINISTRATIVE TRIBUNALS:
A study of the manner in which the Ontario Municipal Board
has applied provincial land use planning policies and has
developed and applied its own planning policies

by

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A thesis submitted in conformity with the requirements
for the degree of Doctor of Juridical Science
Graduate Department of the Faculty of Law
University of Toronto

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POLICY-MAKING BY ADMINISTRATIVE TRIBUNALS:
A study of the manner in which the Ontario Municipal Board has applied provincial land use planning policies and has developed and applied its own planning policies

S.J.D. 1999, John George Chipman
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Abstract

The thesis is an empirical examination of one aspect of administrative decision-making, the manner in which tribunals develop and apply policy in the course of dealing with the matters under their jurisdiction. While regulatory theory suggests that it is the role of government to develop policy and of tribunals to apply that policy in specific situations, the relationship between the two is far more subtle. This is examined through the decision-making of one such tribunal, the Ontario Municipal Board, which plays a central role in land use planning in Ontario through its authority to review the planning decisions of municipal councils and committees.

The Board has regard to provincial planning policies where they exist, but regularly subordinates them to the application of its own policies where the two are in conflict. These latter policies, which emerge from the Board's decisions, deal with a wide range of both procedural and substantive land use planning matters. Its bedrock policy, derived from the common law of nuisance and reflecting its commitment to the protection of private property interests, is to protect private property from the adverse impacts of development. Yet it also accords importance to broader public interests in dealing with certain types of applications, and develops policies beyond those mandated in the Planning Act to ensure full public participation in the planning process. This examination of the Board's policy-making role and of its treatment of provincial policies raises questions regarding the applicability of regulatory theories, the legitimacy of its activities and the need for retaining a planning review tribunal at all.
Dedicated to the memory of my parents Reginald Allison and Rose Cecilia Chipman

Requiescant in Pace
Acknowledgements

I would like to express a huge debt of gratitude to my supervisor, Professor Hudson Janisch, for his enthusiastic support, encouragement and supply of wisdom and advice during the preparation of the thesis. I wish to thank also the members of my committee, Professor Peter Silcox, Professor John Bossons and Mr. Stanley Makuch, for their comments and advice throughout this period.

I am most grateful to the chair and staff of the Ontario Municipal Board for permission to review the Board's files, minutes and other documents, which provided me with an excellent "behind the scenes" understanding of its operation. I must thank also the staff of the Archives of Ontario for their assistance in obtaining a great deal of material pertaining to the Board.

Most of all, I thank my wife, Mary Chipman, for her unfailing love, companionship and support in returning to undertake graduate studies and in persevering to complete this project.
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INTRODUCTION

1. Overview

We swim in a sea of regulation, and our lives are governed at every turn by a myriad of administrative agencies: boards, commissions, authorities, tribunals, councils. A recent study showed that 580 provincial agencies, to say nothing of numerous federal agencies, are operating in Ontario alone.1 These agencies have been the subject of a rich, but often generalized and theoretical literature.2 Yet, despite their importance, there has been little published empirical scholarly analysis of the manner in which such agencies actually engage in their day-to-day activities.3 Court decisions, particularly those of the more senior courts, are closely studied, but the vast range of administrative decision-making, which probably touches more persons more closely than do judicial decisions, remains largely anonymous and unaddressed. This thesis is a study of administrative agency decision-making as engaged in by one such agency, the Ontario Municipal Board.

The Board may be classified as an administrative tribunal.4 It exercises a range of regulatory jurisdictions over certain activities, partly as an administrative entity making policy-based decisions and partly as a quasi-judicial entity whose decisions, based on applying the law to given fact

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2 See Chapter one for an overview of the development of regulatory theory and of the literature pertaining to it.

3 As the only comprehensive study of Canadian legal research has indicated, there has been little empirical legal research undertaken generally, not just in this area. See H.W. Arthurs, Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law (Ottawa: Social Sciences and Humanities Research Council of Canada, April 1983). Table 1 in that Report shows, for example, that developing and applying statistical data was undertaken frequently by only 3% of Canadian law professors, occasionally by 15% and not at all by 58%. Table 4 shows that empirical research methodologies were employed in less than 10% of law review articles published in each of five selected years. The authors concluded, with respect to research by both law professors and government research lawyers, “that lists of research projects undertaken by these institutions rarely indicate any empirical, interdisciplinary, comparative or historical aspects.” (p. 83)

4 Macaulay and other writers explore the vexed question of distinguishing between categories of agencies: e.g. is agency X a commission or a tribunal? I do not propose entering into that debate, but only to note that I consider that the term tribunal best applies to the Board, for the reasons given.
situations, directly affect individual and corporate rights and obligations. There has been an ongoing debate in the literature of regulation as to the degree of independence that such tribunals do, or should, exercise in carrying out their mandates. They are created by governments. In the purest theoretical model, their role is to apply the policies of their creators in making decisions on the specific matters laid before them. Yet it is recognized that this relationship is much more complex in reality. Administrative tribunals cannot be automata applying the policies of their creators. The policies of the senior levels of government are, by their nature, normally expressed in very general terms, and tribunals must exercise an often wide degree of discretion in applying them in specific circumstances. The interests of other parties, individuals, companies, community groups, business and public interest associations, municipal and regional governments, must also be taken into account. The result is that such tribunals can appear to be functioning independently of the governments which created them.

On what basis, then, do administrative tribunals make decisions if they are not merely applying in a mechanical fashion the policies of their creators? My hypothesis is that they engage in making and applying their own policies so as to avoid arbitrariness and provide a degree of consistency in their decision-making, and to provide some direction to the parties subject to their regulatory authority. This appears to fly in the face of the frequent assertion that tribunals are not bound by precedent and base their decisions on the facts laid before them, but it does not. Rather, it is a recognition that administrative tribunals will function in an arbitrary and possibly chaotic fashion if they do not evaluate the facts in each matter before them within the framework of policies applied with some degree of consistency. These may be policies expressed by the senior level of government to which the tribunal is responsible. They may be policies of the parties subject to regulatory supervision, such as those contained in municipal official plans. These are external policy sources to which the tribunal must at least respond. It is my thesis that, even where these sources exist, a tribunal will also develop its own policies to deal with areas of its jurisdiction where it receives no general guidance and to give expression to the beliefs and the values generally shared by its members. These internally-generated policies may be complementary to those received from external sources, they may address matters not included in the latter, or they may be given precedence over them.
I have selected the Ontario Municipal Board as an appropriate venue within which this thesis might be examined. It has for many years played an important role in the province as a tribunal empowered to regulate municipal decision-making with respect to a wide range of activities, particularly land use planning, municipal finances and the determination of real property assessment for local taxation purposes. My analysis is limited to the Board’s exercise of its land use planning jurisdiction, the activity which occupies most of its hearing time and in which policy considerations are paramount.

2. Relevance of the Topic
Why should such a study be of any relevance? There are several reasons why the policy-making activities of an administrative tribunal are worth a close analysis.

While administrative tribunals oversee many different activities, they have not received a great deal of close analysis to determine how they actually carry out their function. Given their significant role, it is valuable to have a clear understanding of the considerations they bring to bear in making decisions on the matters under their jurisdiction.

The relationship between tribunals and the governments on whose behalf they are supposed to be acting and whose policies they are supposed to be implementing is a key feature of administrative law. Tribunals are unelected, unrepresentative bodies which can wield huge influence over the activities subject to their regulatory authority. It is thus important to understand the extent to which they act within the constraints of public policy or, conversely, they are able to develop and apply their own policies, based on their own perceptions of appropriateness, free of public accountability.

More specifically, the Ontario Municipal Board has for many years played a decisive role in overseeing land use planning in the province through its authority to review and approve planning decisions made by municipalities. Surprisingly, given its importance in this role, it has been the subject of little scholarly attention. There is no lack of “how to be successful before the Board”

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5 The only academic analysis of the Board has been G.M. Adler, Land Use Planning by Administrative Regulation: The Policies of the Ontario Municipal Board (Toronto: University of Toronto Press, 1971).
presentation material, often of high quality, prepared by lawyers, planners and other professionals who appear before it, but this is of necessity of a limited and practically-focused nature, and is no substitute for analysis which attempts to place the Board's decision-making in a more analytical context, to get behind what it does to examine how and why it does it.

There is clearly a public interest in the role that the Board plays in the planning process. Since the 1970s it has either been the direct subject of study by the government or its role has been considered in the context of studies directed to changes in the planning process and more particularly to amendments to the Planning Act. These exercises have been generally normative in nature. Many observers have expressed widely varied views as to what jurisdiction the Board should have and how it should carry out its duties. Many recommendations have been made, usually for procedural changes, but there has been little examination given to how it actually arrives at its decisions and what matters it takes into account in doing so. The result of this activity has been that, despite tinkering with the Board's powers and procedures, it has for many years, as the following analyses show, continued to exercise its decision-making function largely as it sees fit.

3. Outline

Chapter one provides a context within which to undertake a specific regulatory analysis. It includes an overview of the development of theories of regulation, with their strong economic and political science orientation, and introduces also several legal issues that deserve consideration in regulatory analysis. It addresses the extent to which these issues may be relevant in analysing the activities of a tribunal such as the Board.

---

6 The one provincial study dealing directly with the Board has been the Select Committee on the Ontario Municipal Board, Report of the Select Committee on the Ontario Municipal Board (Toronto: November 21, 1972) (Chair: J.P. MacBeth) [hereinafter MacBeth Report]. In recent years the House Standing Committee on General Government has addressed the role of the Board on occasion.

Chapter two provides a bridge between the general discussion of regulatory theory in Chapter one and the appropriateness of regulating a specific activity, the use of land. It makes a general case for subjecting land use to some form of regulation, examines and notes the drawbacks of several approaches to this, and provides a case for the use of a review agency in the planning process.

Chapter three provides an overview of the Board's history. It describes the initial rationale for its establishment and, most importantly, the manner in which it has been given an increasing responsibility for reviewing or directly approving land use applications as the scope of these has broadened.

As noted above, the relationship between a tribunal and its senior level of government is a central feature of administrative law. Chapter four presents the results of an empirical analysis of one element of this relationship, the manner in which the Board has interpreted and applied provincial land use planning policies in dealing with the matters before it. Reported decisions for the periods 1971-1987 and 1987-1994 in which this matter has been addressed have been studied, including numerical analysis of the decision data. The review periods selected were those during which the provincial government took very different approaches to planning policy development, and were thus selected to determine how the Board responded in different policy contexts. The chapter provides a persuasive case that the Board has shown a substantial consistency in addressing provincial policy, a consistency which is evidence of a strongly developed, if not always articulated, policy of the Board itself.

Chapters five and six present the results of an empirical analysis of the thesis that an administrative tribunal develops its own policies to ensure a degree of consistency in its decision-making. Areas selected for this analysis are those which have often been addressed in Board decisions during the same review periods as noted above. They have been grouped into areas of planning procedure and substance, largely for convenience of reporting. Some of these are areas in which the Board is interpreting and applying statutory provisions, such as notice and hearing requirements, statutory conditions precedent for the approval of interim control by-laws and the interpretation of "minor" in minor variance applications. Others are matters of planning process for which there is little if any
statutory guidance, such as interfering with council decisions or deciding whether a planning application is premature. Others are matters of planning substance for which there is, again, little or no statutory direction or provincial policy guidance. These include the evaluation of the interests of various parties to a planning application, determining what constitutes good planning, providing adequate protection to neighbourhoods facing development pressures, establishing parameters for commercial development within municipalities and providing various forms of social housing. The analyses of decisions in most of these areas shows that the Board has often developed its own policies for dealing with them, policies which are occasionally found to be in conflict with provincial planning policies.

Chapter seven includes a summary of the findings in respect of the Board’s policy development and general discussion, arising from the results of the analyses, regarding the continuing role of the Board as a planning review tribunal.

The basis for the analyses undertaken herein has been the review and coding of a large number of Board decisions in which the matters under review have been addressed. Details of the methodology developed for this purpose are set out in the Appendix. Two review periods were selected, 1971-1978 and 1987-1994, to allow an opportunity to analyse the Board’s policy development activities under differing circumstances and to determine if there have been changes in such activities over time. A total of 669 decisions were reviewed, 348 from the earlier review period and 321 from the later. As Table Intro-1 shows, these decisions were distributed over each period. Table Intro-2 presents a summary of information regarding the decisions.

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8 The earlier period preceded the Planning Act, 1983, which introduced extensive procedural changes, while during the later period the new Act governed the planning process. The new Act also gave statutory recognition, which was lacking during the earlier period, to provincial planning policy.

9 Supporters are those parties supporting approval of applications before the Board. Opponents are those opposed. Approval means that an application was approved, often with modifications. See the Appendix for a more detailed discussion.
### TABLE Intro-1

**Number of Decisions Selected for Review and Analysis**

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(1) Decision data is based on the analysis of 344 of the 1971-1978 decisions and 320 of the 1987-1994 decisions. The remainder were excluded because they either involved multiple applications and included both approvals and refusals, or involved a motion, with neither the approval or refusal of the application itself.

(2) Percentages based on 344 1987-78 and 320 1987-94 decisions.
* Less than 1%.
CHAPTER ONE
FRAMEWORK FOR THE STUDY OF REGULATORY TRIBUNALS

Regulatory analysis does not occur in a vacuum; far from it. As Owen and Brautigam have noted, "[t]he literature on regulation is so extensive and eclectic as to defy any neat taxonomy." The regulatory theories that have been developed, as seen in this literature, provide the context within which the analysis of the OMB must take place. The purpose here is to note theories and regulatory models that have been developed and to consider what assistance they might provide in developing a framework for the analysis of the Board’s regulatory decision-making. In doing so, however, one must keep in mind the limitations of theory and the need, in the end, to ground theory in empirical analysis. Stone expresses this well:

... that regulation is conclusively superior to the free market or another alternative does not necessarily follow. To determine the best or better alternative for a public problem we must examine each situation on an individual basis in a responsible ongoing analysis; the same solution will not fit every problem.11

A. DEFINITIONS OF REGULATION

We cannot understand how a tribunal operates, or evaluate its effectiveness, without an understanding of what is meant by regulation. A dictionary definition which seems most apposite is "to control, direct or govern according to a rule, principle or system". A useful generic definition is found in Mitnick: "Regulation is the intentional restriction of a subject's choice of activity, by an entity not directly party to or involved in that activity". Other definitions show a


11 A. Stone, Regulation and its Alternatives (Washington: Congressional Quarterly Press, 1982) at 64.


recognition that regulation in modern society is largely a public, governmental activity. Stone defines it as "a state-imposed limitation on the discretion that may be exercised by individuals or organizations, which is supported by the threat of sanction." Other definitions introduce further elements into the concept: "Regulation is legitimate coercive intervention in the daily affairs of individuals in the public interest." The key element found in these definitions, one at the heart of all subsequent analysis, is the element of purpose. Both speak of the "public interest", making it clear that there must be a valid reason, rooted in public policy, for subjecting otherwise legitimate activity to restriction. It is clear from the analysis undertaken in Chapters four to six that consideration of what constitutes the public interest, and of evaluating public and private interests generally, are central to the Board's decision-making.

The activities subjected to regulation are generally economic activities. The Economic Council of Canada (hereinafter ECC), which undertook a major study of regulation in the late 1970's, defined regulation as "the imposition of constraints, backed by the authority of a government, that are...

14 Not all regulation is carried out by the government or by publicly established agencies. Self-governing professions, for example, operate within a statutory framework, but do so independently of government. Non-statutory private regulatory activity is possible, but it possesses an inherent instability. It relies on the willingness of private persons or entities to voluntarily surrender, to another private entity which is separate from them, some of their discretion to act in certain areas of activity. A cartel is the best example of such an association, although it is generally feasible only where a small number of parties, who together have effective control of a market, are involved. In the more usual situation, where a large number of parties may be involved, establishing a form of private regulation of economic activity is much more problematical. The transaction costs associated with such organization, the strong likelihood of 'free rider' problems and, most importantly, the limited ability to coerce recalcitrant parties into obeying the regulatory rules, make both the establishment and the continuation of such schemes very unlikely.

15 Supra note 11 at 10.


17 Mitnick, supra note 13 at 7.
intended to modify economic behaviour in the private sector significantly."18 Priest et al provide an almost identical definition for what they refer to as economic regulation19 While regulated activities are generally economic activities, regulation cannot be properly assessed in terms of economic efficiency only. Other values related to fairness, social justice and the achievement of other goals which, although they may not maximize economic efficiency, also come into play.20

The ECC distinguishes between two types of regulation, direct and social. Direct regulation is industry-specific. It is the government regulation of certain aspects of the activities of selected industries such as price, rate of return, output, entry and/or exit from the activity. Its objectives are tailored to the operation of the regulated industry, although the economic tools and tests applied will likely reflect non-economic social and political goals. Social regulation, which the ECC describes loosely as "health, safety and environmental regulation"21, is directed to the conditions under which goods and products are produced, sold or disposed of. It is directed to influencing the physical characteristics of these products, not for the purpose of regulating output per se, but because of the deleterious influence that these products, or the process of their production, can have on others.22 In other words, regulation takes place not to make the regulated industries carry

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18 Economic Council of Canada, Responsible Regulation: An Interim Report (Ottawa: Ministry of Supply and Services, 1979) at 43.


20 It should be noted also that governments have available to them a variety of general instruments, distinct from regulation, for influencing the activities of their citizens. These include exhortation, moral suasion, direct expenditures, taxation and public ownership. Elements of regulation are present in a system of taxation, for example, but one "missing link" is that taxation is not in itself an activity and, in imposing taxes, a government is not directly restricting private activities. This is not to say, of course, that tax policies do not have substantial indirect influence on such activities, but it is not those activities themselves which are subject to restriction.

21 Supra note 18 at 45.

22 The ECC defines four categories of social regulation:

(1) health and safety - consumer products, transportation and health and welfare safety
(2) environmental regulation - pollution control, land use planning, environmental aspects of resource development
(3) "fairness' regulation - protection against fraud, consumer protection, anti-discrimination legislation
(4) cultural regulation - broadcasting, language, "Canadian content"
out their activities in a manner which is considered most beneficial, but rather to have them do so in a manner that is least detrimental.

The evolution of the OMB is of particular interest in the context of these two types of regulation. It was established in 1906, as the Ontario Railway and Municipal Board, to regulate the operations of provincially owned railways, street railways and local public utilities. The regulation of municipal telephone systems and of highway truck transportation were subsequently added to its responsibilities. The initial functions have since atrophied, and telephone and trucking regulation have been removed. Most of the Board's time is now devoted to social regulation, primarily of land use planning and development activity, yet there has been little change in its structure or its mode of operation. The Board now has more members than at its inception, and a far broader jurisdiction, but it continues to operate as a quasi-judicial body conducting adversarial hearings on specific applications or appeals brought before it, and making its decisions on the basis of the evidence submitted to it by the parties.

B. CANADIAN AND AMERICAN APPROACHES TO REGULATION

The political and economic pressures that have led to the adoption of regulatory schemes have been much the same in both Canada and the United States, and have led to the establishment of similar agencies. Nevertheless, there are significant differences between the governmental structures and the political cultures of the two countries which should be kept in mind when reviewing regulatory literature. Much of this literature is American, and confusion can arise when the same words have different meanings and connotations. Take the example of the concept of independence. A regulatory agency in the United States which is independent of both the Executive and Congress is in a very different situation from an independent agency in Canada. The latter, whatever degree of statutory independence it is accorded, remains subject in practice to the Cabinet which, in turn, is answerable to Parliament.

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23 See Chapter three for a brief review of the evolution of the Board's jurisdiction.

24 Both countries have, for example, established regulatory agencies for railway, maritime, air and truck transportation, securities, and telecommunications.
American authors on regulation take their situation as a given. As Cairns observes: "Given that the larger part of the existing literature on regulation has been written by Americans, it is important to bear in mind that these writers will take for granted their own institutions and characteristic national responses to a particular ensemble of problems." Canadian authors show great awareness of the differences between the two countries, largely because of the basic distinctions between their constitutional structures. In the United States, with its division of powers between the Executive and Congress, much consideration of regulation, both in major public studies and in academic analysis, has focused on the relationship between that American model, the independent regulatory agency, and the two branches of government. In Canada, with its system of government in which parliament is sovereign within its area of jurisdiction, the whole question of the role and, particularly, of the independence of regulatory agencies has had to be addressed in a very different context.

As Janisch states:

Canada never adopted the American model of an independent regulatory agency, although it has, on occasion, gone far in that direction. This hesitancy is of central importance for an understanding of current regulatory issues in this country. Indeed, the history of regulation in Canada has largely been a constant process of working out the tensions inherent in our commitment to parliamentary responsibility and the need for regulatory tribunals which fall

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28 It may be that too much can be made of this distinction. As Foote notes, the abolition of American independent agencies and their replacement with executive agencies (i.e. under the direct control of ministries, in the Canadian context) might not alter too much, as both types of agencies operate within a political context anyway. In this respect, they are in a similar position to Canadian agencies. See S.B. Foote, "Independent Agencies under Attack: A Sceptical View of the Importance of the Debate" (April/June 1988) Duke L.J. 223 at 225.
to some degree outside the sphere of immediate political control.\textsuperscript{29}

Brown-John, after reviewing many writings on the formation of regulatory agencies in both Canada and the United States, notes the importance of the different national contexts within which regulation has developed in concluding:

But the types of economic purposes cited above have not been dwelt upon as prerequisites to the origins of regulatory agencies in Canada because it is suggested, after a review of several agencies, that in Canada creation was prompted more by reaction to real and anticipated problems than to conscious endeavours to regulate for economic purposes ... In summary, while regulatory agencies may seek consciously or otherwise to achieve certain economic goals, in practice they are products of their roots. The roots - control of technology, management of resources, protection of the environment, control of sin and amusements - generate an atmosphere for regulatory agency activity which emphasizes the public policy and political heritage of regulation at the expense of the economic rationalist argument.\textsuperscript{30}

Cairns, in his review of the literature evaluating economic regulation, concludes that:

In the United States, the policing role of regulation - ensuring that economic activity closely approximates competition - has been emphasized in economic analyses. In Canada, broader social considerations than economic efficiency have been central to policy making: regulation has been used to promote and to plan as well as to police.\textsuperscript{31}

Similarly Reschenthaler, in a comprehensive survey of Canadian and American literature on regulation\textsuperscript{32}, notes that American evaluations of regulation have focussed on its economic impact, while Canadian studies have been directed more to general policy, administrative procedure, and the accountability of regulatory agencies.

These differences have been compounded by the different histories of government-private relationships in Canada. Regulation here has not focussed as heavily as it has in the United States on the control of private economic activity for the purpose of avoiding certain evils associated with


\textsuperscript{30} Supra note 16 at 49.

\textsuperscript{31} Supra note 25 at v.

\textsuperscript{32} Supra note 26.
the unregulated exercise of that activity. Rather, Canadian governments have been more heavily involved than their American counterparts in the promotion, regulation and direct conduct of economic activity, not just to achieve economic goals such as greater efficiency, but for the purpose of achieving broad public policy goals. Governments, both federal and provincial, have been involved in the creation of services such as railways, airlines and hydro-electric utilities, and of agencies to achieve avowedly cultural goals such as the Canadian Broadcasting Corporation, the National Film Board, and the Canadian Radio-Television and Telecommunications Commission. Yet the national distinctions are not so neat, as the example of land use regulation shows. Both Ontario and American states use the same planning tools - official plans and zoning - which were developed initially in the United States. Ontario's use of the OMB shows a distinctly Canadian method of overseeing the local use of these tools. States rely primarily on the courts, and government departments, whereas Ontario relies on a quasi-judicial tribunal. Yet this tribunal, while exercising a jurisdiction directed ostensibly to meeting certain public policy goals, will be seen in its decision-making to be exercising a strong bias toward avoiding the evils of unregulated private economic activity.

C. RATIONALES FOR REGULATION

While the preceding review gives some indication as to what regulation is, it is silent with respect to purpose: Why regulate? Mitnick gives an all-encompassing rationale for regulation as "an attempt to correct or restrain intentional activity (e.g., natural monopoly) and as an attempt to control unintentional, by-product effects of activities (i.e., externalities)."33 The rationales given in the literature have generally been divided into two categories: public and private interest. The division between the two is unclear, however, and has been variously viewed by different authors. It appears more useful, therefore, to consider rationales in more functional terms, and the division generally adopted is: market oriented, or economic efficiency rationales, and social and cultural rationales. The bulk of the literature deals with the former, but there is also much consideration of the latter, particularly in Canadian and in more recent writings.

33 Supra note 13 at 320.
Baggaley suggests a two-fold rationale. The traditional explanation for regulation is that government responds to public pressures to resolve certain social and political evils. With the development of tools of economic analysis, and an increasing recognition of the difficulty of determining the public interest, this has been replaced with an economic efficiency rationale directed to remedying market failures. Baggaley states that "The allocative efficiency rationale is essentially a more rigorous formulation of the public interest rationale. Its advantage lies in the fact that allocative efficiency is an economic rather than a philosophical concept making it easier to define and measure." He says also that "Almost any instance of regulation that can be explained in terms of protecting the public interest can be explained in terms of allocative efficiency." Breton states that the essence of the economic rationale is that the demand for regulation arises from the presence of problems where some classes of economic activities are left entirely to the market. He notes that inducements to regulate include the existence of natural monopolies, exploitation of common assets, and situations where an individual or firm is inadvertently affected outside a market context by the actions of others. This type of affect, referred to as an externality, may be positive if it is beneficial, or negative, if its affect on other parties is adverse. The latter plays a significant role in justifying the imposition of regulation, thereby emphasizing the fact that much regulation is negatively directed to preventing harm rather than being positively directed to, generally put, making things better.

One commonly expressed view is that regulation is a response to problems or, in economic terms, a response to market failures. The ECC, for example, states that the most significant rationale for regulation is improving economic efficiency by remedying market "failures" that reduce the efficiency of the resource allocation process. These include natural monopolies, "destructive"

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35 Supra note 18 at 45.
competition, negative externalities or "spillovers", imperfect or costly information and problems associated with common property resources. The ECC Report notes that:

Certainly, the existence of negative externalities or spillovers is a common justification for a great deal of government intervention in the form of "social" regulation. In addition to environmental protection legislation, these include land use regulation (e.g., zoning for compatible uses) ... safety regulation ... health protection regulation ... and even the regulation of financial markets.39

While the allocative efficiency analysis provides regulatory analysts with a powerful tool, the difficulty is that it can be, and is, applied with equal force to both public and private interest theories of regulation. Trebilcock et al identify a similar list of efficiency rationales relying on failures in the efficient operations of markets.40 They also broaden the debate by applying the same arguments to both the private (economic) market and the political market. They note that the two differ in many respects, but are similar in that one can examine both the demands on politicians and what they are able to supply, and that both private market operators and politicians act in ways to maximize their self interest. The latter differs greatly between the two markets, however. In the private market, it is defined as profit; in the political market, as continuing tenure in office.41 Stone adopts a market failure justification for regulation similar to the above, but expands the analysis to include elements carrying the debate beyond the purely economic. He defines market failure as "instances in which the free market fails to attain an optimum allocation of society's resources. That is, a situation where the excess of benefits over costs under the free market's use of resources is less than that under an alternative arrangement."42 Stone's classification of market failures into three categories-efficiency, externalities and equity - is important, because the nature of the failure can be important in determining what is the most appropriate form of government intervention.

35 Ibid. at 47.


41 Ibid. at 21.

42 Supra note 11 at 63. Note also that Stone states that costs and benefits must not be interpreted too narrowly.
The market failure rationale provides a powerful, but limited analytical tool, its limitations shown by the fact that regulatory analysis quickly moves to additional considerations. Trebilcock, for example, identifies a serious limitation in applying this rationale to actual examples of regulation, stating that:

... when we discuss some of the forms that regulation takes in Ontario today, it does not appear that the existing range of regulatory institutions can be explained solely as a response to these failures in private markets. Instead, much of the regulation we observe appears to redistribute income to some specific groups, commonly at the expense of the majority.43

The above example, showing that income redistribution can be a significant rationale also, raises two important points. Firstly, if market "failure" means less than optimum efficiency of resource allocation, there is no guarantee that redistribution by regulatory action will produce a more efficient allocation. To the extent that such regulation results from pressures exerted by politically or economically powerful interest groups, it is likely that the consequent income redistribution will be less efficient. Thus, while both approaches may be characterized as economic rationales, they may well have opposite results. Secondly, while income redistribution may result from political pressures as noted above, it can also have a strong normative basis that is distinct from considerations of economic rationality and may well lead to the adoption, for public policy reasons, of regulatory schemes which are less efficient than the operation of the unfettered free market.

A fundamental problem with the market failure rationale is that, in many areas of regulation, there is no market. Authors can speak of a "market" for pollution control on the ground that there is a demand that the negative externalities known as pollution be alleviated but, with limited exceptions - the sale of pollution permits, lowered market values of properties affected by pollution - there is no market in which this demand can be expressed in money terms. It is unrealistic to describe this as merely a failure of the market. Rather, it is inherent in the very nature of pollution that a market, in the classical sense, cannot exist.

D. THEORIES OF REGULATION

The purpose here is to indicate major theories of regulation that have emerged in the literature, and to consider the extent to which these theories, and which of them, may provide a useful theoretical framework for an empirical analysis of the OMB. As Adeyinka correctly notes:

In recent times, theories of regulation have become very much a part of administrative and regulatory law. Theories and variations of theories on regulatory origin and process are as pervasive in the political and economic literature on public administration, as government regulation is itself pervasive in private economic activities. It is futile to attempt to describe or reconcile this huge literature. Nevertheless, it is possible to identify common threads among leading views and to associate some approaches with particular areas of regulatory activities.\(^4^4\)

Regulatory theories have generally been classified as "public interest" or "private interest". I cannot do full justice here to the various views subsumed within each general heading, nor to the fact that there is considerable overlap between the two. Despite this, the division into the two theoretical approaches is a useful tool to prevent one from being overwhelmed by the range of views expressed.

1. Public Interest Theories

Public interest theories are based on the belief that one of the proper functions of the state is to control business, and that certain industries must be controlled in order to prevent their causing harm to the public. The evolution of views as to what "harm" means has been instrumental in the development of both public and private interest theories. In analysing traditional regulation directed to controlling specific industries, it has been defined primarily in utilitarian terms. Harm meant initially the excessive costs that unregulated monopolies could force customers to pay. With the rise of sophisticated techniques of economic analysis, it has come to be defined in terms of achieving a less than optimum degree of efficiency. In considering the rationale for "social" regulation, however, non-monetary considerations of physical harm to the individual and "quality of life" concerns have become significant. Attempts by economists to quantify these concerns have met with considerable scepticism. While I will not further address this debate here, its existence should be kept in mind in analysing a regulatory system in which quality of life issues have great

significance.

The older "naive" view, common in writings in the 1930's and 1940's, is that regulation is undertaken to correct major problems in certain industries, problems which usually stem from recurrent abuses in those industries or arise because goals considered to be in the public interest are not being achieved in the private sector. The view is that regulation is required to protect consumers from the depredations of firms operating in those industries. Despite this rationale, the focus in this approach, also known as the structural/legal/rights protection approach, is on the operation of the regulatory agencies themselves rather than on the rationale for their establishment. Regulation is seen as a deliberate and organized administrative response to economic problems. The administrative efficiency of the process and the rights of the parties subject to regulation are emphasized. The theory does, however, have certain deficiencies. While it holds that regulation is undertaken for general public benefit, the public interest element in it is largely implicit. The public is not identified nor, because of this, can the interest, or interests, being served by regulation be adequately analysed. Considerations of economic efficiency with respect to the input of regulation are given little consideration.

The recognition of problems with the notion of an objective public interest led to the formulation of the "interest representation" or "group public interest" theory. The basis of this theory is that

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an understanding of the various parties having an interest in a regulatory matter, of their interests, and of the environment in which they operate, is critical to an understanding of regulation. The elements to be considered are the conditioning factors which make up the institutional context of regulation, the parties in interest who are concerned with the character of regulation, and the actual political instruments which provide the pattern of operative controls.\(^\text{16}\) This theory was developed in the normal regulatory context of the time, studies of the regulation of specific industries. Despite this, it offers valuable insights for an analysis of land use regulation. The insights which this and other theories provide are discussed in Chapter two, Section D.

2. Private Interest Theories

(a) Economic Theories

The optimistic attitude toward regulation began to wane in the 1950's, as critics came to the view that the original public purposes of regulation had become inverted in practice. To explain this failure, some writers concluded that it was the norm, not the exception, for regulatory agencies to be captured by the industries they were established to regulate. Moreover, this period saw the rise to prominence of economic analyses of regulation. Where public interest theory had been largely the product of political science and legal scholars, these private interest theories were, in the initial period, developed largely by economists. These theories were referred to as "capture" or "economic" theories because they provided economic models under which regulation is supplied by government in response to the demands of private parties.

The initial version of the capture theory, known as the life cycle theory, provides a transition between public and private interest theories. It focuses on regulatory agencies. Such agencies are established for public interest purposes, in that coalitions of interest groups are formed to push for regulatory legislation intended to benefit consumers of the industry proposed for regulation. As these agencies reach maturity, however, the initial consumer interest group support fades, the agencies develop ever closer links with the industries they are regulating, and they become the

\(^{16}\) Fainsod, *ibid.* at 299.
captives of the regulated groups.\textsuperscript{49} This progress is pungently described by Galbraith:

Regulatory bodies, like the people who comprise them, have a marked life. In youth they are vigorous, aggressive, evangelistic and even intolerant. Later they mellow, and in old age - after a matter of ten or fifteen years - they become, with some exceptions, either an arm of the industry they are regulating or senile.\textsuperscript{50}

One useful insight arising from this theory is that regulatory agencies can indeed, over time, undergo changes in their vitality and in their relationships with both the regulated industries and those whose interests they are presumably established to safeguard. The assumption on which this theory rests is that such agencies have in fact been established for public interest purposes. There is a strong body of thought, however, illustrated below, to the effect that regulatory schemes are established to meet the interests of the regulated industries from the outset.

A second version of the capture theory, which is referred to as the supply and demand theory and has received a great deal of consideration in recent years, is strongly embedded in economic theory. Having studied regulation of common carriers and occupational licensing, Stigler developed in a seminal paper an explicit, predictive theory of regulation.\textsuperscript{51} He propounded the thesis that regulation is undertaken at the behest of the regulated industry and is designed and operated primarily for the benefit of that industry. While the state can provide several benefits, such as direct subsidies or control of prices, the main benefit of regulation is control over entry into the industry, thereby protecting the existing participants from new and possibly powerful competition. The government or, more particularly, the political party in control of government, is the "seller" of regulation, while


\textsuperscript{51} G.H. Stigler, "The Theory of Economic Regulation" (Spring 1971) 2 Bell J. Econ. & Manage. Sci. 3.
industries seeking government controls "purchase" these controls through financial and voter support to the political party. An industry is able to use the power of the state to its advantage for two reasons. Firstly, because the number of firms in any given industry is less than the number of persons outside who must bear the cost of restrictions on entry, the former are better able and have a greater incentive to organize to wield political influence. Secondly, as government officials are also self-interested, they seek to maximize their votes, or wealth, by providing regulation to industries which can in turn provide them with campaign contributions and other electoral support. Stigler therefore concludes that, given the nature of the political process leading to the establishment of regulation, a regulatory agency is bound to be subservient to the regulated industry. This theory appears to strike at the basic economic rationale for regulation, the achievement of allocative efficiency, in stating that "When an industry receives a grant of power from the state, the benefit to the industry will fall short of the damage to the rest of the community."\footnote{ibid. at 10.}

The capture theory has been extended and refined by other writers, notably Posner\footnote{See R.A. Posner, "Theories of Economic Regulation" (1974) 5 Bell J. Econ. & Manage. Sci. 335. Posner expands on the supply and demand nature of regulation.} and Jordan\footnote{W.A. Jordan, "Producer Protection, Prior Market Structure and the Effects of Government Regulation" (April 1972) 15:1 J. L. & Econ. 151. Jordan offers three hypotheses regarding the effects of regulation - the consumer protection hypothesis, the no-effect hypothesis, and the producer protection hypothesis - and concludes that the weight of the evidence supports the third.}. The limitations of the theory, as expounded by these and others, can be considered both general in nature and specific to the objectives of this study. It is regulation seen from the point of view of the regulated industry. This may have some validity regarding the establishment of a regulatory scheme, but it is essentially a static concept which ignores both the process of regulation and the position of the regulators themselves. It is inferior in this regard to the life cycle theory, which provides an explanation of how the agency itself, in its ongoing operation, is captured by the regulated industry. Even if the establishment of a regulatory scheme results from the capture of government by an industry group, the regulators generally have a large degree of discretion in the day-to-day application of their often generalized mandates. Yet it is in the ongoing exercise of this discretion...
on a case-by-case basis, not in its general legislative structure, that regulation has its most significant impact on the regulatees. The capture theory was developed to explain what were perceived as the failures of American independent regulatory agencies engaged in the direct regulation of specific industries. It is doubtful that it is applicable in different regulatory situations where these conditions - a limited number of powerful industry players and associated interest groups, a general public having little incentive to become knowledgable about and seek to influence the regulatory process - are not present.

The relevance of the capture theory to the Canadian situation is open to question. Unlike the decisions of American regulatory agencies, those of regulatory bodies in Canada are subject to review by Cabinet, thereby providing for a degree of political control which is absent in the United States. While regulated industries may well play a significant role in the establishment of regulatory schemes in Canada, the effective capture of a regulatory agency on an ongoing basis would require the capture of the key ministers and officials of the government, not just of the agency. It is possible that, in Canada, the opposite is more likely to occur. The degree of control inherent in Cabinet review provides one opportunity for the "capture" of an agency by government. Also, as many of the members of Canadian regulatory agencies are from the government sector rather than the regulated industries, the capture of such agencies by the government of the day is a distinct possibility. Some members are politicians, generally from the governing party, or supporters of the governing party, and are certain to be attuned to the policies of the government or to its leanings on matters on which it may have no formal policy positions. It is unlikely that these persons will take positions in opposition to those of the government. Other members are public servants, who also be aware of the government's position on matters brought before them and who, because of the nature of their previous employment, are likely to treat the government's position or its approach to dealing with such matters as the "norm" that is to be upheld unless there is strong


evidence to the contrary. Also, as most agency appointments are for a fixed term, both politician and public servant members are likely to be mindful of their subsequent career prospects, and of how these might be damaged if they become perceived, during their tenure, as "anti-government".

The economic theories described above provide powerful tools for the analysis of regulation even though they fall short of providing a comprehensive framework for the analysis of land use regulation. The economic approach, by its very nature, cannot provide a full understanding of what is, in the final analysis, a political activity:

1. Politics involves the consideration of preferences which do not always have a common monetary measurement. Whereas the economic market can be judged on the basis that each person has the same rational, wealth-maximising motive, participants in the political market have a wide range of goals and motives. How does one, for example, operate a land use regulatory scheme so as to "rationally" weigh the interests of those seeking economically productive development such as commercial or industrial uses against the interests of those seeking to be protected against the negative externalities that might result from such uses?

2. Unlike the economic market, where a person commits only himself, the political process involves assembling majority coalitions to make decisions that will bind everyone, whether a member of that coalition or not.

3. While economics is based on the assumption that preferences are given, politics is to a large extent an exercise in changing preferences. Regulatory schemes are established because a sufficient number of persons, or sufficiently influential interest groups, come to believe that it is desirable to do so.

(b) Political Theories

The above theories are referred to as "black box" theories. They focus on the demand for regulation, and its effects, but treat what occurs in the regulatory process itself as both an unknown and a matter for no direct consideration. The political theories might be called attempts to fill in the black box. The hypothesis underlying them is that the fundamental determinant of regulatory
behaviour is the political context within which the regulatory agency operates.\textsuperscript{57}

The literature pertaining to political theories displays two variants. One, which Mitnick terms the "focal decision-maker" approach, focuses on the key decision-makers and determines how these parties engage in regulatory activity. The other, termed the "behavioural" approach, examines the activities in which these decision-makers participate and the behaviours and relationships in such activities.\textsuperscript{58}

The focal decision-maker approach itself has two variants, characterized as "regulator as politician" and "regulator as bureaucrat". One important model of the former, which acts as a bridge between the economic and political theories, is that developed by Peltzman.\textsuperscript{59} He attempts to establish a formal economic model of Stigler's theory, but goes beyond this to establish what is essentially a model of wealth distribution by elected politicians seeking to maximize votes. Where Stigler focuses on regulatees, and the incentives underlying their "demand" for regulation, Peltzman looks to the motives of government officials, and their incentives for "supplying" regulation. His thesis, summarised by Wilson, is that:

... government officials are vote maximisers who arbitrate among competing interests that seek to use government to redistribute resources. Under differing conditions of supply and demand, either producer or consumer interests may become more vocal and influential. Accordingly, politicians will favour one or another interest as economic circumstances give greater urgency to the needs of one or the other. Because interests compete, politicians must reach compromises that permit large, politically heterogeneous coalitions to be formed in support of a policy.\textsuperscript{60}

Peltzman's significant advances on Stigler's thesis are his focus on the regulators, and his thesis that regulators will not tend to favour any single group, but to build the broadest possible coalitions of

\textsuperscript{57} It should be noted that both economic and political theories accept, as an underlying premise, that the purpose of regulation is to effect a redistribution of wealth.

\textsuperscript{58} See Mitnick, \textit{supra} note 13, at 120-52 for a useful summary of these theories.

\textsuperscript{59} S. Peltzman, "Toward a More General Theory of Regulation" (August 1976) 19 J. L. & Econ. 211.

\textsuperscript{60} J.Q. Wilson, \textit{The Politics of Regulation} (New York: Basis, 1980) at 361.
supporters in order to increase votes.

The regulator as politician variant has been both refined and criticised. Regulators are not usually politicians or other elected officials, and they are normally able to exercise a degree of regulatory discretion independent of political direction. The theory assumes that effects follow directly from the regulatory legislation, and ignores the issues of implementing and administering regulatory policy.

The second variant, the regulator as bureaucrat, focuses on the organizational goals of the agency, the personal goals of the regulators and the goals of the agency's clients. Organizational goals include the non-reversal of the agency's decisions by the legislature or the courts and the preservation of the interest being regulated. Personal goals include status, ease of working conditions and expectations of future rewards for current service. Clients' goals are those of the regulated parties and of the "public interest" as interpreted by the parties.

In the focal decision-maker approach the behaviour of individuals is studied. The behavioural approach, on the other hand, is an examination of the behaviour of the organization. It has been characterized by Joskow:

Agencies seek to minimize conflict and criticism appearing as 'signals' from the economic and social environment in which they operate, subject to binding legal and procedural constraints imposed by the legislature and the courts. The agencies' organizational structure,

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62 But see below for discussion of the role of politicians in the planning process.

regulatory instruments, and operating procedures are chosen to achieve this goal.\(^{64}\)

Another variant of this approach is the analysis of regulatory agencies as agents of government. The theory is that governments create regulatory agencies to act as their agents when they are required to arbitrate disputes between parties with strongly opposing interests.\(^{65}\) This approach may provide a significant clue to the relationship between government and regulatory agencies, as it is in the self-interest of an agency to ensure its own survival by acting in support of government policies or initiatives. This form of analysis accords with the position of Canadian commentators who emphasize the public policy, public goals nature of regulation in this country. While it may well be that the concept of "public" and of "public benefit" is in fact a veneer for the interests of the agencies or their clients, the essential political nature of this analysis is significant in the Canadian context.

E. REGULATION AND THE RULE OF LAW

1. Approaches to Legal Analysis

The rationales and theories reviewed above give many valuable insights into the nature of regulation, but they fail to provide what must be, for the lawyer, a crucial dimension. They attempt to describe regulation in terms of an economic paradigm, concentrating upon the efficient allocation of resources, and on a political paradigm, in which the focus is on the effect of the relationships and intersecting interests of various groups involved in the regulatory process. What is lacking in them, however, is the legal paradigm, concentrating on the identification and treatment of both substantive issues and procedural rights. In the theories reviewed above, the law is a "black box". It is taken as a given that the regulatory process operates through the application of the law, but no consideration is given to the content of that law, or to how differing approaches to law are either given expression in that process or affect its outcomes. The law is looked upon as providing a neutral framework for the exercise of power within a regulatory system, but no consideration is given as to whether it expresses a particular philosophy or ideology governing that exercise of

\(^{64}\) P.L. Joskow, "Inflation and Environmental Concern: Structural Change in the Process of Public Utility Price Regulation" (October 1974) 17 J. L. & Econ. 291 at 297.

power.

The law is not neutral. It expresses the values and interests of dominant groups in society and, more particularly for our purposes, of the dominant players in the regulatory process. The consideration of these matters goes to the heart of what constitutes the role of law in society and the role of administrative law in the larger legal context. A full review of these matters is far beyond the scope of this thesis which, in this context, is to consider what views as to the nature of the legal process are expressed, explicitly or implicitly, in the board's making and application of policy, and the effect of these views on its decisions.66

There are various ways of characterizing these approaches. One general division is into what might be termed "restrictive" and "positive" law.67 The first is associated with the Diceyan Rule of Law,68 in which law is seen as exercising an external constraint on the administrative and policy-oriented actions of government, and administrative law is directed to the manner in which the courts can restrain the excesses of decision-making by administrative tribunals, government officials and Ministers, all of whom may act in ways which may be considered a threat to the rule of law. In this context, the term administrative law is applied largely to the study of remedies for and judicial review of the decisions of inferior tribunals. The focus is on issues of jurisdiction and procedure, and the effect of resolving these issues on the substantive matters dealt with by tribunals is not of prime concern.

66 It should be noted also that it is beyond the scope of this thesis to examine the philosophy underlying the land use planning system in Ontario per se.

67 The following is a gross over-simplification that helps clarify the differences in the approaches, but does not reflect the complexity of their application in the real world of regulation, where they co-exist in an uneasy balance.

68 The three elements comprising Dicey's concept of the Rule of Law are:
1. the exclusive legitimacy of the regular law, as opposed to arbitrary or discretionary actions, as applied by the adjudicative monopoly of the regular courts;
2. everyone is subject to the ordinary law and to the jurisdiction of the courts; and
3. the general principles of the constitution relating to private rights result from individual decisions of the courts.

For a summary of Dicey's position see H.W. Arthurs "Rethinking Administrative Law: A Slightly Dicey Business" (April 1979) 17(1) Osgoode Hall L.J. 1 at 5.
The "positive" approach focuses on the contributions of the law to the development of public policy. There is an emphasis on fairness in providing for both full rights of representation to interested groups and persons, and fair results accruing to them. Administrative law is viewed as a tool directed to the achievement of these public purposes, one whose application should not be fettered by narrow or over-zealous application of procedural or jurisdictional rules. There is a tendency to transform "favours" into "rights"; ie. to transform public purposes, as expressed in legislation or policy directives, into authoritative principles by which activities of regulatory agencies can be judged. The irony of the latter process, however, is that the creative actions of administrative agencies lead to a process of "legalization" in which policies are transformed into rules which in turn fetter the exercise of administrative discretion. There is thus a continuing ambivalence in the regulatory process between the enforcement of binding rules and the creative use of legal principles in the development and application of public policy. As Abel has stated: "The administrative law we have has been too preoccupied with the prevention of bad administration. The administrative law we need is designed for the promotion of good administration." Underlying this division are deeper questions which advance considerations of administrative law beyond the conceptual confines of judicial review and which go to the heart of the regulatory process: What is the relationship between rule-making and the exercise of discretion? As a corollary, how do we legitimate the discretionary judgements made by public officials in carrying out their regulatory functions? Sossin states that "[r]ules purport to dictate how an official should act in a particular situation, but the application of rules to particular situations necessarily entails discretionary judgements". The tensions between rule-making and discretion, between discretionary absolutism

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69 For a discussion of the concept that rights acquired through government largesse; eg. social security, use of public resources, constitute a form of wealth that cannot be taken away without due process, see C.A. Reich, "The New Property" (April 1974) 73 Yale L.J. 733.


71 A. Abel, "The Dramatis Personae of Administrative Law" (1972) 10 Osgoode Hall L.J. 61 at 91.

and public participation, run through the literature. Both Davis\textsuperscript{73} and Hutchinson\textsuperscript{74} note the pervasiveness of discretionary activity in administrative systems, as opposed to the marginal\textsuperscript{75} and arbitrary\textsuperscript{76} interposition of the courts in administrative decision-making and to the necessarily generalized nature of rules. Davis argues that administrative law studies should focus much more than they have on discretionary activity, stating that: \"[r]ules alone, untempered by discretion, cannot cope with the complexities of modern government and of modern justice. Discretion is our principal source of creativeness in government and in law.\"\textsuperscript{77} His four fundamentals encapsulate the rationale for creating tribunals with discretionary powers:

(1) No matter how expert their helpers may be, legislators are less than omniscient and usually are wise, when they establish an agency, to attempt no more than to legislate broad frameworks for administrative policy-making.

(2) Problems of policy are often beyond the highest expertness, so that meaningful answers have to come from focusing on facts and circumstances of concrete cases, limiting the decision to a single set of facts, and leaving the policy open for other circumstances.

(3) A legislative body is ill-equipped to resolve controversies of named parties; that function usually calls for court procedure or for the adjudicative procedure of an agency.


\textsuperscript{74} A.C. Hutchinson, \"The Rise and Ruse of Administrative Law and Scholarship\" (1985) 48 Mod. L. Rev. 293.

\textsuperscript{75} Hutchinson, \textit{ibid.} at 316, calls judicial review marginal because, of over a million administrative decisions made annually by 2,000 administrative tribunals (in the United Kingdom), only a minute fraction are reviewed by the courts. The situation is no different in Canada. During the period 1986-1991, for instance, the OMB held 8935 hearings on planning and municipal applications. During the same period there were 5 court decisions reported in the Ontario Reports arising from OMB decisions on planning matters, and a further 7 court decisions reported in the Ontario Municipal Board Reports. While these figures doubtless under-represent court activity in this area, as they exclude unreported decisions and decisions reported elsewhere, they give a clear indication that the Board's discretionary decision-making activity has only rarely been challenged. Sources: Ontario Municipal Board, 81st to 85th Annual Reports; 53 to 75 O.R. (2d); (1986), 18 O.M.B.R. to (1992), 26 O.M.B.R.

\textsuperscript{76} Arbitrary in the sense that the matters addressed by the courts are not necessarily those of the greatest legal significance, but those about which someone feels sufficiently strongly to commence legal proceedings.

\textsuperscript{77} Davis, \textit{supra} note 73 at 25.
(4) Even questions suitable for legislative determination are often delegated for some such reason as failure of legislators to agree, preference of legislators to compromise disagreements by tossing the problem to administrators, draftsmanship which is intentionally vague or contradictory, or some combination of such factors.\textsuperscript{78}

This is a rationale having a strong empirical justification, but it leaves open the deeper question of legitimizing the full scope of discretionary decision-making.

2. \textbf{Legitimacy}

Jones\textsuperscript{79} focuses on an aspect of administrative law directly related to the provision of "discretionary justice": Whence arises its legitimacy? The legitimacy of the traditional elements of the legal system, the parliaments which promulgate the laws and the courts which interpret them and which have created the common law, has long been settled. The legitimacy of the activities of administrative tribunals and bureaucrats is established to some degree by the statutory delegation of certain powers to them. This formal delegation provides the necessary jurisdictional underpinning to enable administrative agencies to function, but it is less certain that such delegation supports the degree of discretionary authority assumed by such agencies. The OMB, for example, is given specific authority under the \textit{Planning Act} to hear appeals and references pertaining to specified planning approvals. It is given a general jurisdiction under the \textit{Ontario Municipal Board Act} to do such things "as may be necessary or incidental to the exercise of the powers conferred" upon it.\textsuperscript{80} Does this delegation give it the authority to create and enforce its own policies, particularly with respect to matters on which the province has already established policy through legislation or other means?\textsuperscript{81} This is a matter that must be kept in mind while analysing the Board's policy-making activity.

\textsuperscript{78} \textit{Ibid.} at 38.


\textsuperscript{80} R.S.O. 1990, c. O.28, s. 37(a).

\textsuperscript{81} For example, the OMB has often imposed a standard of public participation higher than that required under the Act. See Chapter five, Section B.
Jones provides a framework for the consideration of these matters by summarizing a number of studies pertaining to the concept of legitimacy in administrative law and regulatory policy. He accepts Habermas' definition of political legitimacy - "a political order's worthiness to be recognized" - and argues that the definition applies equally to administrative and regulatory legitimacy. He translates this ideal into practical legal terms by applying the concepts of participation, accountability and openness in evaluating four commonly applied models of administrative legitimacy: the Legislative model, in which "the legitimacy of any particular administrative decision can be established by determining to what extent it carries forward legislative prescriptions," the Accountability and Control model, which is "based on the premise that ... the actions of administrators may be further accepted as legitimate to the extent that the administrative process embodies significant elements of legal and political accountability and control," the Due Process model, whose fundamental principle is that "the legitimacy of the administrative process can be enhanced by a popular perception that its decision-making procedures are fair in that they allow the participation of affected interests," and the Efficiency and Expertise model, which asserts that "the legitimacy of an administrative agency will be enhanced by its efficiency in meeting its statutory responsibilities." While each of these models is clearly an oversimplification, they provide in the aggregate a conceptual framework within which to evaluate the Board's policy development and application activities. They do not, however, provide a complete legitimation framework in either general terms or when applied to it.

The Due Process model has certainly played an important role in the legitimation of the Board, as this was originally seen its role as being one of ensuring the fairness of its procedures and the full

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a2 J. Habermas, Communication and the Evolution of Society at 178. Quoted in Jones, supra note 79 at 411.

a3 Jones, ibid. at 413.

a4 Ibid. at 415.

a5 Ibid. at 419.

a6 Ibid. at 420.
participation of all affected parties in its appeal process. Yet it is not clear that the other models are equally supportive of the Board's activities. With respect to the Legislative model, the analysis in Chapters five and six shows that the Board has engaged in policy-making in areas where there are no legislative prescriptions available to it. This problem arises because legislation is necessarily general in nature, and unable to address all specific situations that regulatory agencies must deal with. Diver has commented that "[e]xperience has taught that statutory command is an exceedingly blunt instrument for regulating the policy making process." As Jones notes:

A major difficulty with this method of legislating is that the legislature's failure to make its preferences [known] can result in a consequential failure on the part of the administrator to develop coherent policy. Law will be replaced by ad hoc bargaining and administrators will lose their legitimacy. ... This lack of clear statutory authority deeply [compromises] the administrator's legitimacy and efficiency.

The legislative model poorly describes the tasks given to administrators. An administrator will often find it difficult to argue that her or his actions are legitimate because they are in accordance with Parliament's instructions: there will only on rare occasions be direct correlation between the two.

With respect to the Accountability and Control model, there is certainly a degree of accountability arising from the Board's statutory relationship with the Legislature, including the provision for the Cabinet to declare matters to be of provincial interest, and from the nature and tenure of its membership. With the exception of situations where a provincial interest has been declared, it is difficult to determine how politically accountable the Board is for its individual decisions which, in the aggregate, can have a significant effect on the nature and location of development across the province. While all of its decisions are theoretically open to judicial review, thus imposing judicial accountability, only a tiny minority are actually reviewed, and a successful challenge is possible only where the courts are satisfied that it has committed an error of law or of jurisdiction. Consideration

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87 Although as an analysis based on McAuslan's trilogy of ideologies discussed below (see note 99) suggests, procedural fairness and allowing participation may not ensure that the law provides equal status to all points of view.


65 Jones, supra note 79 at 413.

9c Ibid. at 415.
of the Efficiency and Expertise model leads to ambivalent conclusions regarding the legitimacy of the OMB. While it can provide a degree of expertise with respect to planning matters, much of the strongest criticism directed against it, and against its retention in the planning process, has been directed to its lack of efficiency - the additional time, cost and complexity that appeals add to the process.

A consideration of how these models apply to the Board thus leads to the conclusion that either its legitimacy as a policy-maker with respect to other than procedural matters is uncertain, or that the set of models does not address all aspects of legitimacy. While this thesis is an examination of its policy-making activities, the question of the legitimacy of its authority in this area is troubling. It is an administrative tribunal which is required to make substantive, policy-related decisions within a statutory context that provides little policy direction. The Planning Act is largely a procedural statute, yet it is unable to carry out its responsibilities without addressing policy issues. It has resolved this dilemma in many instances by applying local planning policy as expressed in municipal official plans. It has also had regard for provincial policy, where it is recognized to exist. Both of these policy types are legitimate: the former because of the statutory requirement that municipalities prepare official plans “containing objectives and policies established primarily to provide for the physical development of a municipality or part thereof” and the latter because of the statutory listing of matters of provincial interest, the provision in the Planning Act for policy statements and for declarations of provincial interest, and the inherent right of the government to establish policies pertaining to any matters within its jurisdiction. What is required, in addition, is a form of

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91 See, for example, submissions contained in Select Committee on the Ontario Municipal Board, Proceedings, Select Committee on the Ontario Municipal Board (Toronto: various dates in 1972).

92 This is not entirely so. The Act has long given the Minister and, on appeal, the Board, directions as to what it is to have regard to in considering plans of subdivision. (Planning Act, s. 51(4)) Section 2 statements outlining matters of provincial interest has given a policy framework, but one so highly generalized as to be of minimal benefit in day-to-day decision-making. Other than these examples, however, parties to the planning process have to look outside the Act for policy guidance.

93 Planning Act, s. 1.

94 Ibid. s. 3.

95 Ibid. s. 17(16), 34(27).
unambiguous legitimation for the discretionary policy-making activity that the Board is forced to engage in, in the absence of provincial policy directives, in order to fulfil its allotted responsibilities. A preliminary suggestion, addressed further in the conclusions in Chapter seven, is to expand the Legislative model to encompass a "fair, large and liberal" interpretation of the Planning Act with a rationale justifying the exercise of a strong element of discretion to enable the Board to properly carry out its mandate.

3. Ideology

The law is not neutral, but is an expression of the values and interests of dominant groups. A shared concept of what the law is, how it is supposed to operate and who it is supposed to benefit may be termed an "ideology" of law. While ideology may be considered too strong a term, it does capture the idea that what is considered to be the most appropriate legal system is one reflecting shared beliefs in the proper distribution of power and influence in the larger society.

A line of analysis focussing on the ideology of law arises from critical legal studies, according to which, as Sossin states, "laws and legal institutions operate as a form of ideology which, by obscuring the political quality of legal judgements, justify and legitimate existing arrangements of social, economic and political power." He suggests also that the application of this form of analysis leads to the conclusion that "the role of administrative law in advanced capitalist society ... is thus to legitimate whatever administrative practice is deemed functionally necessary to perpetuate the status quo and at the same time suppress the emancipatory potential immanent in legal norms." McAuslan, another exponent of this approach to legal analysis, characterizes planning law in terms of three competing ideologies which provide a useful framework for that part of the analysis of the board's decision-making dealing with its application of law. He states that:

The law lacks objectivity and neutrality because it is based upon and is available to implement three distinct and competing philosophies or ideologies which dominate or conflict at different points of the system. Lawyers, planners, politicians and laymen tend to

36 See the Interpretation Act, R.S.O. 1990, c. 1.11, s. 10.

37 Supra note 72 at 380.

38 Ibid.
stress a different ideology and argue for changes or reforms in the law or new laws in terms of the ideology they espouse and the resultant cacophony, first translated into law and then continued in its administration and interpretation, leads to confusion and disarray.  

The private interest ideology is that "the law exists and should be used to protect private property and its institutions".  

It is really the application of the nineteenth and early twentieth century common law, both by the courts and through the provisions of subsequent planning legislation, to protect landowners against government action. The public interest ideology is one in which the law is seen as "providing the backing and legitimacy for a programme of action to advance the public interest". Underlying this is the belief that the public interest can be determined and acted upon by government officials on the basis of their own views and assumptions. This results in laws designed for the benefit of these officials which confer wide discretionary powers on them and either contain no provisions for appeal or provide for redress within the administrative system only.

The third, which McAuslan terms the ideology of public participation,

... sees the law as the provider of rights of participation in the land use planning process not by virtue of the ownership of property but by virtue of the more abstract principles of democracy and justice. These in turn come down to the argument that all who have, for whatever reason, an interest or concern in a proposed development of land or change of the environment should have the right of participation in the decision on that proposal just because they might be affected or are interested.

He emphasizes, however, that substantive as well as procedural issues are involved here. The former would include not just input into the existing regulatory system, but also new government structures and processes which give more power to the governed and which ensure that greater attention is paid to social, community and environmental matters and less to economic and technological ones.

It should be noted at the outset that McAuslan's categories reflect the British planning system, which differs in many ways from the Ontario system. One difference is that the public interest


100 Ibid. at 2.

101 Ibid. at 4.

102 Ibid. at 5.
ideology plays a more limited role in Ontario, in that planning officials, particularly at the municipal level, have and are recognized as having a largely advisory rather than a decision-making role.\textsuperscript{103} Another is that public participation plays a greater role in the Ontario planning system, to the extent that the ensuring of participation, public notice, etc. appears to be the only explicitly recognized legal ideology. Despite these differences, which should not be over-stated, this approach to legal analysis serves to draw attention to the fact that the law itself is not value-neutral, and to provide a framework for understanding the legal-ideological biases expressed by the Board as both a creator and applier of policy.

F. DISCUSSION

The purpose of this chapter is to consider what constitutes regulation, and to review the theories of regulation which may provide a framework for an empirical analysis of the role of the OMB in applying provincial planning policy and creating its own planning policies. It is evident that no single theory can provide an adequate framework for analysis, although each provides some guidance as to the matters to be included in such a framework. I prefer, however, to use theories as indispensable sources of questions to be addressed in conducting an analysis rather than as Procrustean models in which to attempt to fit the operations of the Board.

While public interest theories have been largely superseded in the estimation of regulatory theorists, they continue to provide important elements of an analytical framework. This is particularly so in the Canadian context, where it is often stated that regulation is imposed to achieve public policy goals. Both the definitions of regulation and the rationales underlying it contain a strong element of public purpose. Economic theories of regulation focus on the demand for regulation, and on its effects, but give no insight as to what occurs in the regulatory process itself. As we are concerned

\textsuperscript{103} The position has been more complex at the provincial level where, subject to referral or appeal to the OMB, the Minister has been responsible for approving official plans and plans of subdivision. This has meant in practice that Ministry staff have had a substantial decision-making role. This role has lessened in recent years, however, with the delegation of official plan and subdivision approval authority to regional and the larger local municipalities.
here with certain elements of the operation of a public tribunal, and with influences on those,\textsuperscript{104} the political theories would appear to be of more value in establishing an analytical framework for what occurs within the "black box". These theories focus on the fact that regulation, and policy making within the regulatory process, are at heart political activities, and must be analysed as such, although it must not be forgotten that the results of regulation can and, to be fully understood, must be analysed in economic terms.

While the nature of the law that underlies the regulatory process is given little consideration in the development of the various theories that have appeared in the literature, it appears to be a significant element in a comprehensive analysis of regulatory activity. The vast importance of discretionary decision-making in the application of administrative justice, and the need to provide legitimating rationales for this activity, are matters which underlie any analysis of regulation. A detailed study of these matters lies beyond the scope of this thesis, however, except to the extent of examining the manner in which the Board explicitly, or by implication, justifies its role in applying and, more particularly, in developing policy. The emphasis here will be more on the ideological nature of its decision-making. I will seek in the analysis to examine what legal ideologies are being expressed by it in its policy development activities, and how these ideologies affect its decision-making.

In summary, theories of regulation provide us with tantalizing glimpses of how regulatory systems function, and bring out a range of significant questions. The purpose of an empirical analysis is to answer some of these questions, and the framework for the analysis is one which will, hopefully, enable us to generate these answers.

\textsuperscript{104} It is important to keep in mind that the thesis is a study of the OMB, not of the impact of the Board's decisions on the nature and pattern of land use development in Ontario.
CHAPTER TWO
THE REGULATION OF LAND USE

Chapter one provides a general theoretical framework which is applicable to the regulation of all types of activity. This chapter provides a bridge from this general discussion to the main theme of the thesis, an evaluation of the Board's role in regulating one type of economic activity, the use of land. There are three matters to be addressed in doing this:

1. Why regulate land use?
2. If regulation is to occur, why include a review agency such as the OMB in the process?
3. What insights do the general theories of regulation provide to an initial analysis of the Board's activities?

Land use means, in the abstract, the use of the land base available to society for the various purposes considered necessary or desirable. Land use as an activity which is potentially subject to regulation encompasses two aspects - changes of use and the continuation of existing uses - each of which raises different regulatory questions. Where a particular use exists the only question that may arise, assuming the owner wishes to continue that use, is whether it so adversely affects other persons or properties that it should be curtailed or terminated. Where a change of use is proposed, two other sets of considerations come into play: the extent to which and the manner in which the interests of both the landowner and of others who might be affected by the proposed change, including the general public, should be taken into consideration.

A. THE NECESSITY FOR LAND USE REGULATION: A prima facie case

It is evident that some form of control over the use of land is required. Even Hayek, an ardent exponent of freedom from state control, writes that:

... the costs involved in large numbers living in great density not only are very high but are also to a large extent communal, i.e., they do not necessarily or automatically fall on those who cause them but may have to be borne by all. In many respects, the close contiguity of

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While I recognize that land is used for various activities, and that it is these activities rather than the concept of use per se which lead to the need for controls, I believe that using land is in itself a social and economic activity which is properly subject to regulatory consideration.
city life invalidates the assumptions underlying any simple division of property rights. In such conditions it is true only to a limited extent that whatever an owner does with his property will affect only him and nobody else. What economists call the "neighbourhood effects," i.e., the effects of what one does to one's property on that of others, assume major importance. The usefulness of almost any piece of property in a city will in fact depend in part on what one's immediate neighbours do and in part on the communal services without which effective use of the land by separate owners would be nearly impossible. ... The general formulas of private property or freedom of contract do not therefore provide an immediate answer to the complex problems which city life raises.106

Hayek's words draw attention to two fundamental aspects of interdependence in modern life, the impact of land uses on others and the necessity for shared services, which render some form of land use control and coordination essential. This does not mean, however, that land use regulation as we know it is required. As Stone notes, "that regulation is conclusively superior to the free market or another alternative does not necessarily follow".107 There is considerable support in the economics literature for the proposition that market solutions are superior to regulation and, with respect to land use, that market-oriented alternatives to "traditional" land use regulation should be considered. The need for non-regulatory means of control has long been recognized in law, where property owners have been able to seek remedies for nuisance and trespass arising from the activities of adjacent owners, and have been able to enter into restrictive covenants placing limitations on uses for the benefit of the parties to them. Given the existence of these remedies and of other potential means of control derived from economic analysis, why is regulation necessary? While this question can and must be addressed in economic and other technical terms, it is ultimately a political question whose answer must reflect the values of the society in which it arises.

The regulation of land use, while the focus here, is only one aspect of a broader issue of resources management. The tension between the many private and public interests that is inherent in such management, be it of land, mineral or forest resources, telecommunications channels or the "common" resources of clean air and water, has fuelled the arguments for regulation reviewed in Chapter one, and has greatly influenced the nature of regulatory schemes adopted and the mix between regulated and unregulated activities. The control of land uses is no exception. Since the


107 Supra, note 11 at 64.
advent of the modern concept of land use planning early in this century, public regulation by means of official plans, land subdivision controls and, most importantly, zoning, has been dominant.\textsuperscript{108}

It is possible to distinguish, in evaluating the need for controls on land use, between planning and regulation.\textsuperscript{109} The former is a process whereby policies for the distribution of land uses and their associated services are developed in the context of public policy goals. The latter, technically defined, involves the use of such tools as zoning, subdivision control, minor variances and development control to directly control both the uses permitted on specific parcels of land and the density, form and other aspects of the development that is to occur thereon. It is true that the legal consequences of the two differ, as the former does not directly affect the legal rights of landowners while the latter does. Despite this, I believe that the two processes are so closely interrelated as to constitute a single regulatory system, and I include them both in the term "regulation".

As discussed in Chapter one, the rationales for regulation can be characterized as market oriented, or economic efficiency, and social and cultural. Reasons for controlling the use of land can be similarly characterized as economic efficiency, focussed on negative externalities, and social, focussed on the achievement of social goals. What follows will be an examination of the case for using regulation rather than alternative methods of exercising such control and, given the use of a regulatory system, of the reasons for having a review agency such as the OMB.

\textsuperscript{108} There is a considerable literature dealing with the development of modern systems of planning. Useful descriptions of the American system, on which Canadian planning controls are largely based, are found in M.C. Boyer,\textit{ Dreaming the Rational City: The Myth of American City Planning} (Cambridge, Mass.: MIT Press, 1983) and M. Scott,\textit{ American City Planning Since 1890} (Berkely: University of California Press, 1969). The development of planning controls in Ontario is outlined in,\textit{ inter alia}, J.D. Hulchanski,\textit{ The Evolution of Ontario's Early Land Use Planning Regulations. 1900-1920} (Toronto: University of Toronto Centre for Urban and Community Studies, 1982) and J. Dakin,\textit{ Toronto Planning: A Planning Review of the Legal and Jurisdictional Contexts from 1912 to 1970} (Toronto: University of Toronto Department of Urban and Regional Planning: Papers on Planning and Design, No. 3, 1974). A description from a political science perspective is found in H. Kaplan,\textit{ Reform. Planning and City Politics: Montreal, Winnipeg, Toronto} (Toronto: University of Toronto Press, 1982).

1. Economic Efficiency considerations

The recognition that land uses are closely inter-dependent is a major reason for the imposition of controls. As Bossons notes, "[t]he key element of the case for land-use regulation is the potential existence of externalities. Externalities are effects of private decisions that directly impact on individuals other than the decision makers." The study of externalities reveals considerable variation in their effects. They may be localized, and their area of impact easily defined, or may affect large and indeterminate areas. They may be positive or negative; i.e., they may have beneficial or adverse impacts on the persons and properties affected by them. It is the existence of negative externalities arising from the unfettered right to use property in any manner considered most beneficial by its owner which has justified the provision of land use controls. The economic efficiency argument is therefore addressed to the manner in which the negative externalities, or spillovers, arising from various uses of land can be most efficiently handled.

The underlying premise, whatever the particular schemes of control being considered, is that they make possible the achievement of an optimum disposition of resources resulting in a maximum level of welfare to all members of society. As Bjork states:

The allocative efficiency of the market is held to arise from the ability of individuals to exchange use rights until they reach a distribution of use rights that represents a Pareto-optimal equilibrium ...[which] occurs when no further exchange transactions could be made which would leave at least one party better off and no one else worse off."

This model provides a useful tool for analysing the effectiveness of different systems of land use control, but one must be aware of the assumptions underlying it. Such systems will be efficient in terms of this rationale, i.e., will enable an optimum distribution of resources to be achieved, only to the extent that these assumptions hold true in practice. Moreover, underlying them is the

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\(^{110}\) J. Bossons, "Regulation and the Cost of Housing", in J.R. Miron, House, Home and Community: Progress in Housing Canadians, 1945-1986 (Montreal: McGill-Queens University Press, 1993) at 111. The one drawback with the definition is the word "private", as government decisions pertaining to the use of public lands can also have direct impacts.

It should be noted that Mitnick's definition of regulation, "an attempt to control unintentional, by-product effects of activities (i.e., externalities)" is apposite in this context. See Mitnick, supra note 13.

assumption that there are commonly accepted standards as to what constitutes efficiency. As Bjork notes, "the notion of 'efficiency' assumes a consensus about ends and the distribution of benefits". To the extent that such a consensus does not exist, some form of decision-making becomes necessary to properly assess the divergent views regarding what constitute costs and benefits, and how they are to be distributed. These assumptions include:

1. All costs and benefits arising from the use of land can be identified and included in the allocation transactions. This in turn assumes, for the purposes of the allocative model, that persons are sufficiently knowledgeable to identify all such costs and benefits, and that the legal system treats them as property rights which can be the subject of transactions between willing parties.

2. The transactions resulting in the optimum distribution of costs and benefits as identified by individual property owners will result in patterns of land use distribution which will maximize not only their own benefits but those accruing to non-property owners, communities and society as a whole.

3. All costs and benefits to potentially affected parties arising from any existing or proposed use of land can be quantified and expressed in monetary terms, thus providing a common basis of negotiation among those parties.

4. The interest rate that individual property owners use today to discount future land uses is an appropriate social judgement on present versus future use. This addresses inter-generational evaluations of interest, the extent to which the impact of present land use decisions on future generations should be taken into consideration in making these decisions.

The application of the concept of negative externalities raises many issues which can be only noted in this thesis. While it is frequently applied in a local context, the impact of the use of a property on its immediate neighbours, it can be relevant in assessing the impact of large-scale development patterns. Also, what constitutes an externality is subject to many interpretations. While the term

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112 Ibid. at ix.

113 These assumptions can only be touched on in this context. A useful summary in the context of land use control systems is found in Bjork, ibid. Chapter 8.

114 Deciding, for example, whether residential development on the urban fringe will be primarily high or low density can have significant effects on the location and amount of public investments required in transportation and other hard services and, consequently, on the potential fiscal impacts on all property in the community. The amount of development permitted, and its character, can also have an impact on existing.
clearly applies to measurable physical impacts, any psychological or social impact put forward may equally be treated as a "cost" for which some form of redress is required. However, expanding the application of the concept serves to bring its limitations to the fore. Larger scale land distribution issues, or the psychological impacts of proposed development, will reflect non-economic as well as economic values. It is therefore necessary to consider the social reasoning behind land use control.

2. Social considerations

Economic efficiency focuses on the individual property owner, and on establishing relations among owners with the aim of achieving a Pareto-optimum level of benefit. As Stigler notes, however, achieving this end is not the only legitimate public policy goal:

The economist's conventional concept of efficiency turns on the maximization of the output of an economic process or of an economy. That definition, however, accepts private market judgements on the values of goods and services, and, in policy analysis, one may legitimately employ an alternative definition of efficiency that rests on the goals adopted by the society through its government. When a society wishes, for example, to give more income to a group than the market provides, we may surely analyse the efficiency with which this is done.

The difficulty with treating efficiency as a criterion is its indeterminacy as a value. There are as residents and their properties, even if the latter are not subject to any direct physical impact from the new development. Limiting the amount of new residential development in the face of strong market demands, for example, or requiring that it meet very stringent standards, can have the effect of increasing the value of existing residential properties.

115 While the "polluting factory in a residential area" is often cited as a reason to impose land use controls, the rationale behind the imposition of zoning has frequently been the desirability of protecting single-family residential areas from such "incompatible" uses as higher density housing which would change the "character" of such areas by altering their physical appearance and by introducing a different class of residents into them. This reasoning lay behind the seminal U.S. Supreme Court decision, Euclid (Village of) v. Ambler Realty, 272 U.S. 365 (1926), which established zoning as a legitimate exercise of the police power.

116 Examples include a desire to preserve older residential areas for low density use in the face of pressures for higher density redevelopment, to obtain substantial amounts of open space in developing areas, and to protect environmentally sensitive lands from development.

117 Examples include decisions pertaining to the aesthetics of new construction, and to the class of persons for whom new residential development is proposed.

many efficiency outcomes as there are patterns of distribution of resources. Whether a given outcome is efficient depends on whether one accepts the existing distribution of resources and market entitlements as the most desirable. Moreover, the markets within which efficiency is measured contain a fundamental distortion. They assume a correspondence between what people want and need, and what they can afford to pay. Many needs therefore go unsatisfied, because people cannot afford to pay for them. The limitations inherent in considering only efficiency values can be addressed only through a political process directed to the effectiveness with which a land use control system meets goals reflecting larger social values, such as "public interest", "fairness" or "distributive equity".

The allocation of land to various uses becomes a matter of public policy affecting not just the interests of its owners but also the values of all interest groups in the larger society because, unlike many other commodities, land is a scarce and finite resource. As Reich states, "the first zoning laws primarily tries to keep the different uses of land from interfering with each other. ... Planning begins when the law asks what should be; it is here that the ability of planning to choose values becomes a critical issue." There is a strong public interest in establishing positive land use controls, in ensuring that complementary uses are located in strategic proximity, for reasons both of social policy and efficiency in reducing overall social and economic costs rather than just costs to individual landowners. These matters all reflect publicly determined goals and require

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119 Consider the example of a factory located, as is often the case, in a neighbourhood inhabited by low-income persons. They may want to have the negative externalities of air and noise pollution removed, but they lack the financial resources to express their preferences through bargaining with or suing the factory owner. As a result, they will remain worse off, and a Pareto-optimum result cannot be achieved.

120 This statement is only partially true. As demand for land for various uses increases more land can be brought into the market. However, the financial and time costs of doing so, in terms of meeting public or private infrastructure requirements, can mean that at any given time the supply may be effectively limited.

121 C. Reich, "The Law of the Planned Society" (1966) 75 Yale L.J. 1227 at 1247.

122 For example: Ensuring that schools and recreation spaces are provided in close proximity to the residential areas they serve.

123 For example: Locating such complementary uses as shopping facilities, roads and transit systems so that the public infrastructure can be provided most economically.
substantial public input.

While these reasons may be addressed separately for analytical purposes, they are closely intertwined in practice. While one or the other may provide the dominant intellectual underpinning for a system of land use control, that dominance will be a matter of emphasis, not of exclusivity. It can be difficult to separate, for example, the public interest in protecting single-family residential areas from the intrusions of other "incompatible" uses from the benefits accruing to property owners in these areas from such protection. Considering land use controls on a larger scale, moreover, the achievement of efficiencies in land use distribution patterns and the provision of public infrastructure is a valid social goal to be achieved through the planning process. Despite this, it is clear that controlling land use involves the application of value judgements which extend beyond the uni-dimensional monetary calculus underlying the economic rationale, and that no explanation of the reasons for such controls can be complete without an understanding of these broader issues.

B. ALTERNATIVE METHODS OF LAND USE CONTROL

While the case for imposing some degree of regulation over the use of land appears to be incontrovertible, the most effective means of achieving this control are open to debate. The answer will depend to a large extent on values and goals of the social and economic system within which the controls are to be exercised. While government regulation is the most common form of land use control in Canada and the United States, it is not the only possible, nor the original form of control.

The alternatives available can be described as pure types for analytical purposes, but there is inevitably a degree of overlap in practice. This is reflected, for example, in the interaction of zoning and bargaining. Zoning, with its inherent rigidity as a protective mechanism, lies at the heart of public regulatory schemes. Its rigidity is mitigated in the face of changing land use requirements, however, by an amendment process which relies heavily on bargaining between affected parties to introduce changes which benefit the developing property owners while reducing negative externalities to other parties to a generally acceptable minimum. The result of this bargaining is then given effect through the regulatory process in the form of a zoning amendment. The role of the
Board is frequently to make and impose a settlement, in the form of a decision and order, when the parties have been unable to bargain successfully.

Land use control methods may be characterized as those based on allocative neutrality and those involving value judgements with respect to the distribution of costs and benefits. The former involve bargaining among property owners, including the use of covenants, private building schemes and other similar legal instruments. The latter include common law remedies and forms of public regulation, which may be further subdivided into fiscal schemes and schemes for the direct regulation of land use by public agencies.

1. Bargaining Methods: Reliance on property owners

The economic literature on land use control deals heavily, and generally favourably, with the use of bargaining to obtain optimal patterns of land use. Bargaining by both individual property owners and larger interest groups is inescapable, but it cannot provide an adequate substitute for public regulation.

One might argue that, with limited exceptions, bargaining has never been tried. Yet, the fact that those responsible for land use control in Canada, the United States and Great Britain, countries with strong traditions of private land ownership, have chosen forms of regulation when other alternatives have been available, creates a powerful presumption that bargaining methods alone have been recognized as inadequate. The onus is therefore on those who would replace regulation with bargaining to make the case for doing so, taking into consideration both the economic and social aspects of land use control.

The premise underlying the use of bargaining is that the role of planning is primarily conflict mediation, i.e., the reduction of negative externalities, and that the conceptual basis for legal intervention in the private land market by way of plans and zoning is crude and inadequate to meet modern urban demands.\textsuperscript{124} The application of the law of nuisance can act to some extent as a

substitute for bargaining but, as noted below, it is of limited value. A system of bargaining can involve all potentially affected parties and, because it is free of regulatory constraints, can provide all parties with maximum freedom to seek mutually beneficial solutions to spillover problems. Moreover, property owners are best able to assess the potential gains and losses to them inherent in any land development proposal, and to place an appropriate value on their interests and establish the trade-offs necessary to minimize or compensate them for their losses.

Despite the theoretical efficiency of this approach, its effectiveness in the real world of complex land use inter-relationships and conflicts of interest is doubtful. As Harvey notes:

Where transactions are costless, bargaining between the affected parties may be possible to mitigate divergence of interests. ... Nevertheless, negotiation may be an impracticable solution. Not only may the costs of negotiation be exorbitant relative to the benefits to be shared, but, where 'free-riders' cannot be excluded, it may be impossible to organize sufficient collective bargaining strength to negotiate effectively. In any case, costs (or benefits) are often so far-ranging that not all the losers (or beneficiaries) can be identified. ... Finally, uncertainty and selfishness may prevent a satisfactory solution by private action.125

Another difficulty is that bargaining cannot be effective in the absence of an appropriate distribution of property rights through either the legal system or a regulatory mechanism. This is illustrated in the example of the polluting factory proposed for a residential neighbourhood.126 While potentially adversely affected property owners could bargain with the developing owner to either move the factory elsewhere or drastically reduce the polluting elements of its operation, the latter would have no incentive to internalize the spillover costs by doing either. The affected owners would be subjected to these costs, either in the form of living with the pollution and accepting the resultant lower values for their properties, or by paying the developer an amount sufficient to persuade him to alleviate the spillover problem by building elsewhere or modifying his plans so as to reduce


126 The more frequently occurring example today is a proposal to erect a shopping centre or gas station adjacent to residential properties, but the factory example illustrates the problem as it relates to obvious pollution impacts. In many land use conflict situations the impacts are often more subtle, and are often psychological rather than physical. This is seen in Board decisions, discussed in Chapter six, Section D, where the issue is the "character of the neighbourhood" rather than any adverse physical impact on the residents.
pollution to an acceptable level.\textsuperscript{127}

Given this problem, supporters of bargaining have spoken of the need for some form of property rights to place potentially adversely affected owners in effective bargaining positions. A number of proposals for new property rights to make bargaining effective have been made,\textsuperscript{128} but they gloss over the problems of creating such rights. Who will create them? How will they be assigned? How will they be valued? How will persons whose present property rights are adversely affected by the creation of new rights and their assignment to others be compensated? Will they be compensated? One cannot expect the courts to create such rights \textit{ex nihilo}.\textsuperscript{129} Legislation would be required and, given the range and complexity of the issues to be addressed and the uncertainty of the benefits to be obtained, including the uncertainty that the benefits would outweigh problems with existing

\textsuperscript{127} This example ignores the nuisance remedies available to the affected owners, which of course arise from the law's recognition of a right to protection from interference with their enjoyment of their property. Nuisance is an "after the fact" remedy, however, and does nothing to prevent the initial harm from occurring. Keep in mind also that this example assumes that the owners have both the financial resources and the social cohesiveness to engage in negotiations and follow through with settlements. These assumptions are fine in theory but are unlikely to be realized in the real world. See \textit{supra}, note 119.

\textsuperscript{128} Nelson suggests a hybrid system involving zoning and a new form of private tenure, collective property rights, so that an owner wishing to develop in a manner not permitted by the zoning by-law would have to purchase the right to develop from other owners in the vicinity: R.H. Nelson, \textit{Zoning and Property Rights: An Analysis of the American System of Land-Use Regulation} (Cambridge, Mass.: MIT Press, 1977) at 1, 173. Garrett suggests the creation of binding land use "contracts" between developers and residents of new communities to ensure the continuance of the type of community desired by the purchasers and provided initially by the developers: M.A. Garrett, \textit{Land Use Regulation: The Impacts of Alternative Land Use Rights} (New York: Praeger, 1987) at 44. Fischel suggests a similar system of property rights similar to Nelson's: W.A. Fischel, \textit{The Economics of Zoning Laws: A Property Rights Approach to American Land Use Controls} (Baltimore: Johns Hopkins University Press, 1985). Bjork, writing in the context of environmental protection, suggests defining and protecting individual and collective property rights to the use of the environment, but his arguments would be applicable to land use issues generally: Bjork, \textit{supra} note 111. It should be noted that these schemes focus on resolving local disputes between landowners, and provide no assistance in resolving larger scale planning matters, such as the general distribution of land uses and the location of major public services and facilities.

\textsuperscript{129} The courts can at least modify existing property rights in ways which might be interpreted as the creation of rights. The upholding of the validity of zoning by-laws, for example, creates a "right", once a by-law is in force, to have one's property protected from the impacts of uses not permitted under that by-law unless a formal legal process of amendment is followed. This is not, however, the creation of a new right; rather, it is the upholding of a regulatory scheme.
regulatory systems, such legislation seems highly unlikely.130

Bargaining is unable to address intergenerational considerations. Decisions regarding the use of land, unlike most other commercial decisions, have long-term implications which can create significant issues of intergenerational interest. The built environment lasts a long time. Some changes, such as the conversion of agricultural or environmentally sensitive lands to urban uses, are effectively irreversible. Yet bargaining by private property owners focuses by its very nature on the present interests of those owners and, unless such persons are unusually public spirited it can be assumed that they will seek resolutions which best satisfy their immediate interests.

Bargaining will be most effective when parties share common values regarding the subject matter of the negotiations, are agreed that a resolution can be expressed in monetary terms, and are negotiating primarily over dollar values to be attached to the matters in issue. Yet the nature of land use is such that many different values shared by different persons and social groups require resolution, and many of them are not susceptible to resolution in the marketplace.131

One element of the bargaining approach which has a solid historical legal basis is the use of restrictive covenants.132 Landowners have used covenants to prohibit all but specified uses in the areas subject to them, and to impose architectural controls.133 The use of covenants, combined with

130 It should be noted that Garrett, supra note 128, suggested land use contracts primarily to support his argument that zoning provides a more effective and longer lasting means of control than a private bargaining process intended to achieve similar results.

131 Even in the "factory in the neighbourhood" example, where all of the parties are assumed to be affected landowners, resolution by bargaining may not be possible. Economic theory assumes that the affected parties will be able to agree on the value of each person's interest, and the consequent compensation that will satisfy all. Yet, while the developer can determine the cost of eliminating negative externalities, the residents may well treat their "right" to clean air as an absolute which is not subject to monetary valuation.


133 In an extreme example, Houston, Texas, has used a widespread system of covenants rather than zoning to control the distribution of land uses. It is noteworthy, however, that Houston is the only major city
the application of nuisance remedies and the imposition of fines for creating negative externalities, has also been advocated as an alternative to regulatory land use control.\textsuperscript{134} Covenants can be useful for the limited purpose of protecting stable neighbourhoods, but are of little value, and possibly a hindrance, in dealing with broader land use control issues because of their focus on local protection. They can realistically be imposed only prior to development and the consequent sale of properties. In a typical developed area having multiple land ownerships it would be difficult, if not impossible, to obtain unanimous agreement among owners to their imposition. Moreover, their built-in rigidity can make it difficult to respond to the changing land use requirements which emerge as a community evolves.\textsuperscript{135}

2. Common Law Remedies: Reliance on the courts

The common law remedies of private nuisance, trespass, strict liability and negligence have long been available to property owners to enable them to prohibit, mitigate or obtain compensation for negative externalities imposed on them by the actions of other owners or occupants of land. While the operation of these remedies cannot be reviewed here in detail, there are certain elements common to them all which affect their utility as land use control tools.

These remedies have some potential advantages over the use of regulatory tools. The courts have established certain standards of protection.\textsuperscript{136} Where a plaintiff can establish that he has suffered harm, he is entitled to redress. Where regulation is relied on, however, compliance with the regulatory standard is a sufficient defence, even if the result is to impose costs on other properties.

\textsuperscript{134} See R.C. Ellickson, "Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls" (1973) 40 U. Chi. L. Rev. 681.

\textsuperscript{135} A historical point, which I note but do not explore, is that zoning largely superseded the use of covenants because the latter were recognized as inadequate for the protection of stable residential areas in growing and evolving cities and towns.

\textsuperscript{136} The test in nuisance is "substantial interference with the use and enjoyment of land". See, for example, Gertson v. Metropolitan Toronto (Municipality of) (1973), 41 D.L.R. (3d) 646 (Ont. H.C.). The test in trespass is "physical invasion of property", even if the invasion is not harmful. See Kerr v. Revelstoke Building Materials Ltd. (1976), 71 D.L.R. (3d) 134 (Alta. S.C.).
Moreover, a property owner can act on his own to deal with negative externalities by commencing legal action, and need not rely on a regulatory agency taking action to protect his interests. These advantages are accompanied, however, by significant drawbacks. As Lane notes:

Private enforcement also leads to uncertainty and inconsistency. Each individual will seek to use the law to his own purpose. If the courts can only hear privately-initiated complaints, and must limit their action to the facts offered and remedies asked for, the ultimate application of the law by the courts will be based upon a distorted image of economic reality. It will develop in response to the random order in which individual cases reach final judgement, and by the innate selecting factor of litigation: ability to afford it.137

Even persons able to defend their interests might be dissuaded from engaging in a costly legal process having an uncertain payoff.138 The latter arises from the major uncertainties associated with invoking any legal remedy. While the courts have developed general tests for determining whether a compensable harm has occurred, it is difficult to foresee how these tests will be applied in any given situation. It is unlikely also that a set of agreed-upon judicial standards could be sufficiently well established and disseminated to avoid problems.139 This is compounded by the difficulties and costs that can be incurred in establishing proof that the harm has been sufficient to meet a test and thereby trigger a remedy. These uncertainties are major cost elements in land development and, given the nature of such development, are likely to act as disincentives to development.

Lawsuits are reactive. They can be used only to redistribute costs by mitigating harms after they have come into being,140 and thus fail to meet a major goal of positive land use controls, which is

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138 This concern might be mitigated in some circumstances by the availability of class action suits, but even these can carry substantial transaction costs with them.

139 Under the current system a potential developer relies on expert planning and legal advice as to whether his proposal meets planning and zoning requirements. This can be complex enough. Under a common law remedies approach, a developer might often require a legal opinion as to his degree of exposure to damages, but a high degree of uncertainty would still remain pending the outcome of litigation.

140 There is the exception of the *quia timet* injunction, but it is extremely difficult in most situations of potential land use conflict to prove that the harm would be irreversible. See *Palmer v. Nova Scotia Forest Industries* (1983), 29 C.E.L.R. 157 at 229 (N.S.S.C., Trial Div.).
to prevent the establishment in the first place of land uses having potentially negative externalities.

Common law remedies are an extremely reductive means of land use control. They can provide a (sometimes high) degree of protection from certain physical harms to specific properties, but are of little value in providing psychological or fiscal protection from private land use decisions. There is no likelihood, for example, that the residents of a single-family area could successfully bring an action in nuisance to obtain damages arising from the construction of apartments in the area, or to require their removal. These remedies can provide no assistance to positive planning, to influencing the nature or distribution of land uses to achieve broader planning goals.\(^\text{141}\)

3. Regulation: Selecting the most effective tools for public involvement

Reliance on either private bargaining or the courts to control land use has significant shortcomings. A full evaluation of the range of possible regulatory tools is beyond the scope of this thesis, but some review of the options can be useful in providing a context for the analysis of the model adopted in Ontario, decision-making by elected municipal councils subject to review by an appointed provincial tribunal.

(a) Financial Instruments

The regulation of economic activities frequently includes the use of financial policy instruments: direct expenditures, including grants and subsidies, and direct or indirect taxation.\(^\text{142}\) Such instruments can be extremely important in achieving general public policy goals pertaining to the

\(^{141}\) Examples would include:

- directing new urban development to areas where it can be most efficiently serviced and have the least adverse impact on other valued social goals, such as farmland or environmental protection,
- encouraging land use and density changes in older, built-up areas to take place in a manner which is least disruptive to existing social and economic patterns

use of land, but these goals and their implementing programs are aspatial in nature. They are directed to the achievement of national or provincial public policy goals. They are complementary to land use controls, but cannot be used to determine the most efficient or socially appropriate distribution of various land uses. Within the context of such controls, however, they may have strongly positive effects on development activity.

Other financial tools influence specific land use patterns more directly. Differential property assessments can, to a limited extent, encourage the retention of certain uses. Grants, or the purchase of development rights or of the fee, can also be used, *inter alia*, to protect lands considered worth retaining in their natural state. Again, however, these tools are complementary to schemes of direct regulation, as the latter are required to determine what lands should receive those benefits.

Financial instruments do have a role to play in land use control, subject to the severe financial constraints facing all levels of government, and to their limited availability to municipalities. It is a role subordinate and complementary to direct regulation, however, and its further consideration is beyond the bounds of this thesis.

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143 Examples include grants, loans, mortgage guarantees and tax benefits to encourage the construction of family housing, grants and low-interest loans for the construction of affordable housing and public infrastructure, and tax relief for certain categories of persons, such as seniors, to encourage them to stay in their homes. In addition to the above benefits, taxes could be imposed to discourage certain types of activities, such as those creating significant amounts of pollution.

144 A common example is the assessment for municipal property tax purposes of actively used farmland on the basis of its value for agricultural use rather than its potential value for urban development, and for exempting it from taxation for certain purposes, so as to encourage its retention as farmland. In addition, the *Assessment Act* provides for the assessment of golf courses at less than their market value to encourage their retention as open space in developing urban areas. See the *Assessment Act*, R.S.O. 1990, c. A.31, s. 21, 23. However, these measures are of limited value in controlling land use. Evidence suggests that they create only a minimal delay in the conversion of land from agricultural or open space uses to urban uses. See Bjork, *supra* note 111 at 94.

145 Municipalities in Ontario, for example, have only limited authority to make grants. They can set mill rates for property taxation to meet their own financial requirements, but have no control over the mill rates set by school boards, for whom they must collect taxes. They can establish development charges to be paid by developers to help finance the cost of services. Other financial and fiscal powers which relate to land use control are exercised by the provincial and federal governments.
(b) Direct Regulation

The case for the direct regulation of land use has been stated so far largely in negative terms: the shortcomings of alternative land use control methods, but a case for regulation can be positively expressed in terms of the economic and social rationales outlined above.

Considered in purely economic terms, it is extremely difficult to establish the costs and benefits of regulation, or to compare these with costs and benefits arising from alternative means of land use control. As Garrett notes, in reviewing studies of the impacts of negative externalities, "... not only is efficiency in land use difficult to determine, but it is difficult to apply when costs and benefits are subjective or immeasurable."146 Some direct costs can be noted, but the complexity of land use as a subject of regulation, and the multiplicity of public and private interest groups subject to land use regulation make it impossible to determine with any certainty whether overall economic welfare would be improved with or without such regulation.

"Planning is the method of controlling the free operation of the market economy."147 The effectiveness of regulation can be addressed in noting several areas of potential land use-related market failures:

1. The pervasiveness of negative externalities: If these affected immediate neighbours only, bargaining might be a feasible method of conflict resolution. Public intervention is necessary to deal with this failure of the market where, as is frequently the case with land use, the impact of the externality is spread so broadly that transaction costs are unrealistic. Furthermore, it is claimed that land use regulation creates a social framework that enhances the overall level of welfare. As Bjork states, "In the absence of zoning, the value of all land within the zone would be less than when zoned because of the diminution of values caused by incompatible uses."148

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146 Garrett, supra, note 128, at 41. A recent review of studies in the 1970s and 1980s of the costs and benefits of American environmental regulations, in which public and private costs of pollution control and abatement and primarily health-related benefits were compared, showed costs ranging from $55.4 to $66.6 billion (1988$), and benefits ranging from $16.6 to $135.8 billion: R.W. Hahn and J.A. Hird, "The Costs and Benefits of Regulation: Review and Synthesis", (1991) 8 Yale J. Reg. 233.

147 Harvey, supra note 125 at 164.

148 Bjork, supra note 111 at 67.
2. Optimal use of urban infrastructure: Optimal resource utilization requires that the provision of the "collective goods" of the urban infrastructure and the allocation of land for various uses be closely coordinated. The provision of the former is primarily the responsibility of different levels of government and of public agencies, and the optimal efficiency of its delivery requires a degree of public and private coordination which can be achieved only through a regulatory process involving both public and private interests.

As Bossons has noted,\textsuperscript{149} there are three levels of externalities associated with urban growth which require regulation if they are to be adequately addressed. Local externalities are those impacts on immediate neighbours which are most susceptible to control using bargaining and the common law which, as noted above, exhibit significant inadequacies as land use control methods. Global externalities arise from "the collective actions of all decision makers rather than from the decisions of one landowner"\textsuperscript{150}, and include such social costs as increased pollution, congestion and travel times, and decreased access to open space. Bargaining and common law methods do not address these costs. Land use regulation cannot eliminate them but can, through coordinating the overall distribution of land uses and public facilities and infrastructure, reduce them to more acceptable levels. Fiscal externalities include the public expenditures on schools, roads and other services made necessary by urban development. These costs to the public can be minimized through the use of suitable fiscal measures and through locational decisions, pertaining to both land uses and common facilities, directed to ensuring the most efficient provision of these facilities.

Despite its advantages, there is no question that the regulatory process for dealing with these externalities can impose considerable financial and time costs on both the public and those seeking development approvals. Nevertheless, these costs must be compared with transaction costs, incurred largely by private parties, of utilizing the multiplicity of covenants, agreements and court actions that would be required under private, non-regulatory approaches to dealing with land use

\textsuperscript{149} Bossons, \textit{supra} note 110 at 112-14.

\textsuperscript{150} \textit{Ibid.} at 113.
The need to ensure that the public interest is addressed in controlling land use is a major reason for using regulatory tools. As shown in Chapter one, the concept of the public interest has evolved considerably over time from that of an objective, undifferentiated "public" consisting of everyone not part of the regulated industry to a more subjective, splintered situation in which "the public interest is served by agency policies which harmonize as many as possible of the competing interests present in a given situation." There is a danger that this balancing theory of the public interest may make agencies engaged in land use regulation unduly responsive to immediate pressures and private interests. Despite this danger, there is no doubt that a regulatory system in which all interests may participate is superior to a control system in which only limited interests, primarily property owners within tightly defined areas, have any standing. Furthermore, while the latter may be an efficient means of dealing with localized land use issues, it can contribute little to the efficient resolution of the larger issues, such as determining the overall growth goals of a municipality and ensuring a distribution of land uses and infrastructure to enable those goals to be met.

C. THE USE OF A REVIEW AGENCY

It is arguable that the public regulation of land use could be left in the hands of municipal councils, the public authorities most directly concerned with this largely local activity. Yet it is significant that the planning systems established in Canada, the United States and Great Britain generally provide for some form of review of local planning decisions by the courts, administrative tribunals or provincial, state or central government officials. This may be limited to legal matters, such as the exercise of jurisdiction or the procedures followed by the bodies making the initial land use decisions.}{2}

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{151} It is of interest to note that in Houston, despite the use of covenants, the City plays a regulatory role with the public costs that such a role incurs. Since 1965, when it was granted the authority to participate directly in the enforcement of restrictive covenants as if it was an owner of benefitting property, it has played the major role in the enforcement process. Moreover, the City does have land use regulations, including parking and setback requirements for new apartment and commercial buildings and subdivision controls requiring minimum lot frontages and setbacks. See Siegan, supra note 133 at 76-7.

{152} Supra note 121 at 1234.
decisions, or it may address the substance of the local planning decisions.\textsuperscript{153}

There are several arguments of a political and administrative nature for establishing a process for the review of local planning decisions by agencies or tribunals appointed by senior levels of government:\textsuperscript{154}

1. Local municipalities vary greatly in the expertise they can bring to bear in dealing with often complex planning matters. Moreover, municipal councils often cannot devote the time required to consider policy and technical issues in detail. A review procedure allows for detailed consideration of such issues by a body possessing a degree of expertise and having sufficient time to consider them.

2. The policies of senior levels of government are often important in assessing planning proposals, but municipal councils will vary greatly in the degree to which they consider such policies. A review process allows both the senior level of government and other interested parties to ensure that these policies are placed before an agency which will give them full consideration.

3. There is a concern that local decision-making may be too political, in that certain groups and positions can be favoured for political reasons. A review process allows for the reconsideration of these decisions in a forum free of local political pressures.

4. Negative impacts of planning decisions are often felt beyond municipal boundaries, but local decision-makers may approve development applications without giving consideration to their extra-municipal aspects. A review process allows other municipalities and their residents to have their positions and concerns regarding these proposals considered by a body whose viewpoint extends beyond municipal boundaries.

There is also a strong legal argument for a form of planning supervision. Administrative law

\textsuperscript{153} The courts in all three countries engage in the judicial review of decision-making by municipalities and, where they exist, by provincial, state or central government agencies. Some provinces have review agencies, although their jurisdictions differ. A few American states have tribunals empowered to review some aspects of local planning decision-making, but the major avenue of review is through the courts. The review of local planning decisions in Great Britain is carried out by central government officials.

generally and, in Ontario, the *Statutory Powers Procedure Act*,\(^{155}\) require that persons be afforded a hearing by a decision-making body, with rights to present evidence in support of their position, engage in cross-examination and be represented by counsel, where decisions affecting their rights are being made. Decisions involving the use of land, particularly direct land use controls such as zoning by-laws, minor variances and severances, are clearly of this nature. It would be possible, but highly unrealistic, to expect or require municipal councils to engage in full quasi-judicial hearings prior to making such decisions. *Zadravec*\(^{156}\) has established, in any event, that the existence of a right to appeal from a municipal decision to a tribunal whose hearings are conducted in accordance with the rules of natural justice has made it unnecessary for municipal councils to meet this standard. The fact is that in our legal system some form of review cannot be avoided. This will be undertaken either by the courts, if no other form of review is available, or by a tribunal constituted to apply the rules of natural justice. While such appeals could be made to the courts, there is a strong case for using a specialized agency or tribunal instead.\(^{157}\) The role of the courts is to deal with jurisdictional and other legal issues, and they have neither the mandate nor the expertise to rule on the policy, technical and other substantive issues on which the appeals of land use decisions are based.

The theory being propounded above is that, given the inevitability in our legal system of some form of review of local planning decisions, it is better to have this undertaken by a specialized review tribunal than by the courts. The former can provide a “value-added” approach by addressing the political and administrative matters set out in paragraphs (1) to (4) which are beyond the jurisdiction and competence of the courts. The analysis of the Board’s decision-making in Chapters four to six gives some indication of the extent to which it appears to replicate the role of the courts, and appears to be adding value in these areas.

\(^{155}\) R.S.O. 1990, c. S.22.

\(^{156}\) *Zadravec v. Town of Brampton* (1973), 37 D.L.R. (3d) 326 (Ont. C.A.).

\(^{157}\) This point is made in much of the literature cited in Chapter one, and need not be repeated here.
D. The Application of Regulatory Theories to the Analysis of a Land Use Review Agency

The regulatory theories outlined in Chapter one are valuable to the extent that they enable us to comprehend the forces acting on and within regulatory agencies and the manner in which these agencies actually engage in decision-making. The difficulty with theories, of course, is that they can be eroded by contact with the hard surfaces of reality. They do, however, provide some insight into understanding the activities of one tribunal engaged in land use regulation, but their applicability is limited by the nature of the economic activity which is subject to regulation.

1. Public Interest Theories

Public interest theories offer valuable insights for an analysis of land use regulation. Planning is not an industry producing a definable product, but a process in which the interests of various groups in society are evaluated and decisions made as to which sets of interests are to prevail.\textsuperscript{158} These theories recognize that regulatory agencies must operate within networks of interest groups and must respond to a wide range of pressures, but are themselves capable of acting independently.

These theories do, however, have significant limitations in the planning context. One such lies in determining where the public interest is to be found. Planning involves balancing an unusually wide range of interests: political decision-makers, developers, persons likely to be directly affected by development, public interest organizations. It may be that regulatory agencies are able to recognize some interests as being more "public" than others, and to foster these, but these theories give little assistance in establishing how, from the welter of interests being promoted, the public interest is to be determined. Another is the assumption, implicit in these theories, that interest groups are all-pervasive and coherent. This is not the case. Identifiable groups vary greatly in their cohesiveness and their ability to effectively exert pressure on regulators. A significant portion of the "public" in whose interest planning regulation is being carried out consists of individuals and small groups having widely disparate interests. A third, more specific limitation, is that these theories do not

\textsuperscript{158} It may be argued that planning is an attempt to apply the "principles of good planning" and various tools of technical analysis, such as traffic and environmental impact studies, to determine the best disposition of land uses, public services, etc. This view has considerable surface validity, but it ignores the extent to which planning principles and technical studies are themselves expressions of the values of various interest groups.
appear to address adequately the situation in which the Board operates:

1. One significant participant in the planning process is the provincial government, which plays a dual role. It is responsible for establishing both the statutory framework and processes within which land use planning takes place and, to the extent that it chooses to do so, the planning policies that are to be applied by all other parties, including the Board. Yet it can also, through the direct intervention of affected ministries or agencies, play a direct role as a party in hearings dealing with specific applications. The government is therefore in the unique position of being both the creator of and a participant in the regulatory system. The relationship of a regulatory agency to an interested party that is able to exercise this degree of control over the entire process does not appear to be addressed in these theories.

2. Municipalities also play a dual role in the regulatory process that the theories do not appear to address. They are responsible for making the initial land use decisions and are expected to give prime consideration to the public interest when doing so. But when their decisions are appealed to the Board they become interested parties seeking to influence its review of those decisions, and in doing so they are acting on a par with other interest groups, each of which may be claiming that its position reflects the public interest.

3. There is a widely diffuse and diverse body of interests - individuals wishing to develop or make changes to their property, individuals and neighbourhood groups supporting or opposing such activity - which appear in response to specific, local issues but do not form ongoing interest blocs fostering consistent and coherent policies. It is not always easy, moreover, to determine the extent to which the positions these persons or organizations espouse are expressive of the public as opposed to private interests.

There is one important exception to the above which closely parallels the situation in which public interest theories arose. To some extent, land use regulatory systems have been put into place to regulate the activities of the development industry. Large and small scale developers, often with legal counsel and experts, play a significant role in the planning process, and appear regularly before the Board. To the extent that there is a public interest in ensuring that the activities of this industry are conducted so as to benefit the public, or at least to not cause undue harm, public interest theories are relevant to the consideration of land use regulation.
Given that the evaluation of various interests is a major area of Board policy development,\textsuperscript{159} the capture theory may be of some value in analysing its decision-making. While the model of capture by a single interest group may be too simplistic, it is possible that a strong coalition of groups could exercise a significant influence on the planning process. If municipalities and land developers, for example, adopt similar positions with respect to what are considered appropriate planning policies and development activities, do their interests predominate over diffuse and uncoordinated opposition from individuals and local groups?\textsuperscript{160}

2. Political Theories

Peltzman's theory of the "regulator as politician" provides some insight into land use regulation. This process includes a significant element of direct political decision-making, as local planning decisions are ultimately political decisions. The application of this theory to the role of the regulatory agency in the process is rather mixed, however, as the Board's role is only indirectly political. It is not composed of active provincial or local politicians. While it is ultimately responsible to the provincial government, the fortunes of politicians are not normally affected by its individual decisions. Yet its members are political appointees. While all ramifications of this theory cannot be explored, the analysis herein should give some indication of the extent to which its policy development is politically motivated.

The studies pertaining to the "regulator as bureaucrat" variant of the political theories have been primarily of agencies engaged in direct industry regulation, and may not appear relevant to the Board's situation.\textsuperscript{161} They do, however, offer useful insights for analysis because of the nature of its membership which can, in the context of this theory, be described as bureaucratic. Its members are not judges appointed for life, but are frequently politicians, public servants, or persons having

\textsuperscript{159} See Chapter six, Section B.

\textsuperscript{160} Note, in this context, an opposite view. Mr. A.J. Kennedy, the Chair of the Board from 1960 to 1972, expressed the view that it was an "ombudsman" protecting individual property owners from the adverse effects of development approval decisions of municipal councils. See Subject to Approval, supra note 7 at 24-25.

\textsuperscript{161} To the extent that the Board can be considered to be regulating the development industry, the studies are relevant.
connections with political parties or experience with the types of matters dealt with by it. They were, until recently, appointed at pleasure, and are now appointed for three-year terms with the possibility of renewal. Their conditions of appointment thus give the government of the day complete control over their continuing tenure in office. An analysis of the Board’s decision-making in light of its composition could be of great interest, but was rejected because it was tangential to the theme of the thesis and revealed significant methodological problems.\footnote{162}

The "behavioural" approach to regulation also provides useful insights for an examination of the Board’s activities. It suggests that the role of a regulatory agency is primarily reactive, as various issues are placed before it which may disturb the equilibrium it has sought to achieve. It suggests also that the agency is a participant in the process, not just a passive decision-maker, as it must develop new policies and procedures that will permit a return to a "satisfactory" equilibrium. This provides a valuable insight into the Board’s role in dealing with planning and development matters, a rationale for the reality that, while it is ostensibly making decisions on planning applications by applying provincial and municipal planning policy on a case-by-case basis, it is actively engaged in policy development.

Hirshleifer’s theory that different regulatory agencies can be in competition as "suppliers" of regulation also provides useful insights.\footnote{163} It raises the possibility of exit, with regulatees "voting with their feet" by finding the agency or, more realistically, the jurisdiction in which regulation is most lax. This is an important idea in the planning context, as each municipality is, in establishing its planning and zoning policies, a regulatory agency which can use these policies to try to attract development from other municipalities. The existence of an overriding review agency such as the Board should, in theory, serve to dampen this competition by providing a forum in which lax planning policies, which are more likely than strong policies to lead to the creation of negative externalities, can be challenged and overturned. It will be seen in analysing the Board’s policy

\footnote{162} The political theories assume that the backgrounds, career paths and motivation of agency members can be neatly isolated for analytical purposes. It became clear after initial data collection that this convenient division into members with "public" and "private" backgrounds and interests could not be sustained.

\footnote{163} Supra note 61.
development activity that it has established certain policies or standards against which it measures individual proposals and local planning policies, and which it will apply to lessen the differences between the many "suppliers" of planning policy.

E. Discussion

There is little doubt that, despite its costs, some form of direct land use regulation is necessary in a modern, complex, largely urban-oriented society. While the alternatives, bargaining and the common law, can be of assistance in minimizing the negative externalities of land use decisions, their role is limited to resolving immediate, local problems. Functionally, they are of little use in addressing the broader planning issues pertaining to the determination of the overall growth goals of a municipality and ensuring a distribution of land uses, and the coordination of this distribution with the provision of infrastructure facilities to enable these goals to be met. Politically, they fail to provide for the participation of all interest groups in land use decision-making. Only those parties, usually property owners, who can be clearly identified as being directly affected by a land use decision have status to participate in the initial decision-making, and there is no provision for a review of these decisions in which other interests can be considered. These alternatives represent a privatization of decision-making which can frequently have extensive implications for the broader public. Direct regulation provides an opportunity to resolve these inherent difficulties in the alternatives. It allows for the determination, through the participation of all interested parties in a political process, of where the public interest in land use decision-making lies.

As in the story of the blind men trying to describe an elephant by touching various parts of it, the theories of regulation outlined in Chapter one each provide some assistance in understanding land use regulation, and in analysing the activities of an agency which plays an important role in regulating this activity. The public interest theories draw attention to the importance of examining

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164 One cannot privatize something which is already private, such as making agreements or filing lawsuits. I use the term here in the context of suggestions that direct regulation by public agencies should be replaced by alternatives relying largely, if not solely, on private decision-making, and that by primarily the owners of private property.

165 This is not to say that any regulatory scheme will resolve all of them, only that regulation provides the possibility of doing so, whereas the alternatives do not.
what the Board considers to be the public interest it is addressing in its policy-making and application activities, and the degree to which its views as to what constitutes the public interest reflect the positions taken by its different client groups. The capture theory is of lesser value because of the wide range of interest groups involved in the land development process and appearing before the Board. The political theories make clear the importance of addressing the manner in which its policy decisions and policy applications reflect the goals of the provincial government and its clients, and the nature of its membership. They assist in our understanding of how the Board, a regulatory tribunal with an ostensible mandate to apply provincial and municipal planning policies, has become actively involved in policy making.
CHAPTER THREE
THE HISTORICAL CONTEXT

1. The Beginning: The creation of a tribunal of experts to regulate certain activities in the public interest

The creation of the Ontario Municipal Board provides a good example of the early 20th Century approach to regulation. Urban centres were growing rapidly in Ontario, and certain emerging types of activity associated with such growth, the provision of street railways and public utilities, and the management of municipal finances generally, were creating technical, financial and political problems whose resolution required increasing amounts of the Legislature’s time and political capital. It was recognized that such activities required a degree of public regulation. The tribunal model that had appeared with the establishment of the railway regulatory commissions in Canada and the United States provided the tool that would, it was believed, remove these time-consuming and contentious matters from the political arena and place them in the hands of a specialized agency which would treat them expertly and ensure that the interests of all affected parties were fairly addressed.

The precursor of the Ontario Municipal Board was created by the Legislature in 1906 as the Ontario Railway and Municipal Board (hereinafter ORMB). As its name suggests, the creation of the ORMB represented the coming together of two regulatory areas, those pertaining to railways and to municipalities. Both placed it firmly within the regulatory thinking of the period, as summarized in Chapter one. The federal government, no doubt influenced by the creation in 1885 of the Interstate Commerce Commission to regulate railways and other interstate carriers, had in 1904 created the Board of Railway Commissioners to regulate federally incorporated railways.

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166 The Ontario Railway and Municipal Board Act. 1906, 6 Edw. VII (S.O. 1906), c. 31 [hereinafter ORMB Act].

167 See C.W. Humphries, 'Honest Enough to be Bold: The Life and Times of Sir James Pliny Whitney' (Toronto: University of Toronto Press, 1985) at 139, and B.J. Hibbets, A Change of Mind: The Supreme Court of Canada and The Board of Railway Commissioners. 1903-1939, unpublished LL.M. Thesis, University of Toronto, 1986, at 12-32. While the ICC provided the model for railway regulation it was created in a constitutional and political context differing greatly from that under which the Canadian Board was established. The relationship between the two federal governments and their respective agencies...
The provincial Legislature, which had jurisdiction over street and local railways, had become increasingly burdened by the need to deal with every application for a provincially incorporated railway by means of a separate bill.168 From the 1890’s, when electric street railways came into existence, this had become an even greater burden, and a frequent source of political acrimony. Even after street railway companies had been established, disputes regularly arose between them, the public and councils of municipalities they served with respect to, \textit{inter alia}, fares, rental fees for the use of streets, maintenance of roadbeds and levels of service. The government concluded that the best method of dealing with both the political and the practical regulatory issues was to enact railway legislation of general application to avoid the need for individual bills, and to establish a tribunal that would have jurisdiction to administer this legislation and regulate the ongoing operations of street railways without the need to constantly bring matters before either the Legislature or a committee of politicians.169

Other problems pertaining to municipal government, while not as politically dramatic as those involving street railways, had also led to an increasing public demand for greater regulation of municipal matters. Municipalities were frequently involved in disputes with private gas and electricity suppliers relating to the financing and conditions of the provision of these services and, as Armstrong and Nelles have noted, the use of the traditional private dispute-resolution methods was not considered appropriate:

Municipal politicians had long complained that the courts had not proven a satisfactory agency for enforcing commitments made by private utilities under their franchise agreements. Not only were lawsuits expensive and time-consuming, but judges lacked technical and managerial expertise and in any event were not able to exercise day-to-day supervision over operations.170


\footnote{169 The closely inter-related nature of these two actions is emphasized by the fact that the two required bills were passed together. The railway provisions were contained in \textit{The Ontario Railway Act. 1906}, 6 Edw. VII (S.O. 1906), c. 30. \textit{The ORMB Act, 1906} was enacted at the same time.}

\footnote{170 \textit{Supra} note 168, at 192.}
Both provincial and local politicians concluded that, "[t]he logical bodies to intercede between cities and companies seemed to be a provincially appointed panel of experts whose decisions would be appealable only on points of law." In addition to these railway and utility issues, the province was becoming increasingly involved in approving such matters as municipal debt consolidation. These were all complex and time-consuming activities which led to further support for their assignment to a tribunal separate from the Legislature. It is clear that, from the Board's inception, the rationale for having a tribunal of this nature was derived from the analysis of the "agent of government" and "expert decision-maker" models of regulation, as noted in Chapter one. It removed from the shoulders of elected politicians and placed on those of a tribunal composed of non-elected "experts" the time-consuming responsibility for decision-making with respect to matters which were generally of a local nature and were often technically complex or politically contentious. What the province established was a quasi-judicial tribunal empowered to conduct adversarial hearings, "hear and determine all matters whether of law or of fact", and make binding orders.

It is not clear how these rather separate areas of regulatory activity came to be entrusted to a single tribunal. Humphries suggests that:

Although the board was created primarily to be the instrument for operation of the railway bill, it was given powers with respect to municipalities, aside from those directly connected to railway matters. ... These provisions for jurisdiction over municipal affairs appear to have been afterthoughts, possibly drawn into the legislation by the board's powers to direct

17: Ibid. at 192.

172 For both of the above, see Bureau of Municipal Research, Urban Development and the Ontario Municipal Board (Toronto: Bureau of Municipal Research, 1971) at 4.

173 Board members have not always been experts in a technical sense, such as engineers, accountants or planners. Rather, they have been drawn from a wide variety of disciplines, most frequently the law, and have developed their expertise through constant immersion in the matters under the Board's jurisdiction.

174 The Board was created to relieve provincial politicians of this decision-making burden. It has been suggested, however, that in carrying out its planning review functions the Board has relieved local politicians also, as they have been able to make politically motivated decisions secure in the knowledge that responsibility for dealing with contentious planning issues will rest with the Board.

175 ORMB Act, supra note 166, s. 17.
municipalities on railway subjects.\textsuperscript{176}

It is possible also that the proponents of provincial involvement in the regulation of the municipal issues noted above saw the proposal to create an agency to deal directly with railway issues as an opportunity to "piggy-back" their issues onto the new agency. If so, they established an enduring precedent. As its history was to show, the Board was to be made responsible for an increasingly wide range of regulatory matters. It now exercises jurisdiction under more than 70 statutes.\textsuperscript{177}

The ORMB remained in existence until 1932, when its powers were transferred to the newly-created Ontario Municipal Board.\textsuperscript{178} The new Board continued to function as a quasi-judicial tribunal. Its street railway regulatory responsibilities had largely atrophied, but it assumed greater jurisdiction over municipal affairs, particularly those pertaining to borrowing and other financial matters. Moreover, the planning regulatory function exercised by the former board were transferred to the new one, and its role in this area has expanded to become its dominant activity.

2. The emergence of the OMB as a planning Tribunal: The assumption of responsibility for reviewing municipal land use planning decisions

Land use regulation, which has for many years been the major single element of the Board’s jurisdiction, did not form part of its original mandate. This soon changed. When the Legislature began enacting planning legislation it saw the Board, as noted above, as a useful agency to oversee municipal decision-making in this area also. Despite the numerous changes to the province’s planning system over subsequent years the Board’s role has remained essentially unchanged.

\textsuperscript{176} Supra note 167, at 141.

\textsuperscript{177} A recitation of the Board’s full range of jurisdiction would be difficult, but it includes such disparate matters, in addition to its planning jurisdiction reviewed herein, as approving municipal borrowing to assist farmers constructing tile drains on their lands (\textit{Tile Drainage Act}, R.S.O. 1990, c. T.8), resolving disputes as to the proper boundaries of municipalities (\textit{Municipal Corporations Quieting Orders Act}, R.S.O. 1990, c. M.51), determining the compensation payable to municipalities when telephone systems owned by them are acquired by others (\textit{Ontario Telephone Development Corporation Act}, R.S.O. 1990, c. O.37), and hearing appeals arising from the municipal imposition of charges to pay for services required because of development activity (\textit{Development Charges Act}, 1997, S.O. 1997, c. 27, c. 16)

\textsuperscript{178} \textit{The Ontario Municipal Board Act}, 1932 S.O. 1932, c. 27 [hereinafter \textit{OMB Act}, 1932].
The Board's planning role developed gradually. Plans of subdivision were made subject to its approval in 1912. When cities, towns and villages were given limited powers in 1917 to prepare plans, their adoption was made subject to prior Board approval, and it could order any changes it considered necessary or proper. Municipalities were given limited authority to pass restricted area (zoning) by-laws in 1921, but these did not come into force until approved by the Board. Little significant legislative change occurred from then until the first Planning Act was enacted in 1946. This established an entirely new planning system for the province, involving planning areas and planning boards, and established a process for the adoption and approval of official plans, with the Board considering disputed plans referred to it by the Minister of Municipal Affairs. Restricted area by-laws, and the Board's role in approving them, was brought into the Act in 1959. Since then the Act has been amended on numerous occasions to introduce new planning tools, such as interim control by-laws, site plan control and provincial planning policy statements, and to revise and expand approval, review and appeal procedures. Throughout these many changes, however, the Board's review and appellate role has remained essentially unchanged. It appears that, despite concerns expressed at various times regarding aspects of the Board's jurisdiction and manner of conducting hearings, there has been a general and ongoing acceptance that it should be retained and should continue to carry on in the role of overseeing local decision-making that was assigned to it at its inception.

A salient feature of the province's planning legislation as it has evolved has been the limited guidance it has given to the parties engaged in the process - municipal councils, committees of adjustment, owners, objectors, the Board - with respect to anything other than procedural

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179 The City and Suburbs Plans Act, 2 Geo. V (S.O. 1912) c. 43, s. 2, 3 [hereinafter CSP Act].

180 The Planning and Development Act, 7 Geo. V (S.O. 1917) c. 44, s. 4 [hereinafter PD Act].

181 The Municipal Amendment Act, 1921, 11 Geo. V. (S.O. 1921) c. 63, s. 10 [hereinafter Mun. Act 1921].


183 The Planning Amendment Act, 1959 S.O. 1959, c. 71.
This was not the case under the initial planning legislation. The Board was directed as to the matters it was to consider in approving plans of subdivision, the items to be included in a general municipal plan (which metamorphosed into official plans) and the matters it was to consider in deciding whether to approve, repeal or amend a restricted area by-law. With respect to the latter, the initial legislation stated that the Board may approve the repeal or amendment of a restricted area by-law if satisfied that such is proper and expedient in view of "the desirability of the proposed repeal or amendment in the interests of the owners of the land in the district affected and of the community as a whole." The latter criteria, while no longer in planning legislation, were important because of their importance to the Board's policy development activities. They captured, in a few words, its most fundamental area of policy development, the evaluation of public and private interests and the development and application of its adverse impact test. They make clear also that the genesis of its policy development may be found in its early history, and that its policy development analysed in Chapters four to six represents, not the beginning of such activity, but the continuing evolution in recent years of an activity central to its functioning. Even though these guiding criteria were eventually removed from planning legislation, they remained as central

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184 The one exception has been plans of subdivision, where the matters to be addressed prior to giving approval have been spelled out in detail. See the Planning Act, s. 51(24). The Act gives very little direction, however, in the subdivision area in which the Board is most frequently involved, appeals of conditions imposed by municipalities for approval of plans of subdivision.

185 CSP Act. supra note 179, s. 3.

186 PD Act. supra, note 180, s. 4(2).

187 Mun. Act 1921, supra note 181, s. 10.

188 In an early decision, using language that would not be out of place today, the Board refused to amend a restricted area by-law to permit a building in a residential area to be converted into apartments:

There were, it is true, a number of duplex and semi-detached houses and quasi-public buildings within the area, but the great majority of the erections were high-priced detached private residences. The object of the legislation and original By-law was clearly to preserve the district and street as it was and to prevent their further deterioration.

... the owners of the land in the district - who must be assumed best qualified to speak upon the matter - are overwhelmingly against the amendment.

Re City of Toronto By-law No. 10129 (6 November 1924), No. 9536 (O.R.M.B.).
directives in the Board’s thinking, as seen in its decisions throughout the 1971-78 and 1987-94 review periods.

While the Board may have been characterized in its overall activities as a quasi-judicial tribunal, its planning role has been administrative in nature. As the Ontario Court of Appeal stated in 1934, “The distinguishing mark of an administrative tribunal is that it possesses a complete, absolute and unfettered discretion and, having no fixed standard to follow, it is guided by its own ideas of policy and expediency.”189 The Bureau of Municipal Research distinguished the judicial and administrative functions as follows: “as an administrative agency the Board decides according to public policy and expediency, whereas judicially these decisions are made according to legal rights and liability.”190 Yet as the analysis of the Board’s decision-making shows, it has to a great extent applied its own policy as opposed to externally-derived public policy, and it has blurred the division between these two roles through the development of policies which are derived from legal concepts of “rights” and “liability”.

It may be that the Board’s history made the latter inevitable. It was created as a judicially-oriented tribunal, and has never departed from that model. Its initial role was primarily one of adjudicating disputes and giving formal approvals to by-laws and agreements with respect to the matters under its jurisdiction. It quickly established the trappings of a court, with formal adversarial hearings, the formal determination of parties, rules of procedure, rules of evidence, the formal examination and cross-examination of witnesses and the issuance of legally enforceable orders. Its three initial members were all lawyers, six of its seven chairs between 1906 and 1972 were lawyers,191 and the law has remained its largest single source of members.192 The history of the Board’s increasing

190 Supra note 172 at 9.
191 It should also be noted, in fairness, that only one of the six chairs since 1972 has been a lawyer. By this time, however, the Board’s mode of operation was well established.
192 In 1985, approximately one-half of the Board’s 35 members were lawyers. The remainder were accountants, engineers, architects, planners and public administrators: Ontario Municipal Board, 80th Annual Report (Toronto: Ontario Municipal Board, 1985) at 5.
involvement with planning matters has thus been an example of grafting what is recognized as an administrative, policy-oriented function onto a judicial, legally-oriented tribunal without any corresponding changes to its modes of thought or of operation. It should therefore come as no surprise that the Board’s own planning policy development has been governed largely by this legal model, and has been directed primarily to the protection of mostly private rights and interests, as determined through its adversarial hearing process, rather than the exploration and development of public policy options. While the composition of the Board is here taken as a given rather than a matter for study and analysis, it is likely that the preponderance of lawyers throughout its history has had a significant bearing on the nature of its policy development. Legal training and practice have traditionally focussed more on the rights of and harms to individuals rather than on matters of public policy. As the analysis in Chapters four to six shows, this has to a great degree been the focus of the Board’s policy development also.

The Board’s annual reports reveal, in statistical form, the increasing importance of its planning role. Table 3-1 shows the number of planning and non-planning applications received in selected years, and tracks the emerging predominance of the former. Yet the table greatly understates the amount of the Board’s time and resources devoted to planning matters. Planning applications constitute the great majority of applications for which public hearings are eventually required. The largest number of non-planning applications have been for the approval of municipal debenture financing, for which approval has been largely automatic and public hearings rarely required. The ostensibly

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193 Planning applications include restricted area (zoning) by-laws and amendments, official plans and amendments, plans of subdivision, severances and minor variances. The most recent data do not fully capture the extent of the Board’s planning activity, as appeals of development control by-laws and site plan reviews, new types of planning-related controls, are not included in the planning category. Their numbers are small, however, and they would have only a limited effect on the overall data.

194 Hearings are normally required for assessment appeals also, but these are fewer in number than planning referrals or repeals.

195 The Board has guidelines for the amount of debt a municipality can safely carry. As long as this limit is not being exceeded, which the Board’s staff can determine, approval involves little more than signing the order.
municipal tribunal has thus evolved into a predominantly planning tribunal.\textsuperscript{196}

\begin{center}
\textbf{TABLE 3-1}
\end{center}

\begin{center}
\textbf{Planning and Non-planning Applications}
\end{center}

\begin{center}
\begin{tabular}{|c|c|c|c|c|}
\hline
 & 1907 & 1925 & 1940 & 1959 & 1989-90 \\
\hline
Planning Applications & - & 76 & 116 & 1169 & 3346 \\
Other Applications & 191 & 564 & 1057 & 3199 & 2409 \\
Total Applications & 191 & 640 & 1173 & 4368 & 5755 \\
Planning as per cent of total applications & 0 & 12 & 10 & 27 & 58 \\
\hline
\end{tabular}
\end{center}

N.B. 1989-90 reporting year includes portions of two calendar years.

\textsuperscript{196} This change in emphasis is reflected in a recent development. The provincial government is, as of the date of writing (October, 1998), preparing to merge the Board with the Assessment Appeal Board. The name currently being proposed for the new entity is the Planning and Property Tribunal. While the Tribunal's other areas of jurisdiction will remain, they are recognized as being subsidiary to its main functions, hearing planning and assessment appeals.
CHAPTER FOUR
THE ONTARIO MUNICIPAL BOARD AND PROVINCIAL POLICY

A. INTRODUCTION

1. The OMB and Provincial Policy: An example of ambivalence

One might expect that a tribunal created by a senior level of government would seek to apply the policies of that government, where applicable, to the matters being considered by it. This has certainly been recognized as a role of the OMB. The MacBeth Committee stated in 1972 that it "is satisfied that the OMB tries to follow government policy in making its decisions." Yet the evidence shows that the Board has accorded some importance to public policy, where it exists, but has also subordinated this to its own policy considerations when the two have been in conflict.

The Board’s treatment of provincial policy raises the perennial question of the "independence" of an administrative tribunal. Its existence and operation are the result of provincial policy decisions, and it is meaningless to say that the Board is "independent" of the province or politically unaccountable, in the sense that the courts are independent. In addition to this type of fundamental policy decision-making involved in the creation of the Board, the province has to some extent engaged in the creation of policy that is to be implemented within the planning system. The Board has recognized this. It has regularly taken the position that it must "have regard to" provincial policy, even before the enactment of section 3 of the Planning Act, 1983 made this a requirement in respect of formally adopted statements of provincial policy. In its 71st Annual Report, issued in 1976, it stated that "[t]he decisions of the Board are independent and are governed by the statutes and when not in statutory conflict have regard to government policy." Yet this is a misleading statement, as it suggests that the Board, as a matter of policy, has given much greater weight to provincial policy than the evidence in this chapter shows to have been the case. The Board’s "independence" in dealing with such policy has been substantial; primarily, it

197 Macbeth Report, supra note 6 at 3.

198 For a discussion of the independence of agencies in Ontario, see Macaulay, supra note 1, particularly Chapters 2 and 3.

would appear, because successive provincial governments have chosen not to interfere when the Board has treated provincial policies as matters it must consider, but to which it need give no greater weight than it does to other considerations.

A note regarding terminology would be useful. The terms provincial policy and government policy, both frequently used, are to some extent interchangeable, but the former has a broader meaning. It encompasses both government policy, which technically means policy which has received Cabinet approval, and ministry policy, those internal and often unpublished guidelines and standards developed by individual ministries and applied by them when, *inter alia*, reviewing planning applications.200 The distinction between these two terms is not always clear, however, and the umbrella term provincial policy will generally be used.

The limited extent of provincial policy must be kept in mind when analysing the Board’s treatment of it. The *Planning Act* has given little policy guidance. As noted below, provincial policy has been expressed in certain specific areas but, because of its applicability across the province, has had to be very general in nature. The province has been silent with respect to many procedural and substantive planning matters and, as shown in Chapters five and six, the Board has developed and applied its own policies in these areas. This chapter illustrates the manner in which it has addressed, and has or has not applied, those policies where they do exist, but it represents only a small part of the Board’s policy-related decision-making.

2. **The Sources of Provincial Policy: Many and varied**

Determining what constitutes provincial policy is a complex undertaking. Government is not a monolith. While Cabinet, acting formally as the Lieutenant Governor in Council, clearly speaks for the government, its decisions or expressions of policy pertaining to land use and development issues

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200 The question of what constitutes the public interest is also relevant here. While one might argue that the true public interest lies beyond those interests expressed by the government of the day, I believe that, for all practical purposes, statements of policy issued by a duly elected government or by its ministries must be taken as the most obvious expressions of the public interest.
are, with few exceptions, very general in nature. The day-to-day activities of government which impinge most directly and frequently on such issues are those of individual ministries, each of which has its own mandate and agenda. Within each ministry, policy pronouncements can include statements issued by the minister pertaining to either general policy or specific matters, policy guidelines formally issued by the ministry, and internal guidelines and standards developed by ministry staff to be applied by them in evaluating individual development applications.

The ministries which have been most directly involved with the planning and development matters coming before the board have changed over time with government restructuring, but are currently the Ministry of Municipal Affairs and Housing, the Ministry of Energy and the Environment, the Ministry of Natural Resources, the Ministry of Agriculture, Food and Rural Affairs and the Ministry of Transportation.

The province has been involved in the development of planning policies applicable to major growth areas, and to the province as a whole, but its interest in such activity has varied greatly over the study period. In the late 1960s and early 1970s it engaged, through the Ministry of Treasury,

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201 The removal, in the Planning Act, 1983, of the right to petition the Lieutenant Governor in Council from a Board decision under the Planning Act removed the Cabinet's one direct avenue of involvement with individual planning and development matters.

202 The former would be issued with Cabinet approval, and are effectively provincial policy. An example is the introduction of the UDIRA policy, discussed in Section C.3.

203 For policies in place during the later review period, see Guidelines Directory: A Listing of Provincial Policies and Guidelines related to Land Development (Toronto: Queen's Printer, 1993).

204 Unlike formally adopted policy statements and ministry guidelines, which are at least in published form, these are frequently unpublished and are subject to change at any time.

205 Ministry nomenclature can be confusing. Over the review period land use planning has been variously the responsibility of the Ministry of Treasury, Economics and Intergovernmental Affairs, the Ministry of Municipal Affairs and the Ministry of Municipal Affairs and Housing. The ministry responsible for agricultural land use matters was identified as the Ministry of Agriculture, then the Ministry of Agriculture and Food, before receiving its current name. The ministry responsible for transportation matters was identified as the Ministry of Highways, then as the Ministry of Transportation and Communications, and is now the Ministry of Transportation. The Ministry of the Environment is now the Ministry of Energy and the Environment. Ministry references throughout will generally be to the ministry as named at the time of the reference.
Economics and Intergovernmental Affairs, in a large-scale regional planning exercise to establish broad, long-term development patterns within the Toronto-Centred Region (hereinafter TCR). This was undertaken by the Ministry without a specific statutory basis, but it was intended to provide the framework for local planning activities undertaken within the ambit of the Planning Act. While this exercise in regional planning had little impact on subsequent development in the TCR, there remained support for the belief that there was a provincial interest in planning and development activities that transcended local interests, and that this interest should be given voice in more than ministry reviews of individual applications. During the 1970s, much consideration was given to limiting indiscriminate urban growth and to protecting good agricultural land, which led to the adoption of Urban Development in Rural Areas (hereinafter UDIRA) and the Food Land Guidelines (hereinafter FLG), respectively. This support for a provincial role in determining the general parameters of growth was expressed in the extensive review of the planning process during the 1970s and early 1980s which proceeded through various studies and government position papers. The White Paper concluded that a general statement of broad provincial interests should be incorporated into the Planning Act and that: "To elaborate on defined provincial interests, the Act will authorize the Minister either independently or jointly with other Ministries, to publish policy circulars. In addition, the legislation will be supported by regulations and planning guidelines." The culmination of this process was the enactment of the Planning Act, 1983.

While the major purpose of the Act was to enhance local responsibility for planning, section 2

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207 For discussion of why the TCR concept was largely unsuccessful, see M.W. Frankena and D.T. Scheffman, Economic Analysis of Provincial Land Use Policies in Ontario (Toronto: Ontario Economic Council, 1980) at 44 and 127; F. Frisen, Planning and Servicing the Greater Toronto Area: The Interplay of Provincial and Municipal Interests, in D.N. Rothblatt and A. Sancton, eds., Metropolitan Governance: American/Canadian Intergovernmental Perspectives (Berkeley: Institute of Governmental Studies Press, 1993) at 153.

208 Subject to Approval, supra note 7; Comay Report, supra note 7.

209 White Paper, supra note 7, and several associated background papers.

210 Ibid. at 38.

211 S.O. 1983, c. 1.
required the Minister of Municipal Affairs to have regard to substantive matters of provincial interest, examples of which were set out in the section, and section 3 provided for the adoption by the Lieutenant Governor-in-Council of policy statements on municipal planning matters considered by the Minister of Municipal Affairs to be of provincial interest. Once these were adopted, municipalities and the Board were required to have regard to them. Such policy statements, it should be noted, were not limited to the matters of provincial interest listed in section 2.

There were other provincial decisions which, while not government policy as defined herein, reflected the differing mandates and policies of specific ministries and have had a significant impact on development patterns in the province. The Ministry of Transportation has been responsible for the locating and construction of new highways, and its decisions, particularly with respect to the expressway system, have done much to determine where major urban development will occur. The Ministry of the Environment, through its approval and construction of trunk water and sewer systems, particularly the South Peel Servicing Scheme in the 1960s and York-Durham Scheme in the 1970s, has given a great impetus to growth in the areas served by those schemes. The Ministry of Housing’s Ontario Housing Action Program of 1973-78 was designed to accelerate residential development in areas west, north and east of Metropolitan Toronto. These ministry activities, probably more so than formal land use planning policies, have established the context within which the Board has exercised its decision-making responsibilities.212

In addition to developing general planning policies, and making investment decisions affecting general patterns of urban growth, the ministries of Municipal Affairs, Environment, Natural Resources and others have been actively engaged in developing and applying ministry policy, internal guidelines and standards to assist them in carrying out their mandates.213 They have regularly reviewed proposed official plans and amendments, and have often required them to be

212 The clash between the regional land use policies and these programs to meet other goals, such as providing services or land for housing, were summarized in Frankena and Scheffman, supra note 207, at 143: "It is evident, however, that the province pursued its housing obligations west of Toronto in Peel without being constrained by the TCR plan."

213 The Guidelines Directory, supra note 203 lists 43 guidelines issued by these ministries pertaining to land development.
modified to meet ministry "concerns", a code word for the guidelines, internal policies and standards applied by their officials. Ministries have been required also to comment on zoning by-laws under appeal to the Board, which has often placed heavy reliance on these comments in arriving at its decisions.

Approved official plans may also be considered as indirect expressions of provincial policy. They require the approval of the Ministry of Municipal Affairs and Housing, which approval is not given unless formal statements of government policy are complied with and ministry guidelines and standards are taken into consideration in official plan policies. While official plans are approved by the province they must, however, be considered primarily as expressions of municipal, not provincial, planning policy.

In addressing the relationship between the Board and the provincial government, as expressed through the former’s treatment of provincial policy, the primary focus is on how it has dealt with formal expressions of policy, such as provincial policy statements and ministry guidelines. It is also important, however, to note the significance that it has attached to ministry evaluations of individual development proposals. These are indicators of an ongoing, everyday relationship between the Board and the agencies of government which are most directly concerned with the subject matter of its hearings. Also, it regularly considers the conformity of development applications with official plans, and the importance of the province’s indirect influence on the Board through its approval of official plans must also be acknowledged. My purpose, however, is to examine the Board’s treatment of provincial policy per se. Policy as expressed in approved official plans, while it may be considered an indirect form of provincial policy, is essentially local planning policy which has been accepted as fitting into the provincial policy framework.

B. DECISION DATA: The infrequency of consideration of provincial policy
The data reveal three notable characteristics. The first is the infrequency with which the Board, a

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214 The link between provincial policy and official plans has been made more tenuous through the transfer of official plan approval authority to upper tier regional and district municipalities, but even these give their approvals within the larger context of provincial policy, where it is applicable.
provincial tribunal, has addressed provincial policy at all. This was particularly noticeable during the 1971-78 review period, but was the case also during the 1987-94 period when provincial policies had received statutory sanction. The second is the great differences in the types of policy being addressed by the Board in each of the review periods as a result of the government’s changing approach to policy development. The third is the infrequency with which the province chose to play a direct role as a party even when its own policies were in issue.

The areas here selected for review and analysis are the province’s regional-scale planning policies for south-central Ontario in the 1960s and 1970s, policy statements pertaining to the protection of agricultural lands, policy statements adopted under section 3 of the Planning Act, 1983, environmental protection guidelines, and a miscellany of other examples. The policies included in the analysis of Board decisions for the 1971-79 and 1987-94 review periods, and the frequency with which various policies were addressed by the Board, is indicated in Table 4-1. This list does underrate the importance of provincial involvement, however, as it excludes reference to ministry comments and guidelines which are considered by the Board but are rarely referred to in its decisions.

It is significant that the OMB, a provincial agency, has given consideration to government policy in only a minority of its decisions. During the 1971-78 review period the Board addressed government policy in only 64, or 18% of the 348 decisions reviewed for this period. During the 1987-94 review period this figure increased to 103, or 32% of the 321 decisions reviewed. This was a significant increase, although it still represented only a minority of the decisions reviewed. It was indicative of the increasing importance of government policy in the planning system, arising from the introduction into the system, between the two periods, of matters of provincial interest and provincial policy statements, and from the increasing importance of agricultural land protection and environmental protection policies by the later review period.

Table 4-1 shows that the provincial policy mix addressed by the Board differed considerably between the two review periods. In the earlier period, regional land use planning and policies
TABLE 4-1
Provincial Policies - Frequency of Consideration

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>%</td>
</tr>
<tr>
<td>Regional planning - Total</td>
<td>64</td>
<td>100</td>
</tr>
<tr>
<td>Design for Development</td>
<td>12</td>
<td>19</td>
</tr>
<tr>
<td>Toronto-Centred Reg. Plan</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td>COLUC</td>
<td>8</td>
<td>13</td>
</tr>
<tr>
<td>Policy statements - Total</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Aggregates</td>
<td>n.a.</td>
<td></td>
</tr>
<tr>
<td>Flood Plains</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Housing</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wetlands</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Statements of Provincial Interest</td>
<td>n.a.</td>
<td></td>
</tr>
<tr>
<td>Agricultural land prot. - Total</td>
<td>24</td>
<td>38</td>
</tr>
<tr>
<td>UDIRA</td>
<td>11</td>
<td>17</td>
</tr>
<tr>
<td>Food Land Guidelines</td>
<td>8(1)</td>
<td>13</td>
</tr>
<tr>
<td>Agric. Code of Practice</td>
<td>5</td>
<td>9</td>
</tr>
<tr>
<td>Environmental prot. - Total</td>
<td>10</td>
<td>16</td>
</tr>
<tr>
<td>Niagara Escarpment</td>
<td>5</td>
<td>9</td>
</tr>
<tr>
<td>Min. of Environ. Guidelines</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>Environmental protection</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td>Other - Total</td>
<td>28</td>
<td>44</td>
</tr>
<tr>
<td>Economic development</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>25</td>
<td>39</td>
</tr>
</tbody>
</table>

(1) Including Ministry of Agriculture Strategy and Government Green Paper.

regarding urban development in rural areas were the most significant matters which it had to consider. By the later period, these policies were no longer in effect, whereas policy matters which did not exist in 1971-78, such as statements under s. 3 of the Planning Act, statements of provincial interest and the Food Land Guidelines\textsuperscript{215} were of great importance. During the 1971-78 review

\textsuperscript{215} The latter is not entirely correct, as the Food Land Guidelines arose from agricultural land protection policies in effect from 1976 on, and were adopted as provincial policy in 1978. During the earlier
period regional planning policies were addressed in only 19% of the decisions in which provincial policy was considered. During the 1987-94 review period, in contrast, policy statements adopted under the Planning Act were addressed in 36% of such decisions, thereby suggesting the greater significance of these policies in the planning process. Other results suggest that government policy formulation had matured by the early 1970s, although the content of such policy continued to evolve over the entire 1971-94 review period. Agricultural land protection policies also existed in both review periods, although consideration of them increased from 38% to 46%. Surprisingly, given the increasing emphasis being placed over time on environmental protection, the frequency with which the Board addressed provincial environmental protection policies increased from 16% to only 18%. Another change of note is the great decline, from 39% to 10%, in the consideration of miscellaneous statements of policy. It is not clear why this change should have occurred. It is possible, however, that as government policy become both more encompassing and more closely integrated into the planning process through the 1983 introduction of s. 2 and 3 into the Planning Act, the scope for and the relative significance of other expressions of policy declined.

Table 4-2 shows the infrequency with which the province has chosen to intervene directly when its own policies have been in issue. Its intervention rate in support of applications has been negligible in both review periods. Its intervention rate in opposition has been greater, and increased over time.

\[\text{\textsuperscript{216}}\hfill\text{The regional planning policies applied only to south-central Ontario, a large region centred on Toronto, whereas other policies applied to the entire province. It would therefore be more accurate to compare the number of times these policies were addressed with the number of decisions involving the same area. Yet even this comparison would not obviate the fact that they were rarely addressed at all.}\]

\[\text{\textsuperscript{217}}\hfill\text{The term "agricultural protection policy" is here rather loosely applied to the 1971-78 period. It includes Urban Development in Rural Areas which, as the name suggests, was directed to minimizing unserviced residential and other non-farm related development in rural areas. Despite this, its effect was generally to protect agricultural lands, and it is appropriately included in this category of government policy.}\]

\[\text{\textsuperscript{218}}\hfill\text{Some of the matters loosely addressed as government policy during 1971-78 such as, for example, Ministry of Transportation restrictions on residential development along highways, might by 1987-94 have become subsumed into ministry guidelines and standards. As noted above, these have been considered by the Board in its decision-making but are not addressed in its decisions as formal statements of government policy.}\]
TABLE 4-2

Direct Provincial Participation

A - all decisions during period  
B - decisions in which provincial policy considered

1971-1978

<table>
<thead>
<tr>
<th></th>
<th>A</th>
<th></th>
<th>B</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>%</td>
<td>No.</td>
<td>%</td>
</tr>
<tr>
<td>Total Decisions</td>
<td>348</td>
<td>100</td>
<td>65</td>
<td>100</td>
</tr>
<tr>
<td>Province - Support</td>
<td>1</td>
<td>*</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Oppose</td>
<td>16</td>
<td>5</td>
<td>11</td>
<td>17</td>
</tr>
</tbody>
</table>

1987-1994

<table>
<thead>
<tr>
<th></th>
<th>A</th>
<th></th>
<th>B</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>%</td>
<td>No.</td>
<td>%</td>
</tr>
<tr>
<td>Total Decisions</td>
<td>321</td>
<td>100</td>
<td>103</td>
<td>100</td>
</tr>
<tr>
<td>Province - Support</td>
<td>6</td>
<td>2</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Oppose</td>
<td>43</td>
<td>13</td>
<td>38</td>
<td>37</td>
</tr>
</tbody>
</table>

* - less than 1%

Yet even during the 1987-94 period it opposed applications, generally on the ground that they contravened its policies, in only 37% of the decisions in which these policies were addressed. Nevertheless, direct provincial involvement as a party did increase over time, from 17% of the 1971-78 decisions involving government policy to 41% of such 1987-94 decisions. This suggests that provincial ministries were according increasing importance to policies under their jurisdiction, and to the need to ensure that those policies were followed. Not surprisingly, the province appeared most frequently where the application of its own policies was made an issue, either by its ministries or by other parties. It appeared as a party in 49 of the 348 1971-78 hearings, for example, in 42 of which provincial policies were addressed. Moreover, provincial involvement has been

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219 The obverse is that the province has rarely appeared as a party where government policy was not being addressed. It appeared in only 5 of the 284 1971-78 decisions in which government policy was not considered, and in 7 of the 218 such decisions in 1987-94.
overwhelmingly in opposition to applications, with the province appearing to defend its policies against development proposals which it believed contravened them. It appeared in opposition in all of the 11 1971-78 decisions and in 38 of the 42 1987-94 hearings in which it played a direct role as a party.

The province has been active in supporting some of its policies, but not others. It did not appear as a party in any of the 12 1971-78 hearings involving its regional planning policies and appeared in only 16% of the 37 1987-94 hearings involving statements of provincial policy. Conversely, it appeared more frequently, particularly during the later review period, when the application of its agricultural land and environmental protection policies was an issue. Thus it appeared as a party in 21% of the 1971-78 hearings in which agricultural land policies were addressed, and 53% of such 1987-94 hearings. The comparable figures for its appearance when environmental protection policies were being addressed were 40% and 53%. These differing patterns of involvement probably reflected its view that regional planning policies and provincial policy statements were intended primarily to provide municipalities with guidance in developing their own planning policies, whereas the agricultural land and environmental protection policies were to be applied more directly in assessing individual development applications.

The Board’s treatment of provincial policy provides some indication of the degree to which it operates independently of government. The data suggest that, while the introduction of government policy as a matter to be considered influences the Board’s decision, it is not determinative. As Table 4-3 shows, the Board has, overall, and in both review periods, shown a similar pattern of approvals and refusals. In each period a slight majority of the decisions were refusals, 56% in 1971-78 and 53% in 1987-94. The fact that the pattern was substantially the same for those decisions addressing government policy suggests that the existence of such an issue in a hearing had little influence on

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220 In addition, the province’s appearances as a party at hearings involving provincial policy statements were at those hearings in which environmentally-related policy statements, aggregates and wetlands, were being addressed.

221 This statement is not entirely true of the FLG. They were also intended to guide municipal decision-making, but soon became policy to be applied directly, along with policies in official plans. As noted below, the Board generally gave the two policy sources the same weight.
the Board’s decision-making. Differences did appear, however, where ministries appeared as parties in opposition. The refusal rate increased to 64% in the 1971-78 review period, and to 71% during 1987-94, where ministries were opposed. These changes suggest a direct provincial opposition did have some, but only a moderate impact on the Board’s decision-making.

TABLE 4-3
Approvals and Refusals

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>%</td>
<td>No.</td>
<td>%</td>
</tr>
<tr>
<td>(A) Total Decisions (1)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Approval</td>
<td>151</td>
<td>44</td>
<td>151</td>
<td>47</td>
</tr>
<tr>
<td>Refusal</td>
<td>193</td>
<td>56</td>
<td>169</td>
<td>53</td>
</tr>
<tr>
<td>(B) Decisions in which provincial policy addressed</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Approval</td>
<td>32</td>
<td>50</td>
<td>43</td>
<td>42</td>
</tr>
<tr>
<td>Refusal</td>
<td>32</td>
<td>50</td>
<td>60</td>
<td>58</td>
</tr>
<tr>
<td>(C) Decisions in (B) in which ministry in opposition</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Approval</td>
<td>4</td>
<td>36</td>
<td>11</td>
<td>29</td>
</tr>
<tr>
<td>Refusal</td>
<td>7</td>
<td>64</td>
<td>27</td>
<td>71</td>
</tr>
</tbody>
</table>

(1) Total decision data based on analysis of 344 of the 1971-78 decisions and 320 of the 1987-94 decisions. The remainder were excluded because they either involved multiple applications and included both approvals and refusals, or involved a motion, with neither the approval or refusal of the application itself.

It should be noted once again that the data do not reflect the true importance of provincial involvement, which often included having provincial staff appear as subpoenaed witnesses and the receipt of ministry comments on matters before the Board. They do, however, accurately reflect the province’s formal, high profile involvement as a party, an involvement which was the result of ministry decisions that a matter before the Board was of sufficient significance to its policies that it should play a direct role rather than rely on other parties defending them.
C. THE OMB’S TREATMENT OF PROVINCIAL POLICY: General and particular

1. The Board’s General Approach: Balancing the need to consider provincial policy with the need to apply its independent judgement

The Board has sought throughout both review periods to achieve a balance between the need to apply provincial policy and its need to apply its own independent judgement to the wide range of matters before it. Evidence of this dialogue is found in its own internal deliberations and in its decisions.

There are frequent references in the minutes of Board member’s meetings throughout the 1971-94 period to discussion of various government and ministry policy initiatives, correspondence between it and ministries with respect to these matters, and meetings with ministry officials to discuss them. Unfortunately, the nature of this evidence is that it is often more tantalizing than informative. The references suggest the existence of a relationship between the Board and the province, and of the former’s recognition of the need to give consideration to provincial policy, but they do so without giving much indication of content. There are some more specific references, however. Early in 1979, for example, following the government’s approval of the Food Land Guidelines as government policy, the members considered its application:

[X] referred to the ‘Provincial Government Food Land Guidelines’ publication, which the Members should be familiar with as government policy. [Y] was appointed to review and report at the next meeting on the points in such policy that the Members should follow.

....

A report was delivered by [Y] on the Food Land Guidelines and copies of the report are to be distributed for the information of all Members.222

The members more recently considered the application of the Growth and Settlement Policy Guidelines, and noted in the minutes of their meeting that:

Growth and Settlement Guidelines form the framework within which decisions are being made. They have been discussed by Ministers, approved by Cabinet and represent government policy. .... These are not policy statements under section 3 of the Act, and as a result, these guidelines do not have the same authority as a section 3 policy statement. ...

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222 Minutes of Board Members’ meetings, February 2, 1979 and March 30, 1979. The author was given access to the minutes of the Members’ meetings on condition that, in order to comply with the protection of personal information provisions of the Freedom of Information and Protection of Privacy Act, no personal information, i.e., names of individuals, be revealed.
In the hierarchy of policy tools, guidelines such as these would rank just below section 3 policy statements. They will provide essential policy direction.\(^{223}\)

The Board’s general position was expressed in a letter from it to a senior official in the Ministry of Natural Resources:

The declaration of provincial interest is a very strong tool to which the Board is obliged to give considerable weight during a hearing. However, as I emphasized at our meeting, it is not an end in itself. Unless the evidence is supportive of the provincial statement and its application in a particular hearing is clear for all to see, the matter could well fail. In short, as I said at our meeting, make sure you pick the right type of situation in which to impose the provincial interest. As an administrative tribunal, the Board conducts hearings in an adversarial environment and the evidence we hear is always the final determinant of the adjudication.\(^{224}\)

This summarizes as well as any decision the Board’s view that provincial policy constitutes evidence that it will consider and weigh along with other evidence, but it does less than justice to the importance it has attached to policy expressions, regardless of whether it has been required to have regard to that policy.

Evidence of the Board’s internal discussions of provincial policy is indicative of a close working relationship between it and the province, but its decisions best illustrate its view of the formal relationship between the two. The leading decision with respect to the interpretation and application of provincial policy in the pre-Planning Act 1983 period was the Caledon decision.\(^{225}\) The Board was required to consider the submission that the proposed official plan was in conflict with the Toronto-Centred Region Plan.\(^{226}\) It first performed the useful role of indicating where such policy

\(^{223}\) Minutes of Members’ meeting, September 18, 1992.

\(^{224}\) Letter dated September 6, 1990.

\(^{225}\) Re Township of Caledon Official Plan (1974), 2 O.M.B.R. 1. While the Board does not give leading decisions in the sense that a significant decision of a court will be openly followed, if not be binding through the operation of stare decisis, there have been some Board decisions which give clear expression to its position on various matters. These positions are reflected, if not always clearly articulated, in other decisions.

\(^{226}\) The context of this decision is unusual. It arose from an application under s. 42 of the Ontario Municipal Board Act for review of a decision approving the Caledon official plan, which had been issued 7 days before the unveiling of the TCR Plan. The review was requested by the Minister of Municipal Affairs on the ground that the official plan, as previously approved by the Board, contravened the TCR Plan with
was to be found:

This is found in the statutes, in Government regulations which have statutory force, in decisions of the executive council (the Cabinet) on appeals from the Board, and in official pronouncements by the Prime Minister or other Minister responsible in respect of the particular subject-matter. It was admitted by all counsel that Design for Development: Toronto-Centred Region is such an official statement of policy.\textsuperscript{227}

It then set out the manner, subsequently followed and variously applied by other panels throughout the entire review period, in which it was to interpret and apply provincial policy:

This Board applies such a policy by considering and interpreting the statement of policy with the assistance of counsel after making findings of fact on the evidence before it in much the same way as the Courts apply the law by considering and interpreting the pertinent law after making findings of fact on the evidence before them. The Government states its policy as of general application and this Board interprets and decides how that policy applies to the facts in the particular case without assistance from the Government or any member and applies that policy for reasons which are given in writing and which are subject to the Courts on questions of law and to the executive council (the Cabinet) on any question.\textsuperscript{228}

There are two matters of interest arising from this statement. Firstly, it is very revealing of how the Board sought to establish its independence of government. To do so, it relied heavily on a judicial model of its functions by equating statements of policy with legislation which it must, as do the courts, interpret and apply to the facts. This interpretation as strengthened by its statement that it interpreted policy “with the assistance of counsel”. While lawyers were accepted as experts in statutory interpretation, it did not follow that they were more versed in interpreting statements of public policy than were the politicians and public officials, directly responsible for their preparation, adoption and administration. Yet the Board stated that it was to perform this function “without assistance from the Government or any member”. Secondly, while this statement indicated the process the OMB was to follow in dealing with provincial policy, it did not indicate the substance of this activity. What criteria and standards was the Board to apply in “interpreting and deciding”?

\begin{itemize}
    \item \textsuperscript{227} Supra note 225 at 3.
    \item \textsuperscript{228} Ibid. at 3. Having permitted the review, the Board concluded that the estate residential policies in the official plan were in conflict with the TCR Plan because they provided for a much greater amount of development than was contemplated by the latter.
\end{itemize}
How was it to determine the weight to give to such policy, particularly in the face of other interests and planning issues? The policy statements themselves gave no guidance regarding these questions at this time.\textsuperscript{229} To answer them, one must look to the manner in which the Board responded to these policies and, of equal importance, to the manner in which it applied its own policies.

The Board further developed this theme in the \textit{Grimshy} decision,\textsuperscript{230} where it considered how it would deal with conflict between provincial and local policies. The issue here was the status to be granted to statements or opinions emanating from a Ministry objecting to a municipality’s official plan provisions and zoning by-laws.\textsuperscript{231} While the Board did not address the point, it appears that it did not treat this type of statement as being provincial policy. Nevertheless, its discussion of the relationship between local and provincial interests is indicative of its own policy of balancing interests:

It is not too difficult to imagine situations where the provincial view might differ from that of the municipal representatives, and where it is of such overriding concern that the provincial broader view should probably prevail. Sometimes a more flexible view may be required so as to not discourage a municipality adopting progressive planning legislation. Accordingly, the Board cannot lightly disregard the expressed desire made on behalf of the municipality in what it wishes to have approved.\textsuperscript{232}

This is a clear expression of the Board’s need to place even provincial policy in a larger context in which both provincial and local interests would be addressed. As the decisions reviewed in this chapter show, this statement is an accurate, although partial, expression of its “policy” for interpreting and applying expressions of provincial policy.\textsuperscript{233}

\textsuperscript{229} The requirement to have regard to certain expressions of government policy, but not all, did not come into effect until the enactment of the \textit{Planning Act. 1983}.

\textsuperscript{230} \textit{Re Town of Grimsby Official Plan and Certain Implementing Restricted Area (Land Use) By-laws} (1975), 4 O.M.B.R. 158.

\textsuperscript{231} The Ministry of Municipal Affairs was objecting to the official plan policies for lands for which the Niagara Escarpment Task Force had made different recommendations.

\textsuperscript{232} \textit{Supra} note 230 at 161.

\textsuperscript{233} See Chapter six, Section B for further discussion of the Board’s own policy with respect to the balancing of public interests, of which government policy is a partial expression, and private interests.
The Board's position in receiving and responding to expressions of provincial policy was addressed in lengthy and confusing fashion in a series of cases arising out of its interim order and final decision in the City of Barrie's annexation application.²³⁴ It had held that it was bound by provincial policy as expressed in a Minister's letter stating that the government had allocated a population to Barrie of 125,000, and it had refused to allow cross-examination on the letter. The cases culminating in the Supreme Court of Canada decision focussed primarily on the issue of cross-examination. The Court did, however, significantly limit the authority that expressions of provincial policy were to exercise over the Board's decision-making discretion, stating:

The effect of all these provisions is to leave the Board with the duty to dispose of the annexation issue "upon such terms as it may consider expedient" without any directives, statutory standards or guidelines, and without any right in the executive branch of government to limit the Board by order in council, regulation or otherwise,²³⁵ and that its receipt of such policy expressions did not affect the rights of other parties, including the right to cross-examine. The Court therefore appeared to have taken the position that provincial policy should be accorded no higher status than other evidence. This position was changed, however, by the enactment of the Planning Act, 1983. The Board, along with ministries, other agencies and municipalities, was required to have regard to policy statements issued under section 3 of the Act, and when acting in place of the Minister in approving official plans was required to have regard to the matters of provincial interest set out in section 2. The potential for granting more authority to the statements of provincial policy had therefore been created but, as noted below, the Board's approach showed little change.

The Board's position with respect to having regard to provincial policy was clearly enunciated in the Ottawa-Carleton decision:

The board is directed by the legislation and the judicial authorities to give a fair hearing to all interested persons with relevant views to impart, to use its independent judgement on


²³⁵ Innisfil cited to S.C.R., ibid. at 164.
the merits of the proposal, and to see that planning decisions are made with regard to proper planning principles, while always bearing in mind and having regard to provincial policy and the fact that, as one of several factors, the board is dealing with decisions of a duly elected body exercising legitimate legislative authority.\textsuperscript{236}

It continued to be aware of an uneasy balance between considering provincial policy and applying its independent judgement. Despite the rationale for exercising a degree of independence expressed in both review periods in the 	extit{Caledon} and 	extit{Ottawa-Carleton} decisions, it has recently expressed the subordination of its role to that of the province. In 	extit{IPCF Properties}\textsuperscript{237} it considered a motion that it adjourn two retail warehouse outlet hearings pending its decision in an ongoing hearing on this topic in another municipality. The rationale was that the ongoing hearing would establish general principles pertaining to this new form of retailing which could then be applied to the adjourned hearings. The Board refused the adjournment, stating that:

\begin{quote}
The board agrees ... that the motion requested is "an attempt to elevate the Brampton hearing to a generic hearing". The Planning Act does not provide for that kind of approach to planning issues unless a matter of provincial significance is addressed through a policy statement issued under s. 3 of the Planning Act. This board, no matter how constituted, has no authority to usurp the function of the government in articulating general policy that can be applied province-wide and made to affect municipal governments that were not a party to the proceedings. ... To grant the adjournment to await the Brampton Costco decision would, in effect, elevate that decision to what can be analogous in the Planning Act context as a provincial policy. That is improper.\textsuperscript{238}
\end{quote}

This statement illustrates two elements of the Board's position. It recognized that it lacked the jurisdiction to create formal policy where that jurisdiction has been specifically granted to the province, as under section 3, and it was consistent with its oft-expressed claim that it decides matters on the basis of the evidence before it, not on pre-determined policy. Yet, as evidence of the Board's own decision-making activities here and in Chapter five indicate, both of the above must be heavily qualified. It has not made provincial policy but, in the absence of any more specific directive than to have regard to, it has interpreted such policy as it sees fit. Where provincial policy has been silent, it has developed a consistency of jurisprudence in certain areas which could be

\begin{footnotes}


\textsuperscript{238}\textit{Ibid.} at 188-89.
\end{footnotes}
considered, in effect, as a form of policy created by a provincial agency, even if not formally endorsed by the government. As observers have noted, it has created substitutes for provincial policy in many areas where the latter is lacking. Frankena and Scheffman stated in 1980 that:

One of the most notable characteristics of provincial intervention in land markets is the extent to which the province has failed to provide clear statements of its policies. The lack of clear statements has resulted in considerable uncertainty among developers, municipal planners, and even provincial representatives concerning what provincial policy is, and it has given the OMB an inordinate amount of power to determine land use policy by default. 239

These authors then recommended that "the province provide clear policy statements for use by the OMB as well as municipal governments and landowners". While the province eventually did this to a limited extent, the Board has applied its own gloss in interpreting these as well as other expressions of provincial policy. Its "policy" has been to establish a balance between the latter and other matters which it considers important and, as shown below, that balance is not automatically in favour of provincial policy. The following sections illustrate how the Board has applied that approach in dealing with selected key expressions of provincial policy.

2. Regional Planning Policy
The OMB’s treatment of the province’s regional planning policies during the 1970s show that provincial policy played a marginal role in its deliberations and that, by that time, the Board was already, as a matter of its own policy, treating provincial policy as evidence to be accorded little if any greater intrinsic weight than other evidence placed before it.

In the 1960s and 1970s the provincial government engaged in an ambitious program of direct involvement in comprehensive regional land use planning. This became a matter of policy, in very general terms, with the release in 1966 of the White Paper, Design for Development, a document asserting the province’s responsibility for regional planning. This program was not intended to replace the traditional, locally-oriented land use planning process in which municipalities engaged under the Planning Act, but rather to complement it by providing a general, regional land use, transportation and servicing context within which local planning would take place. These two

239 Supra note 207 at 156.
planning functions remained separate at the provincial level. The Regional Planning Branch of the Ministry of Treasury and Intergovernmental Affairs was responsible for regional planning, while the administration of local planning remained the responsibility of the Ministry of Municipal Affairs.

The province was divided into regions, for each of which a plan was to be prepared. The first and only such plan to come into being was the Toronto-Centred Region Plan, a regional land use plan for an area of 8,600 sq. miles centred on Toronto, extending to Georgian Bay on the north and beyond Peterborough and Cobourg in the east and Hamilton and Kitchener-Waterloo in the west. The plan defined three zones, a heavily urbanized band along Lake Ontario, a commutershed to the north of this and a peripheral area beyond that. It designated growth centres within each zone, and stated land use objectives relating to the size and spatial distribution of urban centres and to the preservation of land for agriculture and open space within each zone. The TCR Plan was unveiled as government policy in May 1970. It was followed by further measures intended to translate its general concepts into more detailed plans and, particularly, to provide specific population allocations within the various subregions and growth centres. Reports in 1971 and 1972 recommended detailed population allocations, which were largely incorporated into the Central Ontario Lakeshore Urban Complex (hereinafter COLUC) Task Force report of 1974. None of these specific recommendations were, however, adopted as government policy.

In “The Hound of the Baskervilles” by Sir Arthur Conan Doyle, what Sherlock Holmes considered significant was that the dog did not bark in circumstances where barking would have been expected. Similarly, what is noteworthy here was not that the Board considered provincial policy, which one would have expected such a tribunal to do, but the infrequency with which it addressed a significant government regional planning policy during the 1971-78 review period. It addressed the major expressions of the policy, Design for Development, the TCR Plan and the COLUC report, in only

240 As the government had long abandoned its regional planning policy by 1987, this policy was not addressed at all by the Board during the 1987-94 review period. The government was now engaged in preparing provincial policy statements, ministry guidelines and other expressions of policy, the Board's treatment of which is reviewed below.
nine decisions, each being considered one, eight and three times, respectively. Furthermore, they played a limited role in the Board’s reasoning, even in the few decisions where they were addressed. Design for Development was referred to only in passing. Of the eight decisions in which the TCR plan was addressed, it was merely noted in four of them and appeared to be the main reason for the decision on only one occasion. Similarly, COLUC was noted in one decision, and was indicated as a reason for the decision in two others.

The reasons for this infrequency of government policy consideration cannot be examined here in detail, but do deserve some comment. One important reason was likely the difference in scale between the land use issues addressed in the regional planning policy and those most frequently considered by the Board. In most applications before it, the scale of development under consideration was too small to have any effect on, or to be affected by, the general policies and land use designations in the regional policies. On occasion, however, the Board did consider applications involving substantial amounts of land or having substantial impact on rural areas or on the natural environment. It seems more likely that this infrequency of consideration arose from two other causes, the lack of importance accorded to the regional policies by the participants in development activities, and the essentially passive role played by the Board. It is beyond my mandate to consider the political, economic or other reasons for the lack of attention paid to these policies. The result, however, was that parties rarely relied upon the TCR Plan or other policy statements in presenting their cases before the Board. Because of the Board’s understanding of its role as being the court-

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241 More than one of these was addressed occasionally in a decision. The Caledon decision, supra note 225, is not included in these figures, despite its importance in formulating the Board’s position in interpreting and applying government policy, as it was a 1970 decision.

242 Barrie Annexation, note 234 (O.M.B.). More accurately stated, government policy with respect to the population target for Barrie of 125,000, which was developed by the Simcoe-Georgian Area Task Force, a refinement of the TCR planning process, was the reason for the decision as to the amount of land to be annexed. Other considerations determined what lands were to be included and where the new boundary was to be drawn. This was not, technically, a planning decision. Nevertheless, the hearing dealt to a substantial degree with land use planning issues (as the author can testify from personal knowledge) such as the amount of land required for residential, industrial and commercial development, and the most appropriate locations for such land uses. The Board’s decision, once it had accepted the need to accommodate a population of 125,000, turned primarily on these planning matters.

243 For a discussion of these reasons, see Frankena and Scheffman, supra note 207.
like consideration of the evidence placed before it by the parties, it did not itself raise these policies, or seek to determine if they might be applicable in any given situation unless they were first brought to its attention by one or more of the parties.

It is noteworthy that the province was not a party, either in support or opposition, in any of these applications. The Board did not therefore have the benefit, other than in the Barrie annexation decision, of the views of the government as to whether, or how, its regional planning policy was to be applied to the facts of a case. It was therefore left with a free hand to apply to the interpretation and application of government policy the approach it established in the Caledon decision.

The Board was generally supportive of government policy, but normally in the context of its own policies. In Maxine it stated that the TCR Plan placed responsibility on a municipality to provide for orderly development within its boundaries and that "the Official Plan designations by the municipality ... are in the best public interest in view of the role that Barrie will be expected to assume under the general provisions of the Toronto-Centred Region Plan."244 In two decisions in the Town of Vaughan it relied to some extent on the TCR Plan. In the first, the amount of development proposed for a community within the Plan's commutershed, where urban development was to be on a limited scale, was too substantial for this location, but a lesser amount of development was approved.245 In the second, the fact that the site of a proposed theme park was within a zone in the TCR in which urbanization was to occur was a point in its favour, but what was determinative of the Board's approval was its application of its own policy pertaining to the principles of good planning.246 In Toronto Airways the proponent of an airport expansion argued


245 Re Vaughan Planning Area Official Plan Amendment 1 (1977), 6 O.M.B.R. 327. The main determinant of the amount of permissible growth here appeared, however, to be the regional municipality's interim policy paper on rural residential development.

246 Re Town of Vaughan Official Plan Amendment 74 and Restricted Area By-laws 156-77 and 180-77 (1978), 7 O.M.B.R. 369. Quaere whether the Board would have decided differently if the planning considerations had continued to be in favour of the project, but it had been located in a TCR zone in which a development of the proposed nature and scale was not permitted.
that the COLUC studies, which provided for urbanization in the vicinity of the airport, supported his planning rationale for its expansion, but the Board's decision to approve the expansion turned on the application of its own policies pertaining to the evaluation of interests and to interference with council decisions.\(^{247}\) Yet it was prepared to accord substantial importance to provincial policy where its applicability to development proposals of some scale became an issue. It took an extreme position in the Barrie annexation decision. When, during the course of the hearing it received a letter from the provincial Treasurer, the minister responsible for the TCR, stating that it was government policy that the board should order the annexation of an area that would accommodate a population of 125,000 by 2011, it stated that it was bound by the letter. The Divisional Court subsequently held that the Board was right in holding that it was bound to follow the letter as government policy,\(^{248}\) and its decision subsequently reflected this.\(^{249}\) In another hearing to structure the long term growth of a municipality within the lakeshore urbanizing zone in the TCR, the municipality took the position that it should be required to take only a limited amount of growth so as to preserve its character. The Board rejected this, stating that "because of the assigned role of Oakville by the Province in both the Toronto Centred Plan and the COLUC studies, there is an obligation on the municipality to accept its fair share of the population."\(^{250}\)

While the Board addressed regional planning policy in only a few decisions, its treatment of such policy was generally consistent in treating it as evidence whose weight and applicability it was to determine in the circumstances of each case. The only exception was the *Barrie Annexation* decision, in which it treated such policy as an absolute. It took a similar approach, as illustrated below, in its treatment of other expressions of provincial policy.

\(^{247}\) *Toronto Airways Ltd. v. Town of Markham* (1975), 4 O.M.B.R. 372. See Chapter five, Section D and Chapter six, Section B.

\(^{248}\) *Innisfil v. Barrie*, supra note 234.

\(^{249}\) *Barrie Annexation*, supra note 234 (Div. Ct.).

3. **Urban Development and the Protection of Agricultural Lands**

The government has long expressed an interest in the preservation of the province's agricultural land base. The demands in the 1960s for the encroachment of urban development into rural areas, particularly those having high-quality food lands, and for non-farm residential severances in such areas, led to the enunciation in 1966 of Urban Development in Rural Areas, a policy directed to the minimizing of scattered, minimally serviced non-farm development in rural areas. The policy was presented in an address by the Minister of Municipal Affairs,251 and was refined in an address by another Minister.252 The essence of the policy was that:

> Year-round, urban residential development should take place in municipalities that have adequate administrative organization to cope with urban problems; that are equipped for and are otherwise capable of providing and maintaining necessary urban services, including piped water, sanitary and storm sewerage, street maintenance, schools and recreational activities; and that have demonstrated a willingness and an ability to provide these services ... A limited amount of filling-in in existing development that might not conform with the general policy ... particularly in hamlets and other small settlements.253

UDIRA was sponsored by the Ministry of Municipal Affairs, and focussed on "traditional" land use issues, the provision of proper hard and soft services for urban development.254 The Ministry of Agriculture and Food (OMAF) was also concerned with the intrusion of urban development into rural areas, but its focus was on the protection of farm land so as to maintain an economically viable agricultural industry in the province. In 1976 OMAF released a statement of its reasons for protecting food lands from urban development pressures.255 This was followed in 1977 by a government Green Paper,256 which contained draft guidelines for municipalities to use in providing

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254 The term hard services means roads, water mains and sanitary and storm sewers. Soft services include schools, libraries, recreation facilities and other services generally provided by municipalities, school boards and other local boards.


in official plans and other planning tools for the protection of agricultural lands. In 1978 a refinement of these, the Food Land Guidelines, was released as a statement of government policy. While these Guidelines have never been formally adopted under section 3 of the Planning Act as a statement of provincial policy, they remain the province's policy in respect of the protection of agricultural lands and have been treated as tantamount to a section 3 policy statement.

(a) Urban Development in Rural Areas

UDIRA was introduced, and refined, by way of speeches made by provincial ministers on two occasions in 1966 and 1968. The policy was therefore well in place by the commencement of the 1971-78 review period, and the Chairman had stated what was to be the Board's policy with respect to it: "These statements should be accepted as containing present Government policy on the subjects in question and it is suggested that they should be followed by this Board as Government policy." The decisions in which it considered UDIRA provide a good example of how it dealt with a stated, and fairly specific, provincial policy prior to the 1983 amendment to the Planning Act which gave formal statutory authority to provincial policy statements.

The Board addressed UDIRA in 10 reviewed decisions during the 1971-78 review period. The facts in these decisions were much the same, as all involved an application by an owner to sever one to three rural residential or farmer retirement lots in rural areas. Opposition came almost entirely from public agencies, with the province and municipalities each opposing on four occasions. No

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258 The Foodland Preservation Policy Statement, containing policies similar to those in the Guidelines but updated, was released in 1986 in draft form, jointly by the Ministries of Municipal Affairs and of Agriculture and Food, but it was not adopted as a policy statement.

259 J.A. Kennedy, Memorandum to Board Members, May 29, 1969.

260 UDIRA is to be distinguished in this regard from the province’s regional development policies, culminating in the Toronto-Centred Regional Plan, as these were far more general in their policy provisions.

261 UDIRA was not considered at all during the 1987-94 review period. It had by then been long superseded by the Food Land Guidelines which, as discussed below, were frequently a factor in the Board’s decision-making.
other provincial policies were specifically addressed in these decisions.\footnote{262} In half of the decisions, it appeared that the Board was relying solely on UDIRA, while in the remainder this policy was only one consideration, with the decision being based also on its determination of interest evaluation, good planning or prematurity. It refused to approve the requested severances in every appeal where UDIRA was being considered.

In considering the Board’s application of UDIRA, it must be kept in mind that this was not an agricultural land protection policy \textit{per se}. Its focus was on the prohibition of urban development without proper services, although this could also, in practice, lead to the protection of good agricultural lands. The Board’s response was to treat the policy primarily as a matter of process rather than as a substantive planning tool. It articulated this position most clearly in \textit{Rodrigues}.ootnote{263} After quoting the Minister of Municipal Affairs’ 1968 UDIRA speech that “[u]rban development should not, with minor exceptions, occur in rural municipalities until the municipality has proven itself capable of handling the physical, financial and social consequences of such growth”, it stated that


extensive reference is made in this speech to the need of a municipal policy enunciation of how development should occur within its boundary and how it should be implemented, which normally presumes an official plan and land use regulations respectively.

... the Township of Erin is essentially rural in nature and, as indicated in the Government policy statement, most urban residential development within a municipality should not occur until it has recognized and assumed responsibility to ensure an orderly integrated growth within its capacity.\footnote{264}

Substantive planning issues were not addressed in this decision. Rather, it was a negative element in the process, the lack of approved planning policies as required by UDIRA, which decided the matter. The Board took the same position in other decisions in which UDIRA was the sole

\footnote{262} With one minor exception, in that transportation policy regarding strip development along provincial highways was considered on one occasion.


\footnote{264} \textit{Ibid.} at 2.
How much status, then, did the Board ascribe to UDIRA? It certainly applied the policy in each decision in which it was addressed. Because the policy dealt with the lack of approved planning controls, however, the Board was not, as in the case of its dealing with other provincial policies, put in the position of having to balance provincial policy against its own policy considerations. Nor was it called upon to balance this policy against development policies spelled out in official plans. It occasionally, in a manner that might be characterized as obiter, used the existence of the policy to bolster its decision based on non-conformity with an official plan.\textsuperscript{266} Other decisions, where it noted the existence of and relied on UDIRA, were based equally on the application of its own policies pertaining to good planning and prematurity.\textsuperscript{267} It thus appears that the Board was prepared to rely on UDIRA in the absence of other policy considerations, but was equally ready to treat it as having no greater bearing than its own policies where it considered these applicable.

(b) Food Land Guidelines

The Food Land Guidelines emerged gradually from 1976 on, and certainly responded to concerns of OMAF existing before that date. They were adopted as government policy in 1978. It is revelatory of the OMB's views with respect to the application of government policy to compare its treatment of an emerging policy in the last two years of the 1971-78 review period with its treatment of a fully-fledged matter of provincial interest, and de facto provincial policy statement in the 1987-94 period.

The Board was quick to apply the province's position as set out in the OMAF Strategy and the Green Paper, even though the matters dealt with in them did not constitute government policy until 1978. During the 1987-94 period, it is clear that it never doubted that the FLG were government


policy to which it must have regard. While they have never been formally adopted under section 3 of the Planning Act, the Board has recognized them as a matter of provincial interest under section 2. There was, however, an element of ambiguity in its treatment of the FLG which arose from their nature as policy instruments. They contained policies which municipalities were required to follow, but not the province. As stated in their Introduction:

They are intended to assist local municipalities, counties, or regions in planning for agriculture in the preparation of official plans or amendments which may affect rural land. The Guidelines also relate to land use or zoning by-laws, and severances and subdivision policies.

The Food Land Guidelines provide a method to incorporate agricultural considerations into local plans.

Their application was limited, however: "It should be noted that the Guidelines are intended only to assist in planning for agriculture, and are not intended to address all of the issues related to planning in rural areas." Also, the FLG made it clear that they are not to be applied independently of official plans. The implementation provisions stated that:

The Food Land Guidelines will be implemented over the next few years as new official plans are introduced, and old plans are updated. Municipalities with official plans not in conformity with the Guidelines are encouraged to review and update their plans. Over the next three to five years, with plans now under review, and the regular amendment of plans, it is expected that official plans will be brought into conformity with the Guidelines.

The Board appears, particularly in the 1987-94 review period, to have adopted an approach to the application of this provincial policy which extends its application beyond that envisioned in the policy itself.

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269 Although ministries, when reviewing official plans prior to their approval by the Minister, are to consider whether the agricultural land protection policies contained in the plans meet the FLG.

270 Supra note 257, Sections 1.6, 1.7.

271 Ibid. section 1.8.

272 Ibid. section 5.5.
As provincial policy in this area did not emerge until late in the 1971-78 review period, the Board had little opportunity to address it. As Table 4-4 shows, the OMAF Strategy, Green Paper and FLG were addressed in eight reported decisions, of which five were severance applications for non-farm residential use in rural areas, and two were subdivision applications. As expected, the owners supported the applications in each case. As with decisions involving UDIRA, opposition was overwhelmingly from public agencies, not neighbouring owners. Despite the fact that provincial policy was in issue, the province played a minor role, appearing as a party on only a single hearing. Municipalities were in opposition in the other seven. The public agencies were largely successful, as the Board refused approval in 75% of its decisions, and approved in only 25%.

### TABLE 4-4

**Food Land Guidelines Decisions**

(1971-1978 data includes decisions in which Food Land Strategy and Green Paper considered)

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<td>Decision</td>
<td></td>
<td></td>
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<tr>
<td>Approve</td>
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<td>25</td>
</tr>
<tr>
<td>Refuse</td>
<td>6</td>
<td>75</td>
</tr>
</tbody>
</table>
The Board considered the application of the FLG in 43 decisions included in the 1987-94 analysis. As might be expected, 33 of these involved severance applications, mostly again for non-farm residential development in rural areas. Many of the latter involved farm retirement lots, and the impact of these on the continuation of agricultural uses. Nine of the decisions involved applications related to agricultural uses, and addressed the continuing viability of the agricultural use of both the severed and remaining parcels.

The FLG decisions in the 1987-94 review period exhibited a different pattern of party involvement than occurred in respect of other policy areas, where neighbours have regularly appeared in opposition to applications, and the province has rarely played a role. The municipal position has been divided, with municipalities supporting development in 16 hearings and opposing it in 23. Unlike during the earlier review period, however, the province played a very significant role, appearing in opposition on 24 occasions. The province and/or municipalities appeared in opposition in 38 of the hearings. Neighbours appeared in opposition in only 9 hearings. The pattern of these hearings has therefore been primarily one in which the province or municipalities have sought to have the policies expressed in the FLG applied to prevent development. They have been largely successful, as the Board has refused to approve applications in 72% of its decisions, and has given approval in only 28%.

Although the Board was dealing in the latter part of the 1971-78 period with ministry statements, not formally adopted provincial policy, it accepted these statements as significant matters to be addressed in considering applications affected by them. In Lakeshore, an application to permit cottage development in an area designated Agricultural in an official plan, it addressed official plan policies, the OMAF Strategy and the Green Paper. Its decision was based primarily on the Green Paper statement that “the use of prime agricultural land for other purposes must be justified including a “documented and demonstrated need ... with reasoning as to why the use cannot be located on poor lands or within non-agricultural designations”, and it refused the application.

\[^{273}\text{Lakeshore Developments Ltd. v. County of Huron (1978), 7 O.M.B.R. 24.}\]

\[^{274}\text{Ibid. at 26.}\]
because "the Board does not consider that sufficient evidence was presented to support the need for more seasonal residential at the expense of taking excellent farm land out of production." \(^{275}\)

Similarly, in Parshan, \(^{276}\) it refused to approve the creation of residential lots on high quality agricultural lands on the ground that the application was contrary to the principle set out in the Green Paper, which it stated "is present government policy that good farm land is to be preserved, not only for the future residents of Richmond Hill but for the whole Province." \(^{277}\)

While in the above decisions the application of provincial policy was paramount, the Board generally treated it as only one among other considerations, primarily interest evaluation, good planning and prematurity. It appears in these other decisions that it decided on the basis of the application of its own policy approaches in these areas, with the application of provincial policy serving largely as reinforcement for its conclusions. \(^{278}\)

All of the decisions noted above involved applications to permit residential development in rural areas, and in all instances the applications were refused. In dealing with severance applications pertaining to agricultural operations, however, the Board exhibited an independence of interpretation reflecting its basic policy position with respect to provincial policy, namely that its role is to interpret and apply such policy in specific fact situations. In Heathcote, \(^ {279}\) it refused to accept OMAF’s interpretation of the Green Paper that a 20-acre parcel was too large to be retained as a retirement lot or that the remaining 80-acre parcel was inadequate for farming. Similarly, in Ginou, \(^ {280}\) it refused to accept the OMAF argument, based on its interpretation of the Green Paper,

\(^{275}\) Ibid. at 27.

\(^{276}\) Re Parshan Subdivision and Richmond Hill (1979), 9 O.M.B.R. 119. See also Rush, supra, note 266.

\(^{277}\) Ibid. at 122.

\(^{278}\) See Re City of Thorold Restricted Area By-laws 18(75) and 34(75) (1979), 8 O.M.B.R. 290; Laviolette v. Town of Rockland (1979), 8 O.M.B.R. 297; Re Township of Zorra Restricted Area By-law 92-76 (1979), 8 O.M.B.R. 317.


that the severance of a 100-acre farm into two 50-acre parcels would reduce their viability for farming.

By the 1987-94 review period the FLG had become well established government policy, and the Board had become accustomed to interpreting and applying them in a wide variety of situations. An analysis of its decisions during this period shows it to have adopted an approach to the application of the FLG which extended their application beyond that envisaged in the policy itself. Since the policy was expressly intended as a guide to the preparation of official plans, the Board could have had regard to the government policy by limiting itself to the interpretation of official plan policies only. Yet it consistently examined the FLG as well as official plan policies, and has treated them on a par with each other in determining whether the proposals contravene either or both sets of policies. Where contravention occurred, the applications were not approved. In virtually all of these decisions, the Board did not see a conflict between the two sets of policies and was not therefore required to balance one against the other. It is not clear why it accorded this status to the FLG, but its approach appears to have been driven by the parties, who have regularly argued for or against development proposals on the ground of conformity with both the FLG and official plan policies. It thus appears to have been caught up in a larger misunderstanding of the role of the FLG fostered by the various parties to the development process.²⁸¹

In the few instances when the Board has clearly had to have regard to the FLG directly, where an official plan amendment has been in issue, it has done so. As it noted in the Ottawa-Carleton decision:

... neither the official plan, the Planning Act, 1983, nor the Food Land Guidelines prohibit the consideration of an amendment to the official plan in respect of agricultural land. If such change is contemplated, however, it must be justified along the lines of the four tests of s. 3.14 of the Food Land Guidelines.²⁸²

²⁸¹ The term misunderstanding may not be accurate. It is possible that what has occurred in the application of the FLG has been a policy shift by the parties from considering them as a tool to be applied in local official plan policy development to a policy to be applied independently in its own right, regardless of the extant official plan policies. An examination of the accuracy of this theory is, however, beyond the scope of this work.

²⁸² Supra note 236 at 172.
Despite its acceptance of the FLG as government policy, it has balanced them with other interests and occasionally overruled them where it concluded that other interests outweighed them. It has, for example, permitted severances contravening them so as to protect two historic houses, stating that:

The board considers the creation of these lots and the public benefit resulting in the preservation of these homes outweighs the broader and more general public interest expressed in these guidelines concerning the elimination of uses that conflict with agriculture.\(^{283}\)

While the Board has had to have regard to government policy as expressed in the FLG, it has not considered itself bound to accept the interpretations of them offered by ministry officials. In several decisions it has approved development proposals, even though opposed by OMAF on the ground of non-conformity with the FLG, on the basis of its interpretation that the proposals in question did not contravene them.\(^{284}\)

(c) Agricultural Code of Practice

The Agricultural Code of Practice (hereinafter Code) differs greatly from UDIRA and the FLG. It is a technical policy guideline prepared by OMAF, while the latter are general statements of government policy directed to a wide range of measures to achieve certain planning goals considered desirable by the government. Its purpose is to protect agricultural uses, particularly offensive uses such as piggeries and feed mills, from demands from residential and other non-farm related uses for their curtailment or discontinuance as being nuisances by providing guidelines for a minimum distance separation between them. As such it represents an attempt by government, acting through the relevant ministry, to regulate the common law concept of nuisance in respect of specific combinations of land use so as to give a degree of protection in advance to a particular use.

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\(^{283}\) Roamin' Stables Ltd. v. Town of Markham Committee of Adjustment (1988), 21 O.M.B.R. 482 at 486.

\(^{284}\) See, for example, Witteveen Meats Ltd. v. Township of South Dumfries Committee of Adjustment (1993), 27 O.M.B.R. 102; MacMillan v. County of Prescott and Russell Land Division Committee (1993), 28 O.M.B.R. 141.
which it wishes to protect.\footnote{It is of interest, although beyond the scope of the thesis to examine the reasons why the government has chosen to give this form of protection to agricultural uses only. Chapter six, Section B shows how, in the absence of government policy to provide a degree of separation between incompatible land uses, the Board has developed and applied its interest evaluation and impact assessment policies to achieve, \textit{inter alia}, the same protection.}

The Code has been addressed in too small a number of analysed decisions, five in 1971-78 and four in 1987-94, to make statistical analysis meaningful, or to be able to distinguish differences in the Board’s approach to applying it in the two review periods. The decisions do show, however, that it has applied this technical expression of agricultural land protection policy in much the same manner as it has the more general and inclusive UDIRA and FLG. It has recognized that they must be heeded as government policy, yet has shown the same ambivalence establishing the degree of significance to be accorded to them.

At the most immediate level, the clear failure of a non-farm development proposal to meet the minimum separation distance requirements of the Code has given the Board sufficient grounds for refusing to approve them.\footnote{\textit{Cameron v. County of Bruce} (1978), 7 O.M.B.R. 460; \textit{Re Township of South Dumfries Restricted Area By-law} 17-77 (1979), 9 O.M.B.R. 109.} However, where there has been a degree of uncertainty with respect to the application of the Code, it has held that the criteria for calculating the minimum separation distance is open to interpretation, and has applied its own interpretation.\footnote{\textit{Re Township of Nichol Restricted Area By-law} 897 (1977), 6 O.M.B.R. 489; \textit{Re Newmarket Planning Area Official Plan} (1979), 8 O.M.B.R. 319.} This is consistent with its overall approach to its role of applying government policy in particular situations. The ambivalence of the Board’s approach is shown, however, in its assessment of the status to be accorded to this expression of government policy. It has accepted that the Code had a life of its own, and that it did not depend for its application on being embodied in a zoning by-law.\footnote{\textit{Re Township of Nepean Restricted Area By-law} 73-76 (1979), 9 O.M.B.R. 36.} Taking this matter a step further, it has held that where there is a conflict between a zoning by-law and the
Yet it has also subordinated the application of the Code to its own impact and interest evaluation policies, refusing to approve non-farm residential severances which complied with the minimum distance separation formula of the Code on the ground that, in addition to such compliance, “the severance must not create conflicts or potential conflicts with the surrounding farm operations.”

4. Matters of Provincial Interest

The province greatly strengthened its potential for playing a direct role in the planning process by introducing the statutory concept of matters of provincial interest. As section 2 of the Act stated:

2. The Minister, in carrying out his responsibilities under this Act, will have regard to, among other matters, matters of provincial interest such as, [for example]
   (a) the protection of the natural environment, including the agricultural resource base of the Province, and the management of natural resources; ...
   (d) the provision of major communication, servicing and transportation facilities; ...
   (f) the co-ordination of planning activities of municipalities and other public bodies; ...
   (j) the provision of a range of housing types.

On its face, section 2 placed no direct onus on the Board to have regard to these matters, either explicitly or by implication. The only specific statutory requirement was that it and other parties involved in plan of subdivision and severance applications were to have regard to, inter alia, “the effect of development of the proposed subdivision on matters of provincial interest referred to in section 2.” In addition, if the Minister declared that an official plan or zoning by-law or any part thereof before the Board had or may have an effect on a matter of provincial interest, its jurisdiction

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291 This sub-section was not in the Planning Act, 1983, but was added by the Planning Amendment Act, 1989, S.O. 1989, c. 5, s. 2.

292 Section 2 was amended by the Planning and Municipal Law Statute Amendment Act, 1994, S.O. 1994, c. 23, s. 5 to require that, in addition to the Minister, “the council of a municipality, a local board, a planning board and the Municipal Board” also had regard to matters of provincial interest. This amendment was made too late in the review period to affect the decisions analysed here. In any event, as described here, the Board did not ignore matters of provincial interest prior to 1994.

293 Planning Act, 1983, s. 51(4)(a), 53(2).
with respect to that document was limited to making a recommendation which would not come into force until confirmed by the Lieutenant Governor in Council.\textsuperscript{294} Despite the only occasionally imposed statutory requirement to consider matters of provincial interest when hearing official plan or zoning by-law applications, the Board has treated them in the same manner as other expressions of provincial policy, and has given them the same weight.

Although section 2 had been in place since 1983, it was only in 1988 that the Board was required to consider how it was to be applied in the context of a hearing. \textit{Fabbri}\textsuperscript{295} dealt with applications to permit additional estate residential building lots and enlarged building envelopes within a natural environmental area. The Board stated that "by operation of ss. 2 and 17(18) of the \textit{Planning Act, 1983} ... the board is required to consider, as is the Minister, the protection of the natural environment"\textsuperscript{296}, and concluded that the proposed development was not consistent with the retention of the existing natural features. Its most significant consideration of this matter came, however, in the 1992 Etobicoke motel strip decision.\textsuperscript{297} The Minister of Municipal Affairs had, well before the hearing commenced, made a declaration of provincial interest under subsection 17(19) of the Act, but had given no particulars until the hearing as to where the provincial interest lay or how it was affected by the proposed official plan. The Board concluded that "when hearing matters referred to it by the Minister such as this plan, [the Board] must also bear the matters under s. 2 in mind, as it stands in the shoes of the Minister on such referrals."\textsuperscript{298} It concluded also that, as the Minister had not identified the parts of the official plan affecting matters of provincial interest, the whole plan was to be taken as possibly affecting such matters, with the result that the entire

\begin{footnotes}
\footnote{294} \textit{Ibid.} s. 17(18)-(20), 34(27)-(29).


\footnote{296} \textit{Ibid.} at 272.

\footnote{297} \textit{Re City of Etobicoke Official Plan Amendments C-65-86 and C-82-88 (No. 2)} (1993), 27 O.M.B.R. 129.

\footnote{298} \textit{Ibid.} at 242. The Board based this conclusion on its role under an official plan referral. Quaere whether the Board would have come to the conclusion that it was required to have regard to matters of provincial policy when hearing a zoning by-law appeal under s. 34, as it was here not "in the shoes of the Minister", but was exercising an independent appellate capacity.
\end{footnotes}
decision would be subject to confirmation by the Lieutenant Governor in Council. Having said this, it proceeded to distinguish by implication between the statutory, procedural effect of the Minister's declaration, which removed its jurisdiction to make a final decision, and the practical implications of such a declaration to its decision-making. Although the government was here presenting its positions with respect to matters of provincial interest, the Board accorded no higher status to these positions than to the positions of the other parties. It was, in effect, distinguishing between the declaration of matters as being of provincial interest, which established a context within which to evaluate the evidence, and the evidence and the positions put forward by the various parties. In dealing with the latter, it did not appear to accord any greater weight to the evidence and arguments of the government than to those of other parties.

Even in its dealings with plans of subdivision, in which clause 51(4)(a) required it to have regard for matters of provincial interest, the Board has rarely given explicit consideration to such matters. It is noteworthy, however, that it did so in two recent hearings in which the Ministry of Municipal Affairs played an active role as the appellant. In Lapointe it refused to approve the creation of waterfront residential lots in the face of Ministry opposition, based on the provincial Growth and Settlement Policy, to permanent residential development in unorganized areas where there were no planning controls or municipal structures to deliver services. The Board stated that:

One of the matters to which the board must give consideration under s. 51(4) of the Planning Act is the effect of development of the proposed subdivision on matters of provincial interest. ... the province has an interest in orderly growth and settlement that does not become a drain on the resources of existing municipalities or of the province itself. Planning controls are also necessary to ensure that the natural environment, in which the province also has an interest, is protected.

299 For example, the government declared the secondary plan, dealing with detailed planning issues, to be a matter of provincial interest, and retained a firm of design consultants to prepare specific design guidelines for development proposals. The Board considered the design guidelines to be generally acceptable on planning grounds, but subjected them to considerable amendment to meet the many concerns raised by the affected property owners.


301 Ibid. at 499-500.
The Board expressed similar views in *Robinson*. In both decisions it should be noted, however, that it was dealing, at the behest of the Ministry of Municipal Affairs, with provincial policy applied directly by the Ministry in territory without municipal organization. Where the Ministry was not involved as a party, or matters of provincial interest were not raised by the parties, such matters do not appear to have been addressed by the Board.

5. **Statements of Provincial Policy**

The Board's treatment of policy statements adopted under the *Planning Act* provides a good example of how a tribunal has applied expressions of general policy to the specific circumstances of individual cases. Because of the differing nature of policy statements, and the greatly differing circumstances of their application, the Board has shown some inconsistency in their application. Despite this, two main policy-related themes have emerged from the decisions. The Board has treated provincial policy statements as the evidentiary equivalent of municipal official plans, and it has subordinated these statements to its own policies in respect of impact and good planning.

The enactment of the *Planning Act, 1983* created the potential for provincial policy, and a form of adherence to such policy, to become a central feature of the planning process. Section 3 stated that:

(1) The Minister, or the Minister together with any other minister of the Crown, may from time to time issue policy statements that have been approved by the Lieutenant Governor-in-Council on matters relating to municipal planning that in the opinion of the Minister are of provincial interest.

(5) In exercising any authority that affects any planning matter, the council of every municipality, every local board, every minister of the Crown and every ministry, board, commission or agency of the government, including the Municipal Board and Ontario Hydro, shall have regard to policy statements issued under subsection (1). (underlining added)

Four section 3 statements were formally approved: Mineral Aggregate Resources (May 9, 1986), Flood Plain Planning (August 11, 1988), Land Use Planning for Housing (July 13, 1989) and

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Wetlands (May 14, 1992). The Food Land Guidelines, adopted by the province in 1987 and regularly applied as policy since then, have been proposed for adoption as a policy statement but have not been so adopted. These four policy statements were thus the only expressions of provincial policy to which the Board was statutorily required to have regard during the 1987-94 review period. Despite this, there is no evidence that it treated them differently from other expressions of provincial policy.

The policy statements fell into two categories. The purpose of the Housing Statement was to provide general guidelines for local planning. Its objectives were to foster municipal land use planning practices which were responsive to housing needs throughout the province. Municipalities were required, in order to meet these objectives, to provide a sufficient supply of residential land, a range of housing types, and residential intensification policies, but were given no direction as to how or where within the municipality these policies were to be implemented. The other policy statements were spatially focussed, as they applied to the identification and protection of specific lands: areas containing flood plains, wetlands or supplies of aggregates. The two former policies, in particular, were similar in their level of technical detail to official plan policies, leaving the designation of the specific lands to which they applied to the municipal planning process. These differences affected the manner in which the Board had regard to them.

Table 4-5 gives particulars of the 37 decisions in which the Board addressed these statements. What is most noteworthy, given the significance of provincial adoption of them, is the infrequency with which the province appeared as a party when they were being addressed. It is most likely that this lack of direct provincial involvement has had some bearing on the significance, described below, in which the Board has attached to these statements.

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303 These policy statements were replaced in 1994 by a consolidated, and greatly amended, Comprehensive Set of Policy Statements, but the latter came into force too late to have any influence on the decisions reviewed here.

304 While it is not evident from the table, the province played an active role only where the environmentally-related statements were under consideration. Four of the six instances in which it took a position involved the Wetlands statement. The province did not appear in any of the 23 hearings in which the Board considered the application of the Housing statement.
### TABLE 4-5

**Provincial Policy Statement Decisions**

<table>
<thead>
<tr>
<th>Types</th>
<th>Application</th>
<th>1987-1994</th>
<th>No.</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Policy</td>
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<td></td>
<td>37</td>
<td>100</td>
</tr>
<tr>
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<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Application</td>
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<td></td>
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<tr>
<td>Official plan amend.</td>
<td>12</td>
<td>1</td>
<td>32</td>
<td></td>
</tr>
<tr>
<td>Zoning by-law</td>
<td>19</td>
<td>1</td>
<td>51</td>
<td></td>
</tr>
<tr>
<td>Plan of subdivision</td>
<td>4</td>
<td>1</td>
<td>11</td>
<td></td>
</tr>
<tr>
<td>Minor variance</td>
<td>4</td>
<td>1</td>
<td>11</td>
<td></td>
</tr>
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<td>Severance</td>
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<td>1</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>Land use</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Residential</td>
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<td>3</td>
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</tr>
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<td>Commercial</td>
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<td>5</td>
<td></td>
</tr>
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<td></td>
</tr>
<tr>
<td>Other</td>
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<td>1</td>
<td>11</td>
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<tr>
<td>Approve</td>
<td>21</td>
<td>7</td>
<td>57</td>
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<tr>
<td>Refuse</td>
<td>16</td>
<td>7</td>
<td>43</td>
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</tbody>
</table>

While policy statements were designed to direct the planning activities of municipalities and planning boards, the Board accepted in *Concorde* that: "[t]he language must be interpreted to include the board when it makes a decision that could have been made by a municipality."\(^{305}\) It has been inconsistent, however, in the importance it has attached to proposed statements. It has concluded both that it was not necessary to have regard for guidelines preceding policy statements,\(^{306}\) and in *West Carleton* that a proposed policy statement should be considered because:

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\(^{305}\) *Concorde Square Ltd. v. City of North York* (1991), 24 O.M.B.R. 82 at 91.

\(^{306}\) The Board has held that it was not required to have regard to the Wetlands Implementation Guidelines preceding the Wetlands Policy Statement, as the former were not a statement adopted under
"[t]here is a public interest already expressed in the wetland area by virtue of the proposed wetland policy and the designation of the Class 1 lands."\textsuperscript{307}

The Board has not treated adopted policy statements as the courts do legislation, as documents which must be interpreted and applied to the facts to reach a decision. Rather, it has treated them, as it has other expressions of provincial policy, as evidence that must be evaluated in the context of other considerations and which may or not be followed, depending on these other considerations.

The Board stated its interpretation of "have regard to" in the\textit{Ottawa-Carleton} decision:

Statements of provincial policy ... must be regarded by the board. The board is not bound to follow them; however, the board is required to have regard to them, in other words, to consider them carefully in relation to the circumstances at hand, their objectives and the statements as a whole, and what they seek to protect. The board is then to determine whether and how the matter before it is affected by, and complies with, such objectives and policies, with a sense of responsible consistency in principle.\textsuperscript{308}

This statement illustrates the two most important aspects of the Board's treatment of policy statements: their function as evidence, and the balancing of policy statements with other matters of concern to it.

\textbf{(a) Policy Statements as Evidence}

The Board has accepted policy statements as part of the package of evidence, encompassing both fact and policy, placed before it for consideration, but it has not generally accorded them greater status or give them greater weight than it gives to other evidence. It has first had to determine whether a policy was applicable at all. In the case of the Aggregates, Flood Plain and Wetlands statements, this was a technical matter; i.e., whether the lands in issue contained aggregate or were flood plain or wetlands as defined in the policy statement.\textsuperscript{309} Once the Board had established that

\begin{footnotesize}
\begin{itemize}
\item section 3 of the Act: \textit{Re Township of Front of Yonge By-law 7-88} (1990), 23 O.M.B.R. 235 at 239.
\item \textit{Re Township of West Carleton Zoning By-law 36-89} (1990), 23 O.M.B.R. 257 at 260. There was no discussion here of "have regard to"; rather, it was implied by the public interest rationale cited.
\item Supra note 236 at 181-82.
\end{itemize}
\end{footnotesize}
a policy statement did apply, it had to determine its applicability to the facts in the case.\textsuperscript{310} In doing this, however, it was taking the same approach as it did when interpreting and applying policies in official plans and it was, in effect, treating the policy statement as the equivalent of an official plan policy.

The Board has shown a degree of ambivalence in its dealing with provincial ministries and their officials with respect to policy statements. Just as it has received the evidence of planning experts as to the interpretation and application of official plan policies, it has received the evidence of ministry experts as to whether policy statements are applicable and, if so, whether they have given regard in respect of the matter at hand.\textsuperscript{311} The Board has expressed the view that ministries have important roles to play in ensuring that policy statements are followed\textsuperscript{312} but, despite this, it has not accorded special status to the evidence of government experts regarding the interpretation or application of policy statements. It has rejected evidence regarding the location of wetlands tendered by ministry experts in favour of that of municipal and owners' experts.\textsuperscript{313} It has, moreover, shown a degree of consistency in the face of inconsistent Ministry of Housing positions regarding the area over which a key element of the Housing policy statement, the requirement that 25\% affordable housing be provided, is to be determined. In Daniels it accepted the position of ministry staff that the 25\% requirement was to be applied over the entire municipality, not to each project.\textsuperscript{314} In the Etobicoke motel strip decision, on the other hand, it overruled the ministry experts' then


\textsuperscript{311} See \textit{Landco Developments Inc. v. Regional Municipality of Niagara} (1993), 29 O.M.B.R. 140 at 142.

\textsuperscript{312} In \textit{Township of Oro-Medonte Official Plan Amendment 39} (1995), 31 O.M.B.R. 315, the Board discussed the role of ministries in dealing with wetlands and environmental protection policies generally. It stated that the Ministry of the Environment and the Ministry of Natural Resources should have been parties to the hearing, and that they should now become involved in the ongoing monitoring programs provided for in agreements between rural residential developers and the municipality, and in testing the monitoring data. It is too soon, however, to tell whether this represents an emerging Board policy position.

\textsuperscript{313} \textit{Remer, supra} note 310.

\textsuperscript{314} \textit{Daniels Lakeshore Corporation v. City of Etobicoke} (1992), 26 O.M.B.R. 208 at 226.
interpretation that the 25% affordable housing requirement applied to the projects in issue and accepted the City's interpretation of the statement that it applied to the larger planning area of which the projects formed only a part.\textsuperscript{315}

(b) Balancing Policy Statements with other Issues

The Board has recognized that the public interest is expressed through policy statements.\textsuperscript{316} Despite this, as Ottawa-Carleton makes clear,\textsuperscript{317} it has engaged in a balancing act, in which policy statements were weighed against other matters of concern to it, and were often rejected in favour of the latter. The balancing of issues, of which public policy expressed through policy statements was only one, was seen regularly in the Board's decisions and can itself be regarded as a matter of policy. This policy was revealed in its treatment, for example, of the Aggregates policy statement, whose purpose was to ensure the protection of aggregate-bearing lands from uses which would prevent its extraction. The need to balance the protection of this resource with other land use demands was evident, and the Board responded to this need. In Young it refused severances for residential purposes within an area of superior sand and gravel deposits on the ground, \textit{inter alia}, that approving them would violate that portion of the statement dealing with the protection of aggregate resources to the extent that such protection was practically or realistically possible.\textsuperscript{318}

As it stated in Sutherland: "The policy of the province seems clear that unless there is an undue social impact in the planning sense, supply of aggregate resources where it may be found in reasonable proximity to the sources of demand should, within reason, be implemented and not hindered."\textsuperscript{319}

It was, however, the Board's treatment of the Housing statement, which did not itself address the

\textsuperscript{315} \textit{Supra} note 297 at 204-06.


\textsuperscript{317} Supra, note 236.

\textsuperscript{318} \textit{Ministry of Natural Resources v. Young} (1987), 20 O.M.B.R. 156.

\textsuperscript{319} \textit{Re Harold Sutherland Construction Ltd. and Township of Keppel} (1990), 23 O.M.B.R. 129 at 137. See also Young, \textit{ibid.} at 160; \textit{Standard Aggregates}, supra note 316 at 382.
need to balance the provision of housing with other planning concerns, that best revealed its own policy with respect to the application of policy statements. It subordinated the application of the latter to the application of its own adverse impact test and its own views as to what constituted good planning. The Board revealed its own hierarchy of planning values, in which it subordinated a provincial interest to one of its own areas of policy, and it did this without any provincial directive to do so.

In the "impact" variant of the test, the Board's position was that it would weigh the impact of the proposed development, as defined in planning terms, against the Housing statement's goal of providing housing, particularly affordable housing. If that impact was determined to be greater than the benefit of obtaining the additional housing, it would not approve the development. As it stated in *Woodgreen*, a minor variance application to permit the construction of an inner-city affordable housing project:

> The board finds further that the proposed development conforms to the provisions of the Land Use Planning for Housing Policy Statement by providing affordable housing which represents good planning and is without serious adverse impact on abutting and adjacent land uses.\(^{320}\)

It stated on the other hand in *Serra*, an application to create two residential lots fronting on a major road, that:

> The board also, without a request by either the township or the applicant has given consideration to the recently approved policy statement for land use planning for housing in the province. It is the board's finding that the proposal would have much more of a detrimental impact on the municipality than would be served by the additional housing that might be created by the proposal.\(^{321}\)

In *Bay-Elizabeth* it refused to approve another inner-city residential project in which the provision of some affordable housing was conditional on a considerable density increase, stating that "the impacts are so significant that they cannot be ignored or outweighed by the benefits brought by the

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\(^{320}\) *Woodgreen Community Housing Inc. v. City of Toronto Committee of Adjustment* (1993), 27 O.M.B.R. 1 at 24.

\(^{321}\) *Serra v. Township of Sandwich West Committee of Adjustment* (1991), 24 O.M.B.R. 316 at 319. An unusual aspect of this decision is that the Board considered the policy statement without it being raised by either of the parties.
In the "good planning" variant of the test the Board made it clear that where it saw conflict between the promotion of housing, even of affordable housing, as provided for in the Housing Statement, and good planning, the latter would prevail. It stated in Social Housing Coalition that:

Given that the proposal is entirely made up of "social" and "alternative housing", it clearly complies with and is supported by the Provincial Land Use Policy for Housing ... and it is deserving of very careful consideration. Does that, however, by itself, override what may be "good planning" in favour of having the lands designated and zoned for Industrial Use even if of a very limited nature? Clearly not!

The provincial policy requires that the board and all other planning agencies "have regard to" those policies when considering residential applications. It does not require that those policies be applied regardless of valid planning considerations favouring a different use.

In this decision it concluded that a design modification would sufficiently ameliorate the impact on neighbouring properties to permit the development to be approved. In other decisions, it refused to approve planning changes required to permit projects containing affordable housing, stating that:

There is, however, nothing in the Land Use Planning for Housing policy statement that would direct the board to ignore planning criteria just to provide affordable housing. As desirable as the development may be from an affordable housing standpoint, it fails seriously on all of the planning tests that the board would normally apply in the granting of a minor variance

and that "the board does not consider that it should set aside consideration of the planning merit of this proposal because affordable housing units are involved." Similarly, in rural areas the Board has refused severances for affordable housing, stating that "the Provincial Land Use Policy on

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322 Bay-Elizabeth Construction Ltd. v. City of Toronto (1992), 26 O.M.B.R. 422 at 431.


324 Woodtree Co-operative Inc. v. City of Toronto Committee of Adjustment (1991), 25 O.M.B.R. 312 at 321. This should be contrasted with the decision in Woodgreen, supra note 320 as an illustration that, while the Board has been consistent in the application of this balancing policy, it may tip the balance either way, depending on the facts before it.

325 Tahanen Non-Profit Homes Corp. v. City of Toronto (1993), 27 O.M.B.R. 62 at 78.
Housing does not encourage indiscriminate severances on rural lands.\textsuperscript{326} In \textit{Oshawa} it gave a more complete indication of the matters to be balanced, stating that:

What [the Housing statement] does not stand for is a placing of housing need above all other planning considerations. The Board must have regard to approved planning policies in a municipality, the state of existing development in the area affected, municipal services and infrastructure to deal with social and environmental matters, suitability of site, compatibility of uses as well as need for a particular type of project.\textsuperscript{327}

There was a complex amalgam of policies under consideration in these decisions. \textit{The Board weighed what it recognized as a broad public interest in providing housing against what it perceived to be a public interest in avoiding adverse impact and in promoting good planning.} Its decision-making process could be considered also an exercise in the evaluation of differing interests. Where it was considering impact it was weighing a general public interest in the provision of affordable housing against the interests of neighbours who would be most directly affected. Where it was weighing affordable housing against good planning, the latter appeared to represent an amalgam of the immediate interests of neighbours in not being subject to adverse impacts from the proposed development, and a broader public interest in ensuring that the rules of good planning, as it saw them, were also taken into consideration.

6. \textbf{Environmental Protection Policies}

The Board’s treatment of environmental protection policies provides further examples of its policy of treating provincial policy, not as an absolute to be applied regardless of other considerations, but as one of several interests to be considered. The category includes environmental protection policies, Ministry of Environment guidelines and Niagara Escarpment protection provisions. The first two categories are very similar. The third differs in that it is associated directly with an important provincial planning initiative, the Niagara Escarpment Area of Development Control, but its goal is primarily a form of environmental protection. In any event, Niagara Escarpment decisions have often addressed other environmental protection policies also.

\textsuperscript{326} Van Loenen \textit{v. County of Lennox and Addington Land Division Committee} (1992), 26 O.M.B.R. 85 at 86.

Despite the importance of environmental protection concerns in the planning process, these policies have been addressed infrequently by the Board; in only 10 of the 1971-78 and 19 of the 1987-94 decisions. The greater number in the later period may be indicative of the increasing importance accorded to environmental protection by the province over time, but the numbers have in any event been too small in both periods to permit significant analysis of the decisions, or to permit a meaningful comparison of the Board's position in the two review periods. They can, however, be taken as indicators of its approach to dealing with such expressions of policy. Moreover, while these numbers appear to suggest that the Board has given little consideration to environmental protection, they significantly underestimate the true influence of this matter on its decision-making. It has frequently considered environmental impact, the effect of air, water and soil pollution, in deciding whether to approve development proposals. What the numbers do indicate is that the Board rarely, in either review period, had to specifically address provincial environmental protection policies.

(a) The Relationship between Provincial and Municipal/Board Policy
In the 1971-78 period the Board treated this relationship as a narrow jurisdictional issue. In two decisions it stated that, even in the face of ministry approval authority, there remained an important role for both municipalities and itself. In Mono it was asked not to approve a zoning by-law because the latter would conflict with the right of the Minister of Mines to approve a pit or quarry permit. It dismissed this argument and approved the by-law, holding that the roles of the ministry and the municipality were complementary and that the local council was required to decide “what restrictions and regulations are most appropriate to satisfy the needs and interests of its inhabitants and the general good of the municipality.” In Orangeville it refused to approve a waste disposal site, even though the site had received a provisional Certificate of Approval from the Ministry of Environment, holding that it:

... could not impose its direction upon the Minister as to the actual detailed operation of the

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326 For a detailed analysis of how the OMB has dealt with issues of air, water and soil pollution, see Chipman, supra note 154. The author analysed 406 decisions of the Board, made between 1984 and 1993, in which significant pollution issues were raised.

329 Re Township of Mono Restricted Area By-law 875 (17 May 1971), No. R 96-69 (O.M.B.) at 5.
site, but that it was concerned and would enquire into the planning aspects of the operation having regard to the surrounding area while recognizing that the on-site details were settled or concluded.\(^{330}\)

The Board's position was thus that the interests of municipalities seeking to respond to concerns of their residents, and of the Board itself seeking to ensure that "good planning" matters were taken into account, were best expressed in terms of the obligations laid on each body in the exercise of its jurisdiction.

During the later review period the Board continued to follow its policy of addressing these policies within a larger context. This did not always lead to the dismissal of the provincial policy. In Bodnaruk the Board approved a minor variance permitting a smaller lot than required by the zoning by-law on the ground that, \textit{inter alia}, the sewage system for the lot had been approved by the Health Unit. It stated that:

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\ldots \text{the effect of the Environmental Protection Act which gives authority to the Ministry of Environment and, by delegation, to the County Health Unit to approve residential sewage disposal systems, may not be diminished or abrogated by a municipal by-law which explicitly or by implication would seek to do so.}^{331}\]

On the other hand, it has refused to apply Ministry of Environment policy that no plan of subdivision be permitted on individual sewage disposal systems on the ground that such a policy "amounts to no development, because there are not going to be any sanitary sewers for the foreseeable future."\(^{332}\) Yet it has also distinguished between ministry and government policy, the latter expressed in the approval of the official plan by Ministry of Municipal Affairs staff, and has stated that "[i]f the province had banned development on septic, I would have thought differently, but the province has not."\(^{333}\) In other words, if the government has not expressed a position, the Board is free to address the matters it considers to be important.


\(^{331}\) \textit{Bodnaruk v. Township of Amabel Committee of Adjustment} (1993), 29 O.M.B.R. 61 at 64. The Board's real reason for approving the minor variance appears to have been the application of its own impact policy, and its conclusion that the proposed use would have no impact on the neighbours.


\(^{333}\) \textit{Ibid.} at 349.
The Board's treatment of the Niagara Escarpment Plan (hereinafter NEP), which is a formal expression of government policy, is consistent with its approach to balancing provincial interests with other matters it considers important. It has refused to approve applications for development on the ground, *inter alia*, that they contravene the NEP.\(^{334}\) In the later review period it applied the then-statutory language in refusing to approve a severance, stating that it must have regard for the NEP policies pursuant to the requirements of subsection 50(2) of the *Planning Act*.\(^{335}\) Yet it has also over-ruled the NEP.\(^{336}\) What may be the definitive statement of the Board's treatment of the NEP is found in *Shoemaker*, where it approved a severance on the ground that it was in conformity with both the NEP and the FLG. It stated that both of these "incorporate provincial policies for the protection of these elements of the provincial interest."\(^{337}\) In ruling that the policies of the NEP should receive a broad and liberal interpretation, it stated also that:

> The Escarpment Plan, as the implementing document, must be taken as providing guidance to the public and direction to those who administer it.

Further, as noted earlier, the Escarpment Plan both on its face and in its enabling legislation bears all the attributes of a land use planning policy document, is now a part of the Regional Niagara Policy Plan and should be weighed and interpreted as an official plan document.\(^{338}\)

As noted in its treatment of the FLG, the Board was here giving weight to a provincial policy both as a policy statement in its own right and as a policy forming part of an approved official plan.

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\(^{336}\) *Re Town of Caledon East and Lawson Subdivision* (1979), 9 *O.M.B.R.* 188. The Board was satisfied, on the basis of its "evaluation of interests" and "prematurity" tests, that the subdivision should be approved, and concluded that the approval of the *Niagara Escarpment Planning and Development Act* did not preclude the approval of a plan of subdivision within the area governed by it.

\(^{337}\) *Supra* note 268 at 367. The "elements" referred to here were the protection of the natural environment, including the agricultural resource base, and the protection of features of significant natural interest.

\(^{338}\) *Ibid.* at 375.
(b) Ministry Guidelines

Unlike policy statements, which have an established statutory authority, guidelines have variable status. They were characterized in Chedoke, in descending hierarchical authority, as guidelines issued by cabinet, a minister, and ministry staff. They have been described as "a statement of principles by a person or group having authority over an activity" and as "nothing more than a preferred position by an authority, under appropriate circumstances." This variability has been reflected in the weight accorded to them by the Board. Guidelines issued by the Ministry of the Environment and other ministries, such as those dealing with noise or stormwater runoff, are highly technical in nature. The Board has treated them as standards which must be met if a proposed development is to be approved, and the only issues are whether they are applicable to the case and, if they are, does the evidence establish that the proposed development will meet them.

Other provincial guidelines of a more general nature have partaken of the character of the policy statements, and have received similar treatment from the Board. In Durham, the Board considered the application of the Oak Ridges Moraine Area Implementation Guidelines, a policy statement directed to the preservation of the environment, particularly the groundwater quality and quantity, of the moraine area. After referring to the Guidelines as a section 2 statement of provincial interest, it noted that they "represent a provincial interest that the board must have regard to", and based its approval of the proposed rural residential subdivision on its finding that the relevant section of the Guidelines "has generally been complied with. The intent of the expression of provincial interest has been met."

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340 Ibid. at 465.

341 e.g., Guidelines on Noise and New Residential Development Adjacent to Freeways: Interim Stormwater Quality Control Guidelines for New Development.


344 Ibid. at 115.
In keeping with its view that guidelines and policies are to be treated as evidence whose weight is to be assessed in the context of each situation, the Board in Nanticoke gave temporary support to a pollution-based residential-industrial separation policy, pending further study, and in Gosfield South refused to apply, as being unrealistic in the circumstances, a ministry policy that development in a rural municipality should take place only on full municipal services.

7. Other Expressions of Provincial Policy

In addition to applying the significant expressions of land use-related provincial policy reviewed above, the Board has addressed a miscellany of provincial policies and guidelines having some, even if indirect, bearing on planning. Its treatment of these matters reveals little that is new with respect to its interpretation and application of provincial policy, but does illustrate its consistency with respect to this aspect of its decision-making.

Considerable differences exist between the policies considered during the two review periods, but the Board’s treatment of policy appears to have been much the same in both. The Board considered other policies in 28 of the 1971-78 decisions. These tended to be either general positions expressed by government with respect to spending restraints and economic development, which touched only tangentially on land use planning, or specific ministry policies and guidelines. During the 1987-94 period the Board addressed other policies in only 11 decisions, but these involved for the most part the application of specific land use-related policies.

A common thread running through the 1971-78 decisions is that the various policies were considered, but the Board’s decisions turned as much, if not more, on the application of its own policy. In deciding in this manner it was, of course, being consistent with its application of government policy in the decisions noted above. Thus, in a decision involving a shopping centre proposed near the government’s Malvern housing project in Scarborough, it noted that the project included a major shopping centre, whose viability would be threatened by the proposed centre, but

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345 Re City of Nanticoke Official Plan Amendment 16 (1990), 23 O.M.B.R. 391.

346 Gosfield South, supra note 332 at 349.
the decision appeared to turn largely on the application of its own commercial competition policy, which in itself had no direct bearing on the government’s interest. In applications for approval of municipal expenditures, the Board is required to consider the need for the proposed project. In several such decisions during 1977 and 1978, it stated the need to give consideration to the province’s financial restraint policy, but then treated this policy as providing further support for its obligation to determine need, and decided on the basis of need rather than on the application of the provincial policy per se.

The Board has, in the 1987-94 review period, applied planning guidelines adopted as government policy in a manner similar to its treatment of government policy statements. In Durham Official Plan Amendment 233 it noted, in approving a rural residential plan of subdivision in an area subject to the Oak Ridges Moraine Area Implementation Guidelines, that they “represent a provincial interest that the board must have regard to”, thereby giving them the same status as policy statements. It noted that, as the Guidelines had generally been complied with, “[t]he intent of the expression of provincial interest has been met.”

The Board considered the application of the province’s Growth and Settlement Policy Guidelines in several recent decisions. Its position was clearly stated in a motion brought to determine their applicability where an official plan amendment application had been made prior to their adoption as policy. It stated that “the growth and settlement policies are admissible as they are government policy that the board should consider” but that because they were introduced subsequent to the


348 See, for example, Re City of Kingston Land Purchase (1978), 7 O.M.B.R. 29; Re Borough of Scarborough Community Centre (1978) 7 O.M.B.R. 364; Re Township of Huntsville Bridge Construction (1978), 7 O.M.B.R. 395; Re Scarborough Transportation Corridor (No. 1) (1979), 8 O.M.B.R. 500. In the latter decision the Board’s concern was with the uncertainty that the expressway for which the land was to be acquired would ever be built, rather than need, and it was held to be premature.

349 Supra note 343 at 114.

350 Ibid. at 115.

...when the board is considering the evidence relating to the settlement policy guidelines the appropriate weight should be given to that evidence under these particular circumstances. They may not carry the weight that policies passed under s. 3 of the Planning Act carry. The board, however, will make that decision as the evidence unfolds.352

The last comment is in keeping with the Board’s policy, discussed elsewhere in this Part, of treating government policy as evidence to be evaluated along with all of the other evidence placed before it. In several other decisions the failure of the development proposal to comply with the Guidelines provided the Board with a reason, along with other reasons based on its own policies, to refuse to give approvals.353

A related matter is the granting of approvals by ministries as part of their ongoing activities. Examples include the approval of plans of subdivision by the Ministry of Municipal Affairs, the approval of pit licence applications by the Ministry of Natural Resources and the issuing of Certificates of Approval by the Ministry of Environment. While such approvals are not expressions of provincial policy per se, there is implicit in them an acknowledgement that policy concerns, as stated by the ministry involved, have been satisfactorily addressed. The Board has generally accepted such approvals, but it has reserved its right to make decisions independently of them. It held in Dysart, for example, in considering a zoning by-law to implement a plan of subdivision approved by the Ministry of Municipal Affairs, that it was not bound by that approval in respect of the adequacy of services, stating that “[t]he Board does not give rubber stamp approval to a zoning by-law because a subdivision has received draft approval even though many matters normally considered by the Board on any zoning application become the jurisdiction of the Minister when considering a plan of subdivision.”354 Similarly, it has expressed its independence of ministry decisions even when the latter are under a statutory obligation to address certain matters. Thus in

352 Ibid. at 79.


354 Re Township of Dysart Restricted Area By-laws 75-44 and 75-57 (1977), 6 O.M.B.R. 177 at 177.
Pushinch it refused to approve a zoning by-law to permit the operation of a gravel pit. After noting the matters the Minister of Natural Resources must take into consideration under the Pits and Quarries Control Act\(^{355}\) in approving a gravel pit, it stated that “[t]he Board is, of course, not bound by the terms of this section, but it does give an indication of the thinking of the Legislature as to where a gravel pit should be allowed.”\(^{356}\)

There have been uncharacteristic occasions, however, when the Board has appeared to accede to a provincial interest in economic development against its better planning judgement. The province’s encouragement of economic development has been too diffuse to be called a specific policy. Moreover, the Board has stated that it is to decide on the basis of planning, not economic considerations. Despite this, there have been decisions in both review periods in which the economic impact of a large development has been a major factor in its decision-making. Metro Centre\(^{357}\) involved an application to approve the former railway lands in downtown Toronto for a huge amount of commercial and residential development. Ottawa-Carleton\(^ {358}\) involved applications to designate 600 acres of high quality farmland for urban uses centred on a professional hockey arena. It appeared in both of these decisions that the Board was very uneasy, but that it felt itself to be under pressure to give approval. In both it expressed dissatisfaction with aspects of the plans, the evidence supporting them and with the fact that the proposals represented planning being carried out in isolation from other planning in the municipality. In other decisions these concerns would have been sufficient grounds for refusal, but it approved both. As it noted in the Metro Centre decision, “[t]his proposed redevelopment has been the subject of intense high level negotiations over a period of several years by the two railway companies concerned with the city, Metro and the Province.”\(^{359}\)

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\(^{355}\) S.O. 1971, c. 96, s. 6(1).


\(^{358}\) Supra note 236.

\(^{359}\) Supra, note 357 at 6.
D. DISCUSSION

A central feature in the examination of the relationship between a tribunal such as the OMB and the government which created it is the manner in which the former responds to that government's policy pronouncements. The results of such an examination do much to tell us both the nature and the degree of independence exercised by it. To put the matter in the language of regulatory theory: Does the tribunal act primarily as an agent of the government, making decisions the government wants but does not wish to have to make itself? Does it interpret the interests of the government, as expressed through its pronouncements, as the public interest? In the context of this thesis, which is directed to examining the role of the OMB as a creator of policy, the question is: Can the manner in which the Board interprets and applies provincial policy itself be characterized as a policy?

1. The OMB has responded with increasing frequency to provincial policy as it has become more closely integrated into the planning process

The Board has had to respond to a wide range of expressions of provincial policy over the entire review period. During the 1971-78 period, these were largely independent of the formal land use planning process established under the Planning Act, although they influenced decision-making under that process. At one extreme, the government's regional land use planning initiatives bore little relation to day-to-day planning decisions, a situation reflected in the infrequency with which the Board was called upon to address them. Ministry policies directed to the control of non-farm related development in rural areas were more clearly applicable to individual applications, and the Board considered them more frequently. Moreover, ministries continued throughout the review period to play a direct and largely unrecognized role through their approvals of official plans and comments on individual development applications. By the 1987-94 review period, provincial policy had become a formal part of the planning process through statutory provisions allowing the declaration of matters as being of provincial interest and the issuance of provincial policy statements to which the Board was required to have regard. At the same time, the expanding range of ministry guidelines and standards continued to have a significant impact on day-to-day planning activity.

The frequency with which the Board addressed provincial policy increased considerably between the two review periods, reflecting to a large extent the greater role and significance accorded to
such policy through its formal inclusion, by way of sections 2 and 3 of the *Planning Act*, in the land use planning process. Nevertheless, such policy was addressed, even in the 1987-94 review period, in only a minority of the Board’s decisions. This likely reflects the fact that the parties infrequently saw provincial policy as being relevant to their concerns.

2. The OMB has followed a policy of consistently balancing provincial policy with its own policies.

The Board is a provincial agency whose mandate requires it to decide matters on policy rather than legal grounds. As such, it might be expected to determine what provincial policy was applicable to the matters before it and to ensure that its decisions were based on such policy. Yet it has not done so. The Board has throughout the review period pursued a policy of balancing provincial policy with its own policies which, for the most part, address the extensive areas of planning procedure and substance which have been untouched by provincial policy.

While the Board has given consideration to provincial policy, its hearings commonly involve other issues as well as the application of such policy. This is unexceptional in itself, but what is significant is that provincial policy has rarely been the sole determinant of the Board’s decisions where it was addressed. The decisions show that the Board’s own policies, which reflect its own philosophy in many ways that provincial policies cannot, also proved to be important. This leads to two conclusions. It is not possible to accurately assess, with few exceptions, the relative importance the Board has accorded to provincial policy and to its own policies in its decision-making activity. Of greater significance, when considering the role of the Board as a provincial agency, is that it has regularly sought to weigh both provincial policy and its own policies in its decision-making, rather than giving preponderance to the former.

The Board has suggested that there is a hierarchy of policy pronouncements. Formal decisions of Cabinet including, latterly, policy statements made under section 3 of the *Planning Act*, were the most important. Published guidelines were less so and were, as their name implied, to be treated as guides for assessing applications rather than as policies that must be adhered to. Similarly, ministry guidelines and standards, or “concerns”, were to be addressed along with other policy
considerations. As one descended the hierarchy, the Board’s expressed view appeared to be that
the importance of provincial policy decreased and that of other considerations, notably Board
policy, increased. The problem with this model, however, was that the Board has in practice
displayed little variation in its manner of treating these differing policy categories.

3. The OMB has followed a consistent policy of “having regard to” provincial policy,
regardless of legislative requirements, in such a manner that it subordinates provincial
policy to its own policies.

The Board was required by the 1987-94 review period to have regard to provincial policy
statements, but was faced with no such statutory requirement during 1971-78. Despite this
difference, its approach to provincial policy appears to have been established by the earlier period,
and to have been carried forward in its interpretation of “have regard to”. This generally consistent
approach to interpreting and applying provincial policy can be described as a policy of the Board.
The framework of this policy was clearly spelled out in the Caledon decision in which, in keeping
with its understanding of its role, it adopted a judicial model in which all facts, including expressions
of provincial policy, were to be placed before it. In that decision it treated policy statements as
being legislative in nature: they were of general application and its role was to apply them in specific
fact situations “without assistance from the Government or any member.”360 This decision can be
treated as almost a “declaration of independence” and, as the other reviewed decisions indicate, the
Board adhered to this position with a high degree of consistency throughout both review periods.

The best-known decision of the 1971-78 period in respect of provincial policy was, ironically, an
aberration.361 The Board stated that it was bound by such policy as expressed in a Minister’s letter,
and proceeded to structure the annexation before it in accordance with that policy. In the meantime,
however, it was according provincial policy a lower, but still significant, priority. It was generally
supportive of such policy, and applied, for example, regional planning policies and UDIRA.362 Yet

360 Supra note 225 at 3.
361 Barrie Annexation. supra note 234 (O.M.B.).
362 In every UDIRA decision, for example, the Board refused to approve the proposed development
on the ground, inter alia, that it did not conform to UDIRA.
two elements displayed in the decisions illustrated the limitations in the Board’s application of provincial policy during this period. Firstly, and most obviously, such policy rarely provided the only ground for its decision-making, thereby making it difficult to assess how much importance it was according to such policy. It often appeared that the Board was using conformity with provincial policy, or the lack thereof, as support for decisions based largely on other grounds, such as the evaluation of interests, good planning or prematurity. Secondly, underlying these decisions, which were for the most part supportive of provincial policy, was the Board’s own policy of evaluating various interests, in this instance the public interest inherent in such statements of policy with the interests of other “publics”. This position was most clearly expressed in the Grimsby decision, in which it noted that, depending on the circumstances, either the provincial or the municipal “public interest” might have to prevail.

The Planning Act, 1983 appeared to enhance the application of government policy in the planning process, as it required decision-makers, including the Board, to have regard to policy statements made under section 3 of the Act. Yet even in applying these statements it exhibited in Ottawa-Carleton a degree of independence from the provincial priorities expressed in them by stating that it was “to use its independent judgement on the merits of the proposal, and to see that planning decisions are made with regard to proper planning principles, while always bearing in mind and having regard to provincial policy.” The phrase “bearing in mind” falls far short of “being bound by”. In its application of the phrase “have regard to” the Board has endeavoured to achieve, as it did when dealing with provincial policy in the 1971-78 period, a balance between the public interest as expressed in the policy statements and other matters of concern to it. Of particular significance, as revealed in its frequent interpretation and application of the Land Use for Housing Policy Statement, has been the its subordination of the public interest as expressed in that statement to its own policies as expressed in its “impact” and “good planning” tests described in Chapter six, Sections B and C. The Board’s understanding of have regard to may therefore be paraphrased as: “We will give serious consideration to statements of provincial policy, but will do so in the context

363 Supra note 230 at 161.

364 Supra note 236 at 161.
of other policies which we consider to be of equal importance. If the interests of the general public inherent in the policy statements are congruent with the interests of those most directly affected by a proposed development, we will approve it. If, however, the general public interest is, in our opinion, outweighed by the adverse impact on those most directly affected, or does not constitute what we consider to be good planning or meet certain other tests, the proposed development will not be approved, or will be approved only with modifications designed to ensure that the goals expressed in our policies are met."

4. The OMB has treated ministry interpretations of provincial policy as evidence, but has not considered itself bound to follow such interpretations.

The Board's manner of dealing with provincial policy in those instances where the province took an active party role provide a clear indication of the significance it has attached to such policy statements. It has treated the application of them to the matters before it as only one among other considerations. It did not consider itself obligated to accept interpretations of policy proffered by ministry witnesses, and often chose not to do so. It balanced these policies with other interests, and occasionally overruled them where it concluded that other interests outweighed them. The Board has thus made its decisions within the context of provincial policy but has limited the application of that context by making the policy subject to some extent to its self-generated policies. This is reflected in the decision data. As Table 4-3 shows, the Board was more likely to refuse to approve applications where provincial policies were being addressed and the province was opposed to their approval, but the province's position was not determinative. This suggests that active provincial involvement did have some influence on the Board's decision-making, but certainly not to the degree that its capacity to render an independent judgement was jeopardized.

5. While the OMB has been involved with the province in general discussions of policy, it has continued to maintain an arms-length relationship with the government in its application of provincial policy in specific instances.

The analysis in this chapter has focussed on how the Board has interpreted and applied specific, mostly formal, expressions of provincial policy. These are important, and the manner in which it has responded to them says much about its relationship with the government. Such a focus does, however, fall short of revealing the full extent of the Board/government relationship. This hidden
relationship has been more pervasive than the formal one. It has been manifested in a general fashion in the meetings that have occurred throughout the entire review period between Board members and government officials to consider a wide range of planning matters, and in the Board’s involvement in discussions leading to the Planning Act, 1983 and to the Sewell Report. It is impossible to assess how this relationship has influenced the Board’s decision-making, although it has likely made its members generally more aware of the thinking and priorities of government. On a day-to-day basis, ministries have frequently stated their positions through reports and comments which form part of the evidence before the Board, and ministry staff have sometimes been called as witnesses. Where there was no reference to ministry positions or witnesses in individual decisions, which was often the case, the influence of provincial policy on the Board’s decisions could only be a matter for conjecture. Where such evidence was referred to, however, the Board did not appear to have treated it differently from other evidence, but chose to weigh it in the context of all evidence received. The information available to us suggests, therefore, that it maintained a liaison with government to consider matters of a general nature, but also that it sought to maintain an arms-length relationship when considering individual applications. This leaves open the question of how the Board’s relationship with government when dealing with general issues affected its thinking when dealing with individual applications. While this question cannot be answered directly, the evidence of its consideration of specific expressions of provincial policy leads to the conclusion that it would have continued to treat ministry guidelines, standards and concerns as evidence to be assessed and applied in the same manner as other evidence placed before it, but not to give any special weight to such evidence because of its source.

6. The legitimization of the manner in which the OMB has dealt with provincial policy is negative: it arises from the tacit permission of successive provincial governments to develop and apply its own policies in this regard.

In Chapter one, Section E, I raised the question of the legitimacy of administrative agencies. The question, in this context, is whether the review powers granted to the Board under the Planning Act and the power under the Ontario Municipal Board Act to do such things “as may be necessary or incidental to the exercise of the powers conferred” upon it gave it the authority to apply

\[^{365}\) R.S.O. 1990, c. O.28, s. 37(a).\]
provincial policy as it has done. The models of administrative legitimacy listed by Jones provide a context for addressing this matter. The Legislative model states that "[t]he legitimacy of any particular administrative decision can be established by determining to what extent it carries forward legislative prescriptions."366 The Board has certainly acted within its mandate, which as a provincially-created tribunal it must do, in addressing the application of provincial policy to the matters before it. Its consideration of such policy is "necessary and incidental" to the exercise of its jurisdiction under the Planning Act. But does this legitimate its treatment of provincial policy as nothing more than another form of evidence, or its overruling of such policy when it concludes that other matters, embodied in its own policies, are more important? I believe that the rationale for the Legislative model is weak. The Board's powers, including its "necessary and incidental" powers, are granted to it to carry out its duties within the context of established provincial policy. It has clearly been stretching its legislative mandate when it has reduced provincial policy to the level of other evidence placed before it, and has overruled such policy when it considered other matters to be of greater importance.

The legitimacy of the Board's treatment of provincial policy is based, to the extent that it is justified at all, on a negative application of Jones' Accountability and Control model. As noted in Chapter one, Section E this model is "based on the premise that ... the actions of administrators may be further accepted as legitimate to the extent that the administrative process embodies significant elements of legal and political accountability and control."367 It is, ironically, the fact that the Board is not a truly independent agency that supports this ground of legitimacy. While the province has given it a mandate to rule on individual appeals and referrals without political or administrative interference, it retains ultimate control over the latter's jurisdiction, its mode of operation, and indeed over its very existence. It has therefore been accountable, not for its individual decisions, but for its overall operation. If the government had been dissatisfied with the manner in which the Board had been interpreting and applying provincial policy, it could easily have amended the legislation under which the latter operates to require it to make decisions in the manner and taking

366 Jones, supra note 79 at 413.

367 Ibid. at 415.
into account the matters which it considers appropriate. The legitimacy of the Board’s treatment of provincial policy therefore arises from the fact that, throughout the review period, the government has not chosen to interfere. The government established the “have regard to” requirement in 1983, but even in the face of the Board’s subsequent application of this requirement and of its manner of applying provincial policy generally, it has not intervened legislatively to require the Board to give paramount importance to such policy. In my opinion, therefore, the ultimate test of the Board’s legitimacy in this area of its decision-making, a conditional legitimacy at best, is that the government has consistently permitted it to deal as it has done with provincial policy without interference.

368 The government did interfere when it enacted the Planning and Municipal Statute Law Amendment Act in December 1994, replacing the “have regard to” requirement with “be consistent with” requirement. There was strong opposition to this change on the ground that it would reduce the Board’s discretion to apply provincial policy flexibly, which was probably one of the things the government of the day had in mind. This provision remained in force only until a new government enacted further amendments to the Act, including returning to the “have regard to” requirement in the Land Use Planning and Protection Act in April 1996. The 1994 amendment was, in any event, too late to have significant application to Board decisions made during the 1987-94 review period.
A. INTRODUCTION
The OMB has developed policies in respect of a number of planning matters which it has regularly applied to provide consistency in its dealings with the wide variety of applications and fact situations placed brought before it.\(^{369}\) This chapter provides an example of how a regulatory tribunal has built on the limited procedural policy directives embodied in its governing legislation to create and apply its own policies in a number of procedural areas. The following chapter contains a similar analysis with respect to its development of substantive planning policies. The introductory material in this chapter is largely applicable to both types of policy development and will not, except to note matters specific to substantive planning policies, be repeated in the introduction to Chapter six.

The Board has long exhibited an ambivalent attitude toward policy development. It has recognized that it is responsible for the application of policy: "The distinguishing character of these [administrative] powers is that the Board is required and expected to make decisions based on upon policy and expediency within certain limits laid down in the legislation",\(^{370}\) but the anticipated source of this policy is not made clear. The following captures another position it has often expressed: "The board is not bound by the precedent of other decisions. However, concepts developed in the course of reaching a decision are sometimes of assistance and interest to other panels."\(^{371}\) It has regularly stated in its decisions that it is required to decide each case on the facts placed before it, but it has also, at least by implication, recognized that it cannot make its numerous...

\(^{369}\) It is not my concern to step behind this analysis; i.e., to determine whether the board ever formulated a "policy" to develop specific policies in respect of certain aspects of its planning approval role. The development of general policies by which the board could guide itself appears to have been inevitable, given the nature of its role in the planning process, the huge number of appeals and referrals it has had to consider, and the statutory and judicial direction, or lack thereof, provided in respect of policy development.

\(^{370}\) Ontario Municipal Board, 55th Annual Report (Toronto: Queen's Printer, 1958) at 3.

\(^{371}\) South and Metcalfe Non-Profit Housing Corp. v. Town of Simcoe (1992), 26 O.M.B.R. 369 at 379.
decisions on a purely *ad hoc* basis. In this, the Board has trodden a fine line. It has expressed support for demonstrating a degree of consistency through the application of certain general principles or standards, but at the same time has been concerned that these not be formally espoused as policy. As it stated in *IPCF Properties*:

The board ... has often, through decision on one matter, articulated "principles" that have proven helpful in addressing similar planning matters. The board though, has always stood on the understanding that board decisions are not precedent-setting so as to bind later panels as does the rule of *stare decisis* in the courts. By contrast, articulated principles of the board are just that: principles. Never have specific matters like parking standards or, for that matter, a definition of a specific land use, been used as a general principle of this board to be applied elsewhere.\(^{372}\)

The position stated here is accurate as to the very specific examples included in it, but it begs the question of the Board’s articulation and application of more general underlying principles as policy.

Despite the Board’s ambivalence, there has been no question among participants in its process, nor among knowledgeable observers, that it engages in policy development. There has been disagreement, however, as to the nature of that activity, its relationship with provincial policy and, most importantly, the extent to which the Board should engage in policy development at all. As J.A. Kennedy, the Chair of the Board, stated in his appearances before the Select Committee of the Legislature on the Ontario Municipal Board (the MacBeth Committee):

Well, I do not deny that we are making policy frequently because what we do is we apply government policy as we find it in the Statute and ... in the Regulations and ... in decisions of the Cabinet on appeals from us and ... in public documents and statements of Ministers and then when there is no government policy on that particular subject we make our own but we try hopefully to follow the same policies consistently.\(^{373}\)

I would like to see the day come when our administrative board would be almost a judicial board. In other words, the policy that they would apply would be dictated and regulated by others, and not by the appointed members of the boards.\(^{374}\)

\(^{372}\) *Supra* note 237 at 188.


\(^{374}\) *Ibid.* (October 19, 1972) at 10. The manner in which the board has dealt with “generalized government policy” is analysed in Chapter four.
The Committee accepted Mr. Kennedy's views, concluding that:

The Committee is satisfied that the OMB tries to follow government policy in making its decisions. However, in at least two types of cases the OMB obviously makes policy. One type occurs when there is no clear statement of government policy. A second occurs when the Board has only a generalized government policy to guide it and feels obliged to make detailed policy applicable to the issues before it.\(^{375}\)

In the following year, the Ontario Economic Council gave strong expression to this view, stating that:

The policies applied by the Board have tended over time to become those it has itself formulated. While the Board has sometimes taken the position it is not bound by past decisions and at other times that the principles underlying previous decisions are relevant, its decisions are, in a very important sense, incremental in nature. Over time, and in the critical areas where pre-established provincial policy is lacking (e.g., high-density residential development), the Board's decisions have served to become provincial policy, rather than to elaborate such policy.\(^{376}\)

The Planning Act Review Committee (hereinafter PARC), engaged in a major review which led to the Planning Act, 1983, later gave a more circumspect expression of this position:

It is now the Board's practice to attempt to secure as much uniformity and consistency in its decisions as is compatible with its mandate to examine the issues it deals with on their merits. ... It is clear that the Board does attempt to establish criteria that can be employed in a consistent way throughout the Province and with respect to particular kinds of applications.\(^{377}\)

Jaffary and Makuch, writing at the same time, put the matter more strongly, stating that "[t]he role of the Board in protecting individual rights and making planning policy is indeed important."\(^{378}\)

The Board's right to develop and apply policies, or general principles by which to govern its

\(^{375}\) MacBeth Report, supra note 6 at 3.

\(^{376}\) Subject to Approval, supra note 7 at 102.

\(^{377}\) Comay Report, supra note 7 at 91.

exercise of discretion, is influenced by the statutory jurisdiction granted to it. The Planning Act, under which it has exercised its appellate jurisdiction, is and always has been primarily a procedural statute.379 Other than policy direction provided by the province and individual ministries, it must therefore be concluded that the Legislature has left the determination of planning policies in the hands of municipalities and, by extension, of those individuals and corporations seeking or opposed to changes in planning policies and land use designations. The Legislature has similarly given no direction to the Board as to what policy it is to bring to bear on these local decisions which come before it for review, again subject to the limited policy direction discussed in Chapter four.

In dealing with official plan referrals, for example, the board's policy development scope is very broad. The Board:

... is acting in the place of the Minister of Municipal Affairs. By operation of ss. 2 and 17(11) of the Planning Act, 1983, the Board is an approving authority which, like the Minister, must decide whether a proposed change to a municipal plan is not only good for certain parties before it but is sound planning in the public interest. As was stated by the Court of Appeal, the function of the board, as of the Minister, "transcends the interests of the immediate parties",380 and its decision is not simply a decision upon objections of the parties which, if resolved, end the matter; the board also acts throughout to ensure that, as far as possible, larger considerations in the public interest are identified and addressed.381

This language leaves unanswered the question as to the source of such policy, but if the Board is to fulfil this mandate it must, in the absence of any external sources of policy direction, formulate its own policies so as to avoid a completely ad hoc pattern of decision-making. Its right to establish policy in hearing zoning appeals was articulated in Hopedale, in which the Court of Appeal stated that "[t]he right of an administrative tribunal to formulate general principles by which it is to be guided is undoubted and has been considered upon many occasions in the Courts."382 While the

379 The only substantive exceptions are the listing of matters of provincial interest in section 2, and the listing in subsection 51(4) of the matters to which regard is to be had in considering approval of a plan of subdivision.

380 Re Cloverdale Shopping Centre Ltd. and Township of Etobicoke [1966] 2 O.R. 439 at 449.

381 Toronto Airways Ltd. v. Town of Markham (1992), 26 O.M.B.R. 1 at 5.

Court stated with approval de Smith's comment that "[i]t is obviously desirable that a tribunal should openly state any general principles by which it intends to be guided in the exercise of its discretion," it limited this exercise of discretion:

The tribunal, however, where it has announced considerations by which it is to be guided, and where it has original jurisdiction, must not fetter its hands and fail, because a guide has been declared, to give the fullest hearing and consideration to the whole of the problem before it.  

_Hopedale_ prevented the Board from stating in advance the policies it was to apply, but did not prevent it from developing policies which, if not explicitly expressed as such, it has in fact applied with a substantial degree of consistency. As MacFarlane has noted:

> The _Planning Act_ does not contain any policy statement on the purposes of zoning; however, the decisions of the Ontario Municipal Board, on zoning appeals or hearings on objections to municipal re-zonings have played a leading role in setting broad administrative policy guidelines for the approval of zoning or the ordering of a council to enact zoning by-laws which it has refused to pass.  

The approach taken by the Board in considering plans of subdivision, severances and minor variance applications has a more substantial statutory basis. With respect to plans of subdivision, subsection 51(4) of the _Planning Act_ requires it, and the Minister, to have regard to the matters specified therein. With respect to severances, subsection 53(2) requires it on an appeal to have regard to the matters listed in subsection 51(4). The Divisional Court established in _Morrison_ that the Board, when considering a minor variance application under subsection 42(1) [now subsection 45(1)] of the _Planning Act_, must satisfy itself that four requirements have been met. While the

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384 _Hopedale_, _supra_ note 382 at 263.

385 C.B. MacFarlane, _Land Use Planning: Practice, Procedure and Policy_ (Toronto: Carswell, 1994) at 6-3. MacFarlane went on to say, in words that must have been written prior to the province's adoption of the Housing Policy Statement, that with the coming into force of the provincial policy the Board's "traditional concerns would in some cases have to take a back seat to more pressing supply concerns." (p. 6-3) As shown in Chapters four and six herein, the Board has regularly managed to apply its own policies where these have been in conflict with provincial policy.

386 _Re 251555 Projects Ltd. and Morrison_ (1974), 5 O.R. (2d) 763 (Div. Ct.). The Court was interpreting the _Planning Act_, R.S.O. 1970, c. 349, but the wording is almost identical in the present subsection 45(1). The four requirements are:

1. The variance must be a minor variance from the provisions of the by-law;
Board is thus provided with a statutory framework for the consideration of these types of applications, there remain broad areas within which it can exercise a policy-making discretion.

As noted above, the specific areas within which the Board has played a role in policy development fall into two categories: procedural and substantive. The term "procedural" applies to policies pertaining to the planning approval process itself and, most importantly, to ensuring the involvement in the process of those persons and interests likely to be affected by planning decisions. These may be loosely characterized as "Rule of Law" policies. The term "substantive" applies here to the content of planning, the wide range of issues such as land use compatibility, density, traffic and environment impacts which an approval authority must address in deciding whether to approve plans and development proposals. These two categories overlap to some degree, but their subject matter is sufficiently different that they can be analysed separately.

Several major areas within which the Board has engaged in procedural policy development, and the frequency of their occurrence, are listed in Table 5.1. The procedural areas selected here are those through which it has expressed its role in the planning process, has sought to establish standards to be followed by municipalities in carrying out their planning activities, and has sought to ensure the preconditions for a high degree of public involvement in the planning process. They are the adequacy of approval procedures, the adequacy of municipal decision-making, and the circumstances in which the Board will overturn a decision of council or will conclude that an application is premature on procedural grounds.

2. The variance must be desirable in the opinion of the committee for the appropriate development or use of the land, building or structure;
3. The general intent and purpose of the by-law must be maintained; and
4. The general intent and purpose of the official plan, if any, must be maintained.
These four tests are regularly cited in minor variance decisions. The manner in which the Board has interpreted the term "minor" is analysed in Chapter six, Section H.
TABLE 5-1

Summary of Board Procedural Policy Areas

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B. THE ADEQUACY OF APPROVAL PROCEDURES: Moving beyond statutory requirements

The Board's policy with respect to the adequacy of approval procedures evolved over time. During the 1971-78 period it was generally satisfied if statutory requirements were met. By the 1987-94 period, however, it was subjecting compliance with these requirements to the test of its own standards for the provision of opportunity for public participation in the approval process, and it was applying this test in a wide range of procedural situations.

The Planning Act sets out procedural requirements for the approval, and the referral or appeal, of official plans, zoning by-laws and other types of planning applications. The adequacy of the approval procedures followed by municipalities is not an issue in the great majority of the Board's hearings but, where adequacy does become an issue, it must interpret and apply the statutory provisions. One might imagine that, as a tribunal receiving its jurisdiction from the Planning Act, it would limit itself to a strict interpretation of the Act but, as the following analysis shows, it has not done so. It has introduced considerations which extend beyond strict statutory interpretation, and in these areas, as well as in the carrying out its interpretive role, it has taken the opportunity to create its own policies.
1. Notice and Hearing Requirements: An example of policy development beyond statutory necessity

The Board's policy evolution between the two review periods reflected to some degree the revision and expansion of notice and hearing requirements that occurred with the enactment of the *Planning Act, 1983*. The pre-1983 Act required only that planning boards, as part of their duties, hold meetings "for the purpose of obtaining the participation and co-operation of the inhabitants of the planning area" in dealing with planning matters generally.\(^{387}\) The Act imposed no notice or public hearing requirements on councils in respect of their adoption of official plans or enactment of zoning by-laws.\(^{388}\) The 1983 Act stated, with respect to notice, public meetings and dissemination of information pertaining to the adoption of official plans, that:

17(2) The council shall ensure that in the course of the preparation of the plan adequate information shall be made available to the public, and for this purpose shall hold at least one public meeting, notice of which shall be given in the manner and to the persons prescribed.

(underlining added)

The Act stated, with respect to zoning by-law approval, that:

34(12) Before passing a by-law under this section, ... the council shall ensure that adequate information is made available to the public, and for this purpose, shall hold at least one public meeting, notice of which shall be given in the manner and to the persons prescribed.

(underlining added)\(^{389}\)

The latter was replaced in 1989 with language that clarifies the purpose of the public meeting but, as will be noted, its effect appears to be to adopt the general position that had already been taken

\(^{387}\) R.S.O. 1970, c.349, s. 12(1)(b).

\(^{388}\) The only notice requirement arose after the enactment of a zoning by-law, when a council was required to give notice of its application for the approval of the by-law by the Board "in such manner and to such persons as the Board may direct": *ibid*. subsection 35(11). A council's failure to comply with a direction of the Board was rare, and was, in any event, a procedural issue related to the hearing itself which differs from the issue being addressed here.

\(^{389}\) It is important to note also that, at the same time, the requirement that a zoning by-law come into force only if approved by the Board was repealed. Under the new Act, a zoning by-law was deemed to have come into force on the day it was passed if no appeal was filed. (s. 34(19)). To ensure provision for public input, the Act now required the council to give notice of and hold a public meeting prior to passing the by-law and to give notice of its passing.
Apart from the applicable provisions in the *Planning Act*, noted above, the legislative underpinning throughout the entire period was the *Statutory Powers Procedure Act*, enacted in 1971. The Act deemed municipalities to be tribunals exercising statutory powers of decision to which the minimum rules of procedure applied. These included the requirement that "[t]he parties to any proceedings shall be given reasonable notice of the hearing by the tribunal." Applicable law during the 1971-78 review period was largely defined by the *Wiswell* and *Zadravec* decisions. In *Wiswell*, the Supreme Court held that a municipality, in enacting a zoning by-law, was engaged in a quasi-judicial matter and was therefore required to act fairly and impartially by acting in good faith and listening to both sides. Early in the review period, however, the Court of Appeal held in *Zadravec* that, as the *Planning Act* provides that neither an official plan, if a hearing is requested, nor a zoning by-law come into force until approved by the Board, the municipal council was exercising only a legislative function and the judicial requirements of giving notice and giving parties a fair hearing was transferred to the Board. Throughout the 1971-78 period, therefore, the Board was not required, by either the *Planning Act* or the Courts, to impose any procedural requirement other

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390 Subsection 34(12) was repealed and replaced by S.O. 1989, c. 5, s. 14(1). It now reads:

*Before passing a by-law under this section, ... the council shall ensure that sufficient information is made available to enable the public to understand generally the zoning proposal that is being considered by council, and for this purpose ... (underlining added)*

This raises the question, which can only be noted here, of the extent to which policy developed by the Board, through its decisions, has influenced provincial policy development. There is evidence that Board members have, throughout the entire review period, met and corresponded with provincial officials, but it is insufficient to enable one to conclude that the Board did influence the government, or vice versa, in the policy areas under consideration here and in Chapter six.


392 Ibid. subsection 6(1).

393 *Wiswell v. Metropolitan Corporation of Greater Winnipeg* [1965] S.C.R. 512. The zoning by-law was held to be void. Because the city knew that there was opposition to the by-law it was obliged not to act until it had afforded the other party the opposition to be heard, and it had not done so.

394 *Zadravec* supra note 156 at 504, 506-7.
than the general requirement under clause 12(1)(b) of the Act that the planning board hold public meetings.

The Board’s position in the few 1971-78 decisions in which it addressed this issue was generally that municipalities need not go beyond the statutory requirements in providing notice of and opportunity for public participation, but that those limited requirements must be complied with. It held, in dealing with an official plan amendment, that the failure of an owner who had been heard at the meeting called by the planning board to receive notice of council’s intention to consider the amendment was not a failure of natural justice. In another official plan decision, the Board noted the failure of a planning board to hold a public meeting until requested to do so by the Department of Municipal Affairs. In a zoning decision, where there were no statutory notice or hearing requirements, the Board noted that “when applications are submitted to the Board, adherence to or avoidance of the locally voluntary process of public meetings is not a defect in the application such as to prevent the Board from considering the matter nor is it necessarily a ground for rejecting same.” Similarly, it rejected an argument in a development control by-law application, for which no notice was required, that objectors would not be entitled to notice of future specific decisions, and it noted that there was nothing in the legislation to prevent the council from inviting public participation if it chose to do so.

Even during this period, however, the Board recognized that while there was no statutory or, following Zadra vec, no legal requirement for municipalities to provide for public participation, there was a rationale for doing so. In the North York decision it stated that: “[g]enerally, the Board agrees with the principles enunciated in the Wiswell and Wandsworth [(1863), 143 E.R. 414] cases. Summarized, they indicate that a municipality is bound to act fairly and in good faith and give all

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396 Re Township of Kingston Official Plan Amendment 3 (26 May 1971), No. R 2903-70 (O.M.B.). While noting the planning board’s tardiness in holding a public meeting, the Board’s refusal to approve the amendment was based on substantive planning grounds.

397 Re City of Toronto Restricted Area By-law 375-75 (1977), 6 O.M.B.R. 82 at 85.

interested parties an opportunity to be heard."

Similarly, it refused in *Cornwall* to approve a zoning by-law on the ground that the municipality had failed to make full use of its powers under section 35 of the *Planning Act* to resolve objections, thereby stating by implication that it should have engaged more fully in public participation notwithstanding the lack of any requirement in section 35 that it do so. But it was only by the 1987-94 review period that its policy had developed fully in this regard. The context had changed considerably by then. In addition to the statutory amendments described above, the courts had dealt further with notice requirements. In *Central Ontario Coalition* the High Court quashed a decision of a joint board established to select hydro transmission corridors in south-western Ontario on the ground of the inadequacy of notice given. The court noted that, even though there was no express statutory requirement as to the content of the notice, such notice must meet the requirements of the *Statutory Powers Procedure Act* in that "a notice given must be reasonable in the circumstances." As to the test to be applied: "[I]t is well established that where the form or content of notice is not laid down it must be reasonable in the sense that it conveys the real intentions of the giver and enables the person to whom it is directed to know what he must meet." On the other hand, in considering an application to quash a joint board hearing regarding the locating of hydro system facilities in eastern Ontario, the Court of Appeal was satisfied that notice was adequate because it gave a clear description of the undertaking, including its location, and made reference to the availability of a report containing

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399 Supra note 395 at 299.

400 Re *City of Cornwall Restricted Area By-law 1894-1975* (1977), 6 O.M.B.R. 125 at 126.

401 Re *Central Ontario Coalition Concerning Hydro Transmission Systems and Ontario Hydro* (1985), 16 O.M.B.R. 172 (H.C.). This case involved the decision of a joint board, consisting of members of the OMB and the Environmental Assessment Board, established under the *Consolidated Hearings Act, 1981* (S.O. 1981, c. 20; now R.S.O. 1990, c. C.29), and applications under the *Environmental Assessment Act* (R.S.O. 1980, c. 140; now R.S.O. 1990, c. E.18) as well as under the *Planning Act*. Nevertheless, the issues addressed are equally applicable to the Board's consideration of notice under the *Planning Act* and have provided it with judicial underpinning for the position it has taken.

402 The hearing notices, given under section 3 of the *Consolidated Hearings Act, 1981*, had referred only to "south-western Ontario" without describing the area referred to by that term and without indicating the location of the alternate transmission routes which were to be considered.

403 Supra note 401 at 197.

404 Ibid. at 196.
all the particulars of the proposal that anyone could reasonably require.\textsuperscript{405}

On the surface, the Board's policy during the 1987-94 period was similar to that in the earlier period. As most frequently expressed, in zoning applications the notice provisions of subsection 34(12) must be strictly complied with, but it was not necessary to go beyond these requirements.\textsuperscript{406} Thus, as long as statutory public meetings were held, and adequate notice of these meetings and of the passing of a by-law was given, objectors could not claim to have had insufficient opportunity to be involved in the planning process.\textsuperscript{407} Similarly, there was no need to go beyond the statutory public meeting requirement and deal individually with each of many objections to designation under comprehensive official plans and zoning by-laws.\textsuperscript{408} Underlying this apparently unexceptional approach to interpretation, however, was what by 1987-94 might be described the Board's real policy on this issue, namely that the real need was to ensure that there was public confidence in the planning approval process even if the statutory requirements had been technically complied with. This confidence must, in tum, have been based on a full opportunity to participate. This policy manifested itself in the following situations considered by the Board.

2. \textbf{Ensuring public confidence in the planning approval process}

(a) \textbf{Adequacy of Notice and Public Meetings}

The Board was not required to consider this during the earlier review period, as there were no statutory notice or meeting requirements. These were introduced in the \textit{Planning Act, 1983}, and by the later review period the Board was applying its “public participation” test to them.


\textsuperscript{406} While most of the decisions involve zoning appeals, I believe that the Board's position applies also, by extension, to the notice and public meeting provisions which apply to other types of planning applications.


While the 1983 Act required the giving of notice, it provided no guidance as to the adequacy of such notice. The Board was required, perforce, to develop and apply its own tests of adequacy. It was concerned to ensure that notice was sufficiently clear to enable members of the public to understand the nature of the development being proposed, and its location, as without this understanding their ability to participate in the appeal process would be compromised. Its position regarding the linkage between notice and public participation was well stated in Thornbury: "Notice is a cornerstone of the planning process and the Planning Act, 1953 was amended in the 1980's to ensure that public input be given an important place in council's "planning issues" consideration." The Board has therefore refused to approve a zoning by-law where it was impossible to locate the site from the notice, where the notice referred to only one area while the by-law applied to the entire municipality, and where it was not clear from the notice that the meeting was being held to obtain the input of the public with respect to the proposed by-law. In an unusual situation, where the tenants of buildings to be converted into condominiums were university students, it held that the notice was inadequate because it was given in the summer months when the majority of the students were not in residence to receive it. Where, on the other hand, a notice referred to department store type uses, but did not specify the exact commercial use proposed (i.e. a "big box" or Walmart type outlet) the Board refused to agree that the notice was misleading, stating that the nature of the proposal was never in doubt and that the public was given enough information to know its basic nature. Similarly, it has balanced a strict application of notice and meeting requirements with its recognized need to ensure adequate public participation and, following Zadravec, has relied on participation in its own hearing as meeting the deficiencies in the

409 Re Village of Thornbury Zoning By-law 4-91 (1992), 26 O.M.B.R. 481 at 486.
412 Ibid.
413 500176 Ontario Ltd. v. City of London (1993), 27 O.M.B.R. 118 at 123.
415 Supra note 156.
statutory meeting requirements.416

The Planning Act, 1983 stated that the purpose of the public meeting is to provide the public with adequate information. As noted above, this was amended in 1989 to require that sufficient information be provided to enable the public to understand generally the zoning proposal.417 In keeping with this language, the Board's policy has been to require a sufficient level of information to be made available to enable the public to participate knowingly in the approval process. It has, in this context, refused to accept a municipal claim that subsection 34(15) gives it total discretion in what information it presents at a public hearing,418 stating that:

... the public did not have sufficient information before it at the time of the public hearing to enable it to assess the true impact of the proposal as required by s. 34(12) of the Planning Act, 1983. ... the purpose of the public meeting is to inform, not frustrate the public through lack of information; it is not just a necessary evil.419

and it has refused to dispense with a public hearing on the ground that environmental reports should have been part of the public hearing process that was held for a zoning by-law involving wetlands.420 On the other hand, it has found notice to be sufficient where the public was given enough information to understand the basic nature of the proposed development.421

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416 Thus, where council had complied with legal notice requirements, but residents were not aware of a public meeting until it was too late to attend, the Board took the position that it should not, on this ground, automatically overturn the by-law, but that it was providing the opportunity for objectors to state their concerns: Re City of Vanier Zoning By-law 3069 (1992), 26 O.M.B.R. 63. See also Henderson v. County of Simcoe Land Division Committee (1994), 30 O.M.B.R. 200.

417 See note 390.

418 Subsection 34(15) states that:

The council shall forward to such boards, commissions, authorities or other agencies as the council considers may have an interest in the zoning proposal sufficient information to enable them to understand it generally ...

It should be noted, in any event, that the section does not speak to the provision of information to the public.


420 West Carleton, supra note 307.

421 Brampton, supra note 414.
(b) Selecting an Application Type to ensure Participation and Policy Consideration

The Board's application of its public participation policy has been illustrated in its selection of application types to ensure the greatest degree of public participation and policy consideration, and its rejection of applications it has considered inadequate in these areas.

A property owner has, in some circumstances, a choice in the type of application required for his proposed development. Changes pertaining to height, density, bulk, setbacks and, to a limited extent, land use, may be made by way of either a zoning amendment or minor variance. The former requires a public meeting and a policy determination by council. The latter requires only a hearing of the applicant and his immediate neighbours by a committee of adjustment. The Board's position through both review periods has been that the use of zoning amendments is preferable to minor variances where the changes being proposed are such as to require broader policy consideration.422

Thus, during the 1971-78 period it refused to approve a minor variance permitting significant reductions in residential lot frontage, stating that: "[i]f significant changes from the provisions of the by-law with respect to lot frontages or other standards for this neighbourhood are to be made, they should be made by Council by amending by-law following the customary planning studies."423

During this period the Board dealt similarly, on occasion, with severance applications, holding that the development that would follow proposed severances would constitute strip development and should most appropriately be subject to the planning studies required for official plan and zoning applications.424 During the 1987-94 period the Board dealt similarly with a number of minor variance applications. It held that the use of minor variances to change the use of existing buildings from industrial to high-density residential was inappropriate, as the minor variance process did not

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422 Even site-specific zoning amendments require planning studies, public meetings and approval by council. Minor variances require no municipal planning input, although it may be present. Plan of subdivision and severance applications both require that regard be had to the matters set out in subsection 51(4) of the Planning Act, but only in the latter can parties other than the owner and the municipality be parties to an appeal.


allow for the formulation of standards and, in the absence of such standards, objectors would be acting in a policy vacuum and would not be properly able to address their concerns.\textsuperscript{425} It has refused to approve minor variances reducing lot frontage, depth and area in order to provide affordable housing, taking the position that this matter should be dealt with in the context of an area-wide zoning change requiring study and public review rather than through the granting of individual variances.\textsuperscript{426}

Similarly, while the approval of zoning by-laws requires public notice and public meetings, the approval of site plan agreements dealing with many of the details of a development proposal involves only the municipality and the landowner. Only the latter may appeal to the Board.\textsuperscript{427} Neighbours have no right of appeal, even though they may be directly affected by the design details of the proposal. The Board's policy of ensuring that public participation should be provided for, even where there is no statutory requirement for it, is illustrated in both review periods by its treatment of the situation where site-specific, but very general zoning by-laws were proposed, with the design details to be dealt with in subsequent site plan agreements. During the earlier period it refused to approve a zoning by-law because "it would permit an apartment building and any conditions and siting would be left to be determined between Council and owner without any right in potential objectors to bring their objections before the Board."\textsuperscript{428} During the later period it refused to approve a by-law that contained only a range of commercial land uses, and no design details, stating that the zoning appeal was the appropriate forum for reviewing the concerns of the appellants who would have no right of appeal from the subsequent site plan decision.\textsuperscript{429} Similarly, it has stated that "[t]he board finds itself in a position that is becoming more and more frequent.


\textsuperscript{427} Planning Act. subsection 40(12).

\textsuperscript{428} Re City of Cambridge Restricted Area By-law 228 (1976), 5 O.M.B.R. 21. Another associated problem was that the by-law, while ostensibly to permit the construction of an apartment building, permitted a wide range of other uses also.

Land-use impacts at the zoning by-law stage are pushed aside on the vague hope that the site plan process will resolve everything and has given approval subject to the by-law itself being revised to provide protection against adverse impacts on adjacent properties.

The procedures for the approval of an interim control by-law, applicable only during the 1987-94 period, are very different from those required for zoning by-laws. No notice or public hearings prior to its enactment are required, although notice of passing of the by-law must be given subsequently, and an appeal to the Board is provided for. It has developed a clear policy toward dealing with such by-laws on appeal, based on a four-part test discussed more fully below. One element of that test is consistent with its policy of requiring participation in the planning review process. In order to approve such a by-law, the Board must be satisfied that the authorized review, which is the reason for imposing interim control, is being carried out fairly and expeditiously. It is only through this review process, in which affected members of the public are able to comment on the planning studies that the municipality must undertake and to put forward their views, that public participation at the standard discussed above can occur.

3. Decision Data
Table 5-2 shows that the Board's decisions dealing with the adequacy of approval procedures. There is some consistency as to the types of applications in which it dealt with this issue, with official plan and, particularly, zoning by-law applications being by far the most frequently considered. The pattern of interest group involvement is similar to the overall pattern for the two review periods, but differs significantly in one respect. The 79% municipal support rate in both periods is well in excess of the 54% overall rate in 1971-78 and 43% in 1987-94, as shown in Table Intro-2. This reflects the fact that it is frequently the process followed by municipalities in approving

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431 Planning Act, subsections 38(1), (3) and (4).
432 See Chapter six, Section E.
### TABLE 5-2

**Approval Procedures - Decision Data**

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<td>4</td>
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<td>64</td>
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(1) Includes both comprehensive official plan and official plan amendment referrals.
(2) Includes both comprehensive by-law and by-law amendment appeals.
(3) Includes both commercial and residential neighbours.
(4) One decision excluded from each review period. One 1971-78 decision involving competing applications, including both approval and refusal. One 1987-94 decision involving motion for dismissal only.
applications which is at issue in these decisions. The "success" rate of municipalities in these decisions as shown in Table 5-3 suggests, however, that the Board was often ready to find inadequacies in the approval process followed by them. For decisions involving municipal-supported applications only, the approval rate was 40% in 1971-78 and 50% in 1987-94, as compared with the overall approval rates for municipal-supported decisions of 57% and 61%, respectively.

### TABLE 5-3

**Approval Procedures - Effect of Municipal Support**

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<td>32 (2)</td>
<td>100</td>
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<td>4</td>
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<td>14</td>
<td>44</td>
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<tr>
<td>Refuse to approve</td>
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<td>69</td>
<td>18</td>
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<tr>
<td>Decisions where</td>
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<tr>
<td>municipal support</td>
<td></td>
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</tr>
<tr>
<td>Total</td>
<td>10 (1)</td>
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<td>100</td>
</tr>
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<td>Approve</td>
<td>4</td>
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<td>Refuse to approve</td>
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<td>All decisions where</td>
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<td>municipal support</td>
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<tr>
<td>Total</td>
<td>184 (3)</td>
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<tr>
<td>Approve</td>
<td>105</td>
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<tr>
<td>Refuse to approve</td>
<td>79</td>
<td>43</td>
<td>53</td>
<td>39</td>
</tr>
</tbody>
</table>

1. One decision excluded because involving both approval and refusal of competing applications.
2. One decision excluded because involving motion for dismissal only.
3. Excludes 4 decisions in which there were multiple applications and results.

In addition, the level of owner opposition, approximately 30% in both review periods, is well in excess of the 10% rate overall. This appears to reflect little more than the mix of application types in which this issue is raised. Many of these decisions deal with comprehensive official plans and zoning by-laws, interim control by-laws and development charges, all matters in which the owner is commonly opposed to the application whose approval is being sought.

Given that the adequacy of the approval process has never been the sole issue dealt with in a decision, it cannot be said that it has been the reason for a decision, but it is clear from these decisions that the Board has placed considerable weight on this issue in deciding whether to approve or refuse an application.
The province played no part in dealing with this issue. This is consistent with its emphasis, in its various policy directives, on specific substantive matters related to planning and development. It is suggestive also of the province's willingness to allow the Board to play an unfettered role, subject to the possibility of judicial review, in dealing with the procedural provisions of the Planning Act.

C. THE ADEQUACY OF DECISION-MAKING: Filling gaps in the statutory requirements

The OMB's treatment of this matter provides an excellent example of extra-statutory procedural policy development by a tribunal. The Planning Act has set out the process in terms of giving notice and holding public meetings that councils, committees of adjustment and land division committees must follow prior to making decisions, but has given little guidance as to what matters they must address or how comprehensively they must be addressed. The Act has, for example, included a definition of official plan, but this has provided no indication as to what municipalities, or persons seeking amendments to official plans, were required to do in order to have adequate regard to the elements of the definition. It has given no indication as to what either should or must be addressed in considering a zoning application. It has included a listing of those matters to which an approval authority and, on appeal, the Board, must have regard in considering a proposed plan of

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436 The province's sole appearance in any of these decisions was to oppose a severance application on substantive planning grounds.

437 R.S.O. 1970, c. 349, s. 1(h):

"official plan" means a program or policy ... designed to secure the health, safety, convenience or welfare of the inhabitants of the area.

S.O. 1983, c. 1, s. 1(h):

"official plan" means a document ... containing objectives and policies established primarily to provide guidance for the physical development of a municipality ... while having regard to relevant social, economic and environmental matters".

A greatly expanded definition of what must, may and must not be included in an official plan was included in the 1994 amendments to the Act, but this change was too late to have any effect on the decisions being analysed here.
subdivision or a severance, but it has given no direction as to what constitutes adequate consideration of these matters.

Faced with this situation, a tribunal could adopt a reactive position by choosing not to address the adequacy of the decision made by the council or committee and to make its decision on the basis of whatever evidence the parties chose to introduce. Alternatively, it could adopt a more proactive role by considering the adequacy of studies and other evidence supporting applications placed before it and, furthermore, of the application process itself. The Board has responded by filling this statutory gap with its own test of adequacy, a test relying heavily on the adequacy with which impacts have been addressed in the decision-making process. More specifically, it has considered the following questions: Did the decision-maker have adequate information and analysis available to it to enable it to make an informed decision? Given the type of application, was the required approval process one that would elicit adequate information and analysis to enable a properly informed decision to be made? The former question pertains to the material upon which municipal councils have based their decisions. The latter pertains to whether the process followed in determining a planning matter was adequate to ensure proper consideration of those matters. In responding to the first question, in addition, the Board has considered its role where inadequate information was provided at the local level, but additional information provided on appeal.

1. Informed Decisions: The adequacy of planning studies supporting decision-making
As described in Section D, below, the Board has been reluctant to interfere with council decision-making where, in its view, councils have properly exercised their discretion. Despite this, it has often been called upon to consider whether councils have had sufficient material before them to be able to do so. The policy it has developed in this area has been that, in effect, councils are unable

438 These have included, during both review periods, a largely similar list of matters to be considered: Planning Act R.S.O. 1970, c. 349, s. 33(4), S.O. 1983, c. 1, s. 50(4) [now s. 51(24)]. They are a mixture of the general, such as “the effect of development of the proposed subdivision on matters of provincial interest as referred to in section 2” (cl. (a)), “whether the proposed subdivision is premature or in the public interest” (cl. (b)), and the specific, such as “the number, width, location and proposed grades and elevations of highways” (cl. (e)) and “the adequacy of utilities and public services” (cl. (l)).

439 Planning Act S.O. 1983, c. 1, s. 53(12).
to properly exercise their discretion if they have inadequate data and analysis before them on which to base informed decisions. As it noted in *Meaford*, it was satisfied that "the Planning Board did not have before it sufficient information upon which to base its decision." In developing this policy it has sought to achieve a balance between public participation and the adequacy of studies supporting applications. It has, for example, refused to approve an official plan amendment, which was adopted contrary to study recommendations, merely because residents wanted it. Its position has more frequently been in evidence, however, where studies supporting the proposed change have been undertaken, but it has had to rule on their adequacy. The level of adequacy expected has depended on the scale and nature of the changes being proposed, and what follows indicates the criteria it has applied in determining adequacy.

During the 1971-78 review period the Board refused to approve applications, whether or not there were substantive planning grounds for approval, because they were in its opinion based on insufficient study. It clearly stated its position in this matter in *Lavigne* in dealing with appeals from refusals to pass official plan and zoning applications:

> The authority given to this Board under the [*Planning Act*] on appeals of this nature is not to be exercised lightly. Before a change in land use from residential to commercial is made which may have a substantial impact on the amenities of a nearby residential area, careful

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As the decision data show, the majority of decisions in each review period in which this issue arose involved the consideration of municipal applications for the approval of official plans and zoning by-laws, including interim control by-laws. Because these were municipal decisions, consideration of the adequacy of the municipal decision-making process overlapped, particularly during the 1971-78 review period, with two other areas of the Board's policy development, the consideration of when it will interfere with the decisions of councils and what constitutes premature planning. The overlap is sufficiently limited, however, that these two other areas of policy development can be and are treated as separate categories, in Sections D and E respectively.

*Re Town of Meaford Restricted Area By-law 537 A.D. 1972* (1974), 2 O.M.B.R. 257 at 260 addresses evidence of need to locate a funeral home in an established residential area. See also the following decisions in which approval of municipal official plans or zoning by-laws was refused: *Re City of Niagara Falls Official Plan and Restricted Area By-law 70-211* (1973) 1 O.M.B.R. 433 (no study of amount of land needed for shopping centre use).

planning studies should be carried out which would support the proposed change.\textsuperscript{443}

Its position was no different when dealing in \textit{Meaford} with appeals of municipally-initiated zoning by-laws: "... there is an obligation upon the municipality to satisfy the Board that there should be a change in zoning. I am satisfied that the Planning Board did not have before it sufficient information upon which to make its decision."\textsuperscript{444} In doing this the Board was not saying that the proposals were necessarily flawed, but that matters which, in its view, should have been addressed, were either inadequately considered or not addressed at all. In coming to such a conclusion, it must have had an idea as to what should be considered, and what constituted adequate consideration. The former resulted, as discussed in Chapter six, from its development and regular application of other planning policies, the most significant of which was the assessment of impact as a central element in the evaluation of interests.\textsuperscript{445} The latter is considered below.

(a) Consideration of Impact

A major element in determining adequacy appears to have been the degree to which the planning studies undertaken have addressed the issue of impact on potentially affected persons and properties. This was implicit in \textit{Lavigne}, in which the Board spoke of the need for studies where a change "may have a substantial impact" upon existing uses in its vicinity.\textsuperscript{446} In a rare reference to the \textit{Planning Act} requirements, for example, it has stated that a municipality did not "have regard to social, economic and environmental matters"\textsuperscript{447} as it failed to address the impact on social and recreational services of permitting higher density residential development than had originally been

\textsuperscript{443} \textit{Lavigne v. City of Cornwall} (1973) 1 O.M.B.R. 391 at 392.

\textsuperscript{444} \textit{Meaford}, supra note 441 at 260.

\textsuperscript{445} On one occasion the Board even refused to approve official plan and zoning by-law amendments required for a municipal sewage treatment plant which had received Environmental Assessment Board approval, on the ground that there had been inadequate study of the impact of the proposal on its neighbours, particularly on the water supply of nearby residents: \textit{Regional Municipality of Niagara v. City of Niagara Falls} (1978), 7 O.M.B.R. 412.

\textsuperscript{446} \textit{Lavigne}, supra note 443 at 392.

\textsuperscript{447} Definition of official plan, \textit{Planning Act}, section 1.
intended within the area.\textsuperscript{448} The Board refused on several occasions during this review period to approve municipal official plans and zoning by-laws and private development proposals largely on the ground that the municipalities had failed to adequately consider these impacts in their decision-making.\textsuperscript{449} It has refused approvals where it was not satisfied that the potential impacts on neighbours, or the concerns of neighbours, had been adequately addressed.\textsuperscript{450} It has refused to give approval where the source of recognized impacts has been incorrectly identified, and the wrong property down-zoned.\textsuperscript{451} While these decisions have focussed primarily on municipal planning activity, the Board has taken a similar position with private appeals arising from the refusal of municipalities to approve official plan or zoning amendments, refusing to give approval where proponents have not presented planning justification to support their requests.\textsuperscript{452}

(b) Consideration of Comprehensiveness

The Board has refused to approve applications on the grounds that either the planning analyses upon which the applications were based had not been sufficiently comprehensive, or that piecemeal, site-specific changes should not be undertaken without overall study of the areas for which they were being proposed. Thus, in refusing the extension of commercial use into a residential area, it stated that:

\begin{quote}
... the problem should not be considered on a piecemeal basis as would appear to be the
\end{quote}

\textsuperscript{446} Oshawa, \textit{supra} note 327 at 351.

\textsuperscript{449} \textit{Re Town of Fort Frances Official Plan Amendment No. 18 and Restricted Area By-law 35/70} (18 May 1971), No. R 2680-70 (O.M.B.), (enlargement of pulp mill near residential area); \textit{Martin v. Township of North Dorchester} (1977), 6 O.M.B.R. 363 (commercial use of building in residential area); \textit{Re Moore Planning Area Official Plan Amendment 10 and Township of Moore Restricted Area By-law 47 of 1977} (1978), 7 O.M.B.R. 390 (proposed senior citizen’s home near existing industry).


\textsuperscript{451} A concrete batching plant was rendered a legal non-conforming use because there was evidence of adverse environmental impacts on a residential area arising from the industrial area within which it was located, but the study on which the official plan and zoning amendments were based did not establish that it was the source of the environmental problems: \textit{Re City of Welland Official Plan Amendment 66} (1992), 26 O.M.B.R. 311.

case here, but rather a consideration should be given based upon sound planning principles as to whether or not this street in the vicinity of the subject property should be studied with a possibility of arriving at a land use more consistent with a busy thoroughfare.453

More recently, in approving an official plan and zoning by-law to permit substantial high-density commercial and residential redevelopment, it stated that "the application as a major change in planning policies for the area should not be decided in isolation without a comprehensive analysis of the area."454

The Board has treated interim control by-laws as a special case, and has imposed a lower standard on municipalities passing them. These by-laws are enacted to place a temporary freeze on development, or at least on the types of development defined in the by-law, in situations where it is believed that such development may cause serious problems, so as to give municipalities time to undertake studies and to put new planning policies into effect. They are a form of protective, often preemptive, planning control, and the Planning Act allows municipalities to pass them without prior public discussion or notice. Because of the circumstances of their enactment, the Board has taken the position that:

It follows that the level of information that exists at the time that an interim control by-law is passed will almost certainly be less than that normally expected as the basis for passage of a more permanent limiting regulation. To expect that the information be perfected to a standard that would satisfy the needs of a s. 34 by-law runs counter to the very notion of interim control.455

As this language suggests, it has required that there be some planning justification for imposing interim control; a purely political decision to appease ratepayers is insufficient.456 In my view, this position does not represent a derogation from the Board's general position regarding the adequacy of decision-making, but is a specific exception justified by the circumstances in which interim control by-laws are imposed. Moreover, the need for municipalities to provide adequate supportive


455 Re Township of Hamilton Interim Control By-law 92-65 (1993), 29 O.M.B.R. 129 at 137.

studies is only deferred, as once the by-law has been passed the municipality must do so, in a fair and expeditious manner, in order to substantiate the planning rationale behind the by-law. 457

2. Correcting Deficiencies occurring at the Municipal Level: A troublesome practice

The Board has occasionally taken the position that, while a municipal council had less than adequate studies upon which to base its decision, it was satisfied that the evidence placed before it on review was sufficient to remedy that deficiency and provide it with enough information on which to base its approval. In Oshawa, for example, it "filled the gap in the process" 458 by hearing evidence regarding issues which were not raised when the official plan being implemented by the by-law was adopted, but became issues when a concrete development proposal led to a zoning amendment. In a more significant decision of this nature, the Ottawa-Carleton decision, the Board was clearly troubled about giving approval for a major arena within an agriculture area in the face of what it clearly believed to be an inadequate level of study when the matter was being considered at the municipal level. Yet despite stating that:

"councils should never, no matter how much pressure may be applied, pass on a matter of major public and provincial interest as this council did when it made a decision with a planning report in front of it making clear that at the time there was not sufficient justification for the use of this agricultural land" 459

it approved the arena at a slightly reduced size! It accepted evidence that the arena could be accommodated in the proposed location without undue adverse impact, 460 but it clearly did so under pressure to give an approval that was a prerequisite to "a matter of major public and provincial interest", the granting of a National Hockey League franchise for Ottawa.

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457 Tan-Mark, supra note 433. The manner in which the Board has developed and applied a policy for evaluating appeals against interim control by-laws is discussed below, in Chapter six, Section E.

458 Supra note 327 at 351.

459 Supra note 236 at 185.

460 The proposal before the municipal authorities was for the arena, substantial commercial development and the designation for urban uses of a total of 600 acres within an agricultural area. All elements of this proposal except the arena and some associated commercial were withdrawn from the application being considered by the Board.
The danger in adopting this position, which the Board has admittedly done rarely, is the impact this can have on its policy of requiring an adequate standard of planning analysis as a part of the municipal decision-making process. Where the parties expect that an application will likely be appealed, they may be tempted to undertake less than adequate planning analyses at the municipal level and to provide comprehensive studies only at the Board hearing. Such an approach can have the effect of down-grading the municipal decision-making process from its prime role in the planning system to that of a hearing preliminary to that held by the main decision-maker, the OMB. Such a reversal of roles is, in my opinion, a reversal of the position accorded to municipalities and to the Board by the Planning Act. 461

3. The Adequacy of the Decision Making Process: Ensuring that a properly informed decision is made

In addition to addressing the adequacy of the planning studies undertaken, or the lack of such studies, the Board has considered whether the process followed has, by its nature, enabled decision making to be based on adequate information. The focus here has not been on the formal processes, but on whether, in specific situations, an application has been adequately considered before a decision has been made regarding it. 462

The Board has found the decision-making process to be flawed in a number of situations. In one early decision, in which the locating of a police communications tower in a park was strongly opposed by ratepayers, it refused approval because there had not been an adequate search for

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461 This concern is not entirely hypothetical. While it is rarely reflected in Board decisions, it is acknowledged that parties anticipating appeals will often "save their ammunition" for the Board hearing by presenting limited information to the council and a more comprehensive case to the Board.

462 This discussion overlaps also the analysis of the Board's treatment of prematurity found in Section E. While there are elements common to both chapters, the analysis here focuses on decisions other than those in which prematurity was addressed.
alternate sites.\textsuperscript{463} It has held that a lack of consultation with the public,\textsuperscript{464} or consultation limited to only one segment of the public\textsuperscript{465} meant that council decisions were inadequately based. It has also stressed the importance of consultation with public agencies as part of the decision making process, where appropriate, in deciding that proposed multiple severances should be processed as subdivision applications. As it stated in \textit{Innisfil}:

It is the decision of the Board that if allowed this consent would in fact amount to a subdivision by the consent method inasmuch as three lots and provision for a road allowance would be created. This is contrary to the Planning Act and does not allow for adequate consultation with the various agencies as would be required by a plan of subdivision. Such consultation is desirable for proper development.\textsuperscript{466}

The Board has expressed concerns about approving development proposals in a planning vacuum; i.e., where there is no official plan or zoning by-law in place,\textsuperscript{467} or where it has recognized a need for comprehensive planning,\textsuperscript{468} to establish the proper planning context in which to evaluate individual applications. While it has normally confined its considerations to the matter before it, it took the unusual step in \textit{Sydenham} of finding the approach taken by a council in dealing with rural residential applications to be at fault, stating that:

... there are major flaws in the approach taken by county planners and council to this

\textsuperscript{463} \textit{Re City of Toronto Restricted Area By-law 280-69} (7 January 1971), No. R 3805-70 (O.M.B.). It should be noted that this was an unusual decision, as the Board has on other occasions refused to consider arguments that searches should have been made for alternate sites.

\textsuperscript{464} \textit{Lapointe. supra note 300}; \textit{Robinson. supra note 302}.

\textsuperscript{465} \textit{Re City of Toronto Official Plan Amendment 25 and Restricted Area By-law 348-73} (1975), 4 O.M.B.R. 221.

\textsuperscript{466} \textit{Minister of Municipal Affairs v. Township of Innisfil} (28 October 1971), No. R 4642-70 (O.M.B.) at 2. See also \textit{Township of Lake of Bays v. Borecki} (1977), 6 O.M.B.R. 305. The same considerations apply where the Board has refused to approve minor variances on the ground that the more comprehensive study and analysis required for a zoning amendment should be undertaken before an approval is given.


\textsuperscript{468} \textit{Re City of Windsor Official Plan Amendment 44 and Restricted Area By-law 3934} (3 May 1971), No. R 3928-70 (O.M.B.); Mono, supra note 329; \textit{Morrison v. 251555 Projects Ltd.} (1975), 4 O.M.B.R. 33; \textit{Re Village of Morrisburg Restricted Area By-law 26-74} (1976), 5 O.M.B.R. 184.
proposal and, generally, estate residential development in the rural area of the county.

Ms. McDonald [municipal witness] sees the county as merely a commenting agency along with all other bodies to which the Minister circulates the plan of subdivision. While this is certainly true, a reasonable person would think that the county’s responsibility as the senior local authority would extend to commenting on all applicable provisions of its official plan. ... [after noting the county planner’s failure to consider the existence of a woodlot in assessing a development proposal] ... This last observation is a telling condemnation of the existing planning process in Grey County where consents have already been granted to an extent which may compromise a use which the official plan policy states should be promoted and encouraged.469

These decisions cover a wide range of factual situations. They do, however, give expression to the Board’s view of the “ideal” planning process which underlies the policies discussed in this chapter, a process in which municipal councils play an active role, development decisions are made within the context of local planning policies embodied in official plans and zoning by-laws, and the public is fully involved.

4. Decision Data

Data summarized in Table 5-4 with respect to the Board’s treatment of the adequacy of decision-making suggest that it has chosen, as a matter of policy, to adopt a proactive stance where adequacy has been called into question, and that it has done so with the greatest frequency in respect of those applications for which it has received neither statutory nor policy guidance.470 Of the 52 decisions considered during 1971-78, 67% involved applications for approval of official plan and/or zoning by-law amendments,471 planning applications for which there were no statutory directives at all as to adequacy. The comparable figure for 1987-94 was 57%.472 Conversely, only 17% of these decisions in 1971-78 and 14% in 1987-94 involved subdivision or severance appeals,

469 Supra note 342 at 334.

470 But see comment below regarding the receipt of ministry reports in respect of referred official plans and amendments.

471 Note that this and the following percentage are not found in the Table. The decisions which involve both official plans and zoning by-laws are counted twice in the Table, but only once here.

472 This figure excludes the 7 decisions involving interim control by-laws, which did not exist during the earlier review period.
for which there was some, albeit limited, statutory guidance in this regard.

**TABLE 5-4**

**Decision-making - Decision Data**

<table>
<thead>
<tr>
<th></th>
<th>1971-78</th>
<th>1987-94</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>%</td>
</tr>
<tr>
<td><strong>Total decisions</strong></td>
<td>52</td>
<td>100</td>
</tr>
<tr>
<td><strong>Application</strong></td>
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<td></td>
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<tr>
<td>Official plan (1)</td>
<td>15</td>
<td>29</td>
</tr>
<tr>
<td>Types</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Zoning by-law (2)</td>
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<td>56</td>
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<tr>
<td>Int. Cont. by-law</td>
<td>n.a.</td>
<td></td>
</tr>
<tr>
<td>Plan of Subdiv.</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Severance</td>
<td>9</td>
<td>17</td>
</tr>
<tr>
<td>Minor variance</td>
<td>4</td>
<td>8</td>
</tr>
<tr>
<td>Other</td>
<td>4</td>
<td>8</td>
</tr>
<tr>
<td><strong>Supporters</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Province</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Municipality</td>
<td>35</td>
<td>67</td>
</tr>
<tr>
<td>Owner</td>
<td>35</td>
<td>67</td>
</tr>
<tr>
<td>Neighbour</td>
<td>7</td>
<td>13</td>
</tr>
<tr>
<td><strong>Opponents</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Province</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
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<td>37</td>
</tr>
<tr>
<td>Owner</td>
<td>8</td>
<td>15</td>
</tr>
<tr>
<td>Neighbour</td>
<td>33</td>
<td>63</td>
</tr>
<tr>
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<tr>
<td>Interest Evaluation</td>
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<td>38</td>
</tr>
<tr>
<td>Approval Procedures</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>Areas</td>
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<td></td>
</tr>
<tr>
<td>Interference</td>
<td>15</td>
<td>29</td>
</tr>
<tr>
<td>Prematurity</td>
<td>17</td>
<td>33</td>
</tr>
<tr>
<td>Good planning</td>
<td>11</td>
<td>21</td>
</tr>
<tr>
<td>Neighbourhood char.</td>
<td>9</td>
<td>17</td>
</tr>
<tr>
<td>Interim control BL</td>
<td>n.a.</td>
<td></td>
</tr>
<tr>
<td>Social housing</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td><strong>Decision</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Approve</td>
<td>8</td>
<td>15</td>
</tr>
<tr>
<td>Refuse to approve</td>
<td>44</td>
<td>85</td>
</tr>
</tbody>
</table>

(1) Includes both comprehensive official plan and official plan amendment referrals.
(2) Includes both comprehensive by-law and by-law amendment appeals.

The approval rate shows a significant difference between the two periods. In 1971-78, 85% of the hearings involving this matter resulted in a refusal, well in excess of the overall refusal rate of 56%,
while in 1987-94 the refusal rate fell to 63%, a figure still higher than the overall rate of 53%.*

These figures support the conclusion, most apparent during the earlier review period, that where the adequacy of decision-making became an issue the Board took a firm and consistent policy position.

The Board’s treatment of municipal decision-making is illustrated in those decisions, noted in Table 5-5 in which municipalities were supporting the referrals and appeals, as these were for the most part municipal applications.* During the earlier period, 80% of these applications were refused, as opposed to a refusal rate of only 43% for all applications supported by municipalities. During the later period 52% of these applications were refused, still well above the overall comparable

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**TABLE 5-5**

**Decision-making - Municipal support**

<table>
<thead>
<tr>
<th></th>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>35</td>
<td>23</td>
</tr>
<tr>
<td>Percent</td>
<td>100%</td>
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<tr>
<td>Approve</td>
<td>7</td>
<td>11</td>
</tr>
<tr>
<td>Percent</td>
<td>20%</td>
<td>48%</td>
</tr>
<tr>
<td>Refuse to approve</td>
<td>28</td>
<td>12</td>
</tr>
<tr>
<td>Percent</td>
<td>80%</td>
<td>52%</td>
</tr>
<tr>
<td>Overall Total</td>
<td>184 (1)</td>
<td>136</td>
</tr>
<tr>
<td>Percent</td>
<td>100%</td>
<td>100%</td>
</tr>
<tr>
<td>Approve</td>
<td>105</td>
<td>83</td>
</tr>
<tr>
<td>Percent</td>
<td>57%</td>
<td>61%</td>
</tr>
<tr>
<td>Refuse to approve</td>
<td>79</td>
<td>53</td>
</tr>
<tr>
<td>Percent</td>
<td>43%</td>
<td>39%</td>
</tr>
</tbody>
</table>

(1) Excludes 4 decisions in which there were multiple applications and results.

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* See Table Intro-2.

* Municipalities were seeking approval of their own official plan or zoning by-law amendments in 31 of the 35 1971-78 and all of the 23 1987-94 decisions included in this Table.
refusal rate for the period of 39%. These figures strongly suggest that, while municipal support has tended to make Board approval more likely overall, it has viewed municipal planning activity very strictly, particularly during the earlier review period, where the adequacy of that activity has been called into question.

The province played no active role in respect of this matter. This, plus the paucity of statutory guidance, suggests a situation analogous to that noted in the previous chapter, with the province leaving the determination of adequacy to both the local decision-makers and, on referral or appeal, to the Board. The raw data are somewhat misleading, however. During both review periods municipal official plan amendments were submitted to the Minister of Municipal Affairs for approval and, if referred, ministry reports on them were forwarded to the Board. Thus, while the latter was making an independent decision on these referrals, it received and gave consideration to the views of the ministry regarding them.

D. INTERFERENCE WITH COUNCIL DECISIONS: Giving content to statutory and judicially-established jurisdiction

Interfering with local decisions lies at the heart of the OMB's activities. A major part of its role as a regulatory agency is to review the decisions of municipal councils to approve or refuse to approve official plan and zoning by-law applications. Its authority to do so is set out in the Planning Act and is subject to judicial interpretation. Short of abdicating that role by rubber-stamping council decisions, it cannot choose but to interfere, and data for both review periods shows that it has done so. Moreover, decisions in which it has addressed this matter show that it has applied its own

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475 The overall figures for applications made by municipalities and applications supported by municipalities are not directly comparable, as the latter include some applications made by owners which are supported by municipalities. The correspondence between the two sets of figures is sufficiently close, however, that the relationship they illustrate remains generally valid.

476 Although it did express concerns in the 2 decisions in which it was a party.

477 In 1971-78, for example, the Board approved 57% of all applications supported by municipalities, but refused to approve the remaining 43% despite municipal support. During the same period it refused to approve 68% of all applications to which municipalities were opposed, but approved the remaining 32% despite municipal opposition. These percentages were similar in the 1987-94 period.
policies, particularly those pertaining to impact and good planning, in deciding whether or not council decisions should be upheld.

The Board’s decisions in this area have also highlighted a tension between different elements of its own interest evaluation policies which are examined more closely in Chapter six, Section B. It has generally regarded decisions of municipal councils as being the best expression of local public interest, yet it has also identified a “higher” private interest in the avoidance of adverse impacts which must overrule the public interest when the two are in conflict. As the following shows, it is generally when such conflict has arisen that the Board has chosen not to uphold council decisions.

There is little doubt that the Board has since prior to 1971 had a policy in place regarding interference in the decisions of councils with respect to zoning matters. There is clear evidence of such a policy in the annual reports from 1960 to 1965 in which it explained its role in hearing zoning applications.478 As it stated in 1960 with respect to its role in zoning matters:

On each hearing the Board considers all evidence adduced and, after weighing the facts and all pertinent considerations, it must decide if the council has made a reasonable exercise of the discretion given to it by the statute. If it appears that the discretion has been exercised reasonably then the Board upholds the action of the council by approving the by-law or refusing to order an amendment as the case may be. If the Board comes to the conclusion, after due deliberation, that there has not been a proper exercise of discretion by the council then the Board refuses approval of the by-law which has been passed or directs an amendment as may be required.479

It refused to treat a municipality like any other party in a zoning hearing, stating in its 1961 annual report that:

The duty of the Board is to review what the council has done under authority reposed in the council by the Legislature. Under that authority the council is given a discretion and the Board should interfere only if it is shown that the council has not made a proper exercise of that discretion. In other cases the Board refuses to substitute its discretion for that of the

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478 It is probably not coincidental that this expression of Board policy began in 1960, as this was the year in which A. J. Kennedy was appointed chair. His views on the role of the Board, and its relationship with government, municipalities and citizens, were clearly expressed in its annual reports, his submissions to various committees, and in Board decisions throughout his 12 year tenure as chair.

council.480

and in its 1964 annual report that:

In this as in all areas of the Board's jurisdiction respect must be maintained for local autonomy. Only in case of clear merit is the decision of locally elected representatives reversed.481

These oft-repeated statements leave open the question as to what constitutes the "proper exercise of discretion". It is in addressing this matter more closely, both here and under other headings of analysis of the Board's policy-making activities, that its policy development becomes most apparent.482

1. Municipal Applications for Approval of Official Plans and Zoning By-laws

The Board's position expressed in its annual reports was later exhibited in decisions during the 1971-78 review period. The statutory context should first be noted, however, as it has been determinative of its policy pertaining to interference. When hearing referrals of municipal official plans and amendments, it has throughout both review periods been standing in the shoes of the Minister of Municipal Affairs. During the 1971-78 period, when a plan was referred to the Board, "the approval of the Municipal Board has the same force and effect as if it were the approval of the Minister."483 Upon a referral during the 1987-94 period, "[t]he Municipal Board may make any decision that the Minister could have made."484 It has therefore had a clear statutory directive during both periods to approve, refuse to approve or approve with whatever modifications it considered appropriate.

The Board's role in the approval of zoning by-laws has differed greatly from that pertaining to

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482 It is significant that this was the only policy matter discussed in these annual reports, which is indicative of its importance to the Board, or at least to Mr. Kennedy.

483 Planning Act, R.S.O. 1970, c. 349, s. 15(1).

484 Planning Act, S.O. 1983, c. 1, s. 17(18).
official plans, and has also changed considerably between the two review periods. During the 1971-78 period, a zoning by-law did not come into force without its approval, and its jurisdiction was limited to approving all or part of the by-law. Moreover, the Act provided it with limited guidelines, stating that “the Municipal Board may have regard to the restrictions on any land adjacent to such land, area or highway.” By 1987-94, the requirement of Board approval had been replaced with an appeal process, with a zoning by-law automatically coming into force if not appealed within 35 days of its passing. On such an appeal, it had essentially the same jurisdiction as it had on the referral of an official plan or amendment, namely to dismiss the appeal (i.e., approve the by-law), approve the by-law in whole or in part or, an additional power, to “amend the by-law in such manner as the Board may determine” or direct council to do so.

The Board’s consideration of municipal applications has, during both review periods, taken place within a well-established judicial context. In the Highbury decision, the Supreme Court held that the Minister or the Board, in considering a subdivision application under section 26 [now section 51] of the Planning Act, was granted a wide discretion, but also “that the discretion, wide though it is, must be exercised judicially and that it is not a judicial exercise of discretion to impose upon the applicant, as a condition of the giving of approval, an obligation the imposition of which is not authorized by the Act.” This decision set limits to the Board’s exercise of its discretion. However, unlike a subdivision application, where the Planning Act provided a list of matters it or the minister were required to address, the Act gave no guidance as to how it was to exercise this jurisdiction. As in the other areas of decision-making, it was therefore left on its own in deciding what it should consider in exercising its discretion, and it has filled this legislative and judicial vacuum with its own

485 Supra, note 483, s. 35(9), (19).
486 Supra, note 483, s. 35(19).
487 Supra, note 484, s. 34(18), (19).
488 Supra, note 484, s. 34(27).
489 Etobicoke Board of Education v. Highbury Developments Ltd. [1958] S.C.R. 196 at 200 [hereinafter Highbury cited in S.C.R.]. The Supreme Court agreed with the Court of Appeal that the board could not withhold approval of a plan of subdivision until the applicant agreed to sell the indicated school sites to the board of education for a price fixed by that board.
policies.

The Board expressed its general position in a number of 1971-78 decisions. In the 1971 Spadina Expressway Mr. Kennedy, in his dissent to the majority decision, clearly expressed both the Board's support for upholding council decisions and the nature of the limits it placed on that support:

I have said in past decisions that this Board should not presume to interfere with the exercise of discretion by local elected representatives within the limits of power conferred upon them by the Legislature without some serious reasons for so doing. In my opinion there are cogent reasons, serious reasons for doing so in this case.\(^\text{490}\)

In Pembroke it made a direct link between the actions of council and the public interest:

The Board is further guided by a principle which it never failed to observe, that it has respect for decisions made by democratically elected representatives of the voters in a municipality. It presumes that a decision made by a municipal council was so made in the interest and for the welfare, benefit, safety and health of the inhabitants.\(^\text{491}\)

These general statements were repeated, albeit in less extreme form, throughout the review period.\(^\text{492}\) They may, however, be taken as the ritualistic expression of a general position which takes on substance only when its application is observed in detail in differing circumstances. When the matter is examined at this level, when consideration is given as to how the Board determines what reasons are "cogent", the simple conclusion is that it applies the substantive planning tests discussed at length in Chapter six.

Examination of a number of decisions during which interference with council decisions was explicitly addressed reveals the circumstances under which the Board did and did not interfere with council decisions during the 1987-78 review period. It refused to interfere with such decisions in the following situations: where a zoning by-law to permit a retail shopping centre did not grossly


\(^{491}\) Re City of Pembroke Restricted Area By-law 77-85 (1979), 9 O.M.B.R. 496 at 500.

\(^{492}\) See, for example, City of Toronto Restricted Area By-law 258-71 (1974), 2 O.M.B.R. 243 at 244; City of London Official Plan Amendment and Restricted Area By-law C.P.-306(eg)-641 (1975), 4 O.M.B.R. 152 at 155; Hamilton, supra note 398 at 385.
exceed the development standards established by the council in its official plan; where proposed apartments near a single-family residential area were held not to be incompatible with the latter; where proposed developments were "in accordance with good planning principles;" where council had decided that a parcel of land should remain privately owned, and thus available for development, rather than being acquired as public open space; where it was satisfied that the council had considered the risk of over-zoning lands for shopping centre purposes; where it was satisfied that a development control by-law properly implemented the legislation and was not implemented in an unfair manner.

These examples, covering a wide range of circumstances, display the ritualistic quality of this policy. It was frequently addressed, yet was applied so as to interfere or not with council decisions on the basis of the Board's own, often unstated, policy considerations. This is illustrated by the following decision in which the expansion of industrial use into an agricultural area in accordance with an official plan staging scheme was approved:

The matter of minimizing any possible impact that might occur is, in the opinion of the Board, a matter of planning which is the prerogative of Council under these circumstances to be determined by the Council in pursuance to the text of the Official Plan and the parent by-law.

... the Board finds no evidence that would justify interfering with that decision.

While minimizing impact may be a planning matter which the Board recognized as a prerogative...
of council, it did not bow to council’s decision in this or other matters. When it was not satisfied that its tests regarding impact had been met, it did not hesitate to refuse to uphold council’s approval. This is illustrated by the circumstances in which the Board interfered with council decisions by refusing to approve a municipal application. These included: failure to consider alternative locations for a police communications tower, giving conforming status to a non-conforming paint factory in a residential area, approving a residential development in an agricultural area without considering the long-term effects, downzoning from residential to agricultural when services would soon be available, not having council follow its established planning process in approving residential lots in an extraction area and approving a performance standards by-law which was of benefit to private interests, but was not in the public interest. Again, these decisions are linked to the Board’s application of its substantive planning policies.

The Board addressed this matter far less frequently during the 1987-94 review period but, in those few decisions, it showed little deviation from the position taken during the earlier period. In approving, for example, municipal applications for a “big box” supermarket in an industrial area, it stated that “[i]t is not for the board to overrule a municipality’s discretion, except in circumstances where the official plan of the municipality or good planning principles are clearly offended.” Once again, it becomes necessary to examine the board’s substantive planning policy

See Table 5-6 for the frequency with which the board has refused to approve council decisions.

Toronto, supra note 463. The deciding issue was that the Board considered the proposed tower to be located too close to single family residences.

London, supra note 492.

Re Township of Amaranth Official Plan Amendment (1977), 6 O.M.B.R. 39. The Board’s real reason for interfering here was its conclusion that the proposal was not good planning.


Re City of London Restricted Area By-law C.P.374(hf)524 (1978), 7 O.M.B.R. 91.

Re Borough of Scarborough Restricted Area By-law 17100 (1978), 7 O.M.B.R. 305.

areas to determine how it has applied this general policy.

2. Private Applications for Amendments to Zoning By-laws

One-third of the decisions in both review periods in which the Board explicitly addressed interference involved appeals of this type. Its jurisdiction differed from that applicable to municipal applications, and it claimed a different responsibility in dealing with each type of application, but in each instance it based its decisions largely on its own impact and good planning policies.

Private applications might be more accurately characterized as “subsection 35(22)” applications, as these constitute the great majority. The Planning Act has, since 1959, contained a provision under which a person could request an amendment to a zoning by-law and, if refused by council, could appeal to the Board.\(^{508}\) Its application of this provision, which follows, was therefore well established by the 1971-78 review period:

(22) Where an application to the council for an amendment to a by-law passed under this section ... is refused or the council refuses or neglects to make a decision within one month after receipt by the clerk of the application, the applicant may appeal to the Municipal Board and the Municipal Board shall hear the appeal and dismiss the same or direct that the by-law be amended in accordance with its order.\(^{509}\)

Its jurisdiction in respect of such appeals during the 1987-94 review period was expanded by the re-enactment of the Planning Act in 1983, and was now that “the Board shall hear the appeal and dismiss the same or amend the by-law in such manner as the Board may determine or direct that the by-law be amended in accordance with its order.”\(^{510}\)

The Board’s exercise of its discretion in this area has, unlike that in most of the other areas studied, been conducted within a judicial context that was well established before 1971. Moreover, this judicial consideration was one in which the Court of Appeal specifically addressed the Board’s policy-making role. In the Mississauga Golf & Country Club decision, the court noted that:

\(^{508}\) Planning Amendment Act, 1959, S.O. 1959, c. 71, s. 27a(19). A similar provision was previously found in the Municipal Act.

\(^{509}\) Supra note 483, s. 35(22).

\(^{510}\) Supra note 484, s. 34(11).
On the appeal to the Board [under (then) subsection 30(19) of the Planning Act], the Board is exercising an original jurisdiction and may direct the council to do anything a council could have done in dealing with the application to it, even if this departs from the strict terms of the relief requested in the application.\(^{511}\)

It stated that the Board was therefore required to exercise its independent judgement upon the merits of the application. The court further developed its consideration of the Board’s jurisdiction on these applications in Hopedale.\(^{512}\) In the appealed decision, the latter had relied on its policy of not interfering with a decision of council unless the latter’s action:

... was clearly not for the greatest common good, that it created an undue hardship, that some private right was unduly interfered with or denied, that they had acted arbitrarily on incorrect information or advice, or otherwise improperly.\(^{513}\)

In response to this, the court stated that:

Although it is proper for the Board in an appeal under s. 30(19) of the Planning Act to consider certain principles in deciding an appeal, it is not proper for the Board to limit its consideration to the application of these principles. It is, of course, important to keep in mind, as the Board has done, that it is being asked to interfere with the discretion exercised by an elective body but that can be but one of all the considerations which must be taken under review. The hearing before the Board is a hearing *de novo* and must be conducted as such. Counsel for the respondent submits that those parts of the principles stated, namely, “clearly for the greatest common good” or “creating an undue hardship” are sufficiently wide to require the Board to give full consideration to all matters as in a hearing *de novo*. I do not agree. It is possible that the Board may so interpret the phrases in question but such phrases are of uncertain meaning and their scope is questionable. Of even more importance, however, is the consideration that if they are to have the breadth of meaning we are asked to attribute to them then no purpose is served by outlining them as principles to be followed by the Board. In laying them down as principles and stipulating that the defendant must come within them the Board has sought, one must conclude, to reduce the scope of the inquiry. To lay them down as principles by which the Board would be guided may therefore be both reasonable and wise but to say that the appellant *must* comply with them before the Board will allow the application is clearly wrong and the Board, if it so

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\(^{511}\) *Re Mississauga Golf & Country Club Ltd.*, [1963] 2 O.R. 625 at 630. The matter under appeal was a rezoning application to permit apartments buildings in an area zoned for low-density residential use.

\(^{512}\) *Supra* note 382. This also involved a rezoning application to permit an apartment building in a low-density residential area.

\(^{513}\) *Re Highway Developments Ltd. v. Township of Etobicoke*. Unreported O.M.B. decision quoted in *Hopedale*, *ibid.* at 264.
fettered its jurisdiction, would be in error.514

The Board gave a comprehensive expression of the distinction between its role in considering council applications and in considering council refusals in Tollefson:

Under this section [Planning Act, 1970, subsection 35(22)] the Board is in a very unusual relationship as far as its powers vis-a-vis municipal councils. It has the authority to direct a council to pass a by-law that it either has refused or neglected to approve. This is different from its usual function, which is the consideration for approval in whole or in part of an application of the municipality. This unusual responsibility should be exercised by this Board only when the Board is satisfied that the municipality has not acted in a reasonable fashion in its consideration of the application. ... it should be the responsibility of the Board to examine council’s action or inaction to determine if it can be justified in taking into account the evidence and argument of opposing interests. It is not a question of second guessing or acting on one’s own sense of priorities.515

Despite the Board’s attempt to distinguish the manner in which it is to treat each type of application, a distinction based on the differing statutory underpinnings of each, it is difficult on the evidence of the decisions in which it addressed this matter during both review periods to see how it distinguished between them in practice. The key to dealing with both types of application appears to lie in the latter portion of the quotation, which states that the Board is to seek to justify council’s decision “taking into account the evidence and argument of opposing interests”. While I do not dispute that the Board has been doing this, the evidence of its decisions strongly suggests that it has not been doing so in a vacuum. Rather, it has regularly filtered this evidence and argument through the sieve of its own procedural and substantive planning policies and has, in practice, subjected them to its “own sense of priorities”.

During the 1971-78 review period the Board clearly recognized the judicially-determined scope of its jurisdiction in dealing with these appeals. As it stated in refusing to approve a spot rezoning for higher-density residential use, “[t]he power vested in the Board in such matters where it is being

514 Hopedale, ibid. at 264-65. I have included this lengthy quotation because it provides a rare example of consideration by a court of the Board’s policy-making jurisdiction. It should be noted also that the court, after making this general statement as to the manner in which the Board must consider an application, concluded that it had not, in this instance fettered itself, and that it considered all matters that it should have.

515 Tollefson v. Township of Gloucester (1977), 6 O.M.B.R. 206 at 213. See also Vaughan, supra note 246 at 388.
requested to set aside the decision of an elected council is one which should be proceeded upon with all judicial caution.”\textsuperscript{516} It stated its position, and its rationale, even more strongly in \textit{Claverley}:

“If there is ever a situation where ‘judicial self-restraint’ should be exercised, it is when this Government-appointed Board is asked to overrule the considered decision of a democratically-elected Council and compel them to pass a by-law.”\textsuperscript{517} In other decisions, it spelled out circumstances under which it would be prepared to overrule a decision of council, such as the failure of council to follow its usual procedures before refusing an application\textsuperscript{518} or an error in judgement on the part of council,\textsuperscript{519} but it refused to overrule because there was no evidence of these failings. The major substantive planning ground for refusing to interfere was, as noted elsewhere both in this chapter and in Chapter six, the likely impact on neighbouring properties of proposed developments.\textsuperscript{520}

Despite this, the Board recognized its authority and obligation to interfere by overruling council decisions in some circumstances. It stated in \textit{Crofton}, after citing \textit{Claverley} to the effect that it should overrule council decisions only with extreme caution: “On the other hand, the Legislature in its wisdom has vested this power in the Board and when the Board feels the circumstances warrant it, it should not shrink from fulfilling its obligations, particularly so in these days of housing shortages and rising rents.”\textsuperscript{521} Thus, it overruled the decision of council to refuse approval where it might have “acted arbitrarily on improper information” by being unduly influenced by incorrect

\begin{itemize}
\item \textsuperscript{516} \textit{Ptak Construction Ltd. v. City of Hamilton} (10 February 1971), No. R.2897-70 (O.M.B.).
\item \textsuperscript{519} \textit{Oriental Investments Ltd. v. City of Toronto} (1977), 6 O.M.B.R. 432.
\item \textsuperscript{519} \textit{Rush v. Township of Scugog} (1979), 8 O.M.B.R. 370. See also \textit{Vailrent Developments Ltd. v. City of Peterborough} (1987), 7 O.M.B.R. 327.
\item \textsuperscript{520} \textit{Hardix Developments Ltd. v. City of London} (13 October 1971), No. R. 3743-70 (O.M.B.); \textit{Arkbo Holdings v. City of Kitchener} (1973), 1 O.M.B.R. 470.
\item \textsuperscript{531} \textit{Crofton Developments Ltd. v. Borough of Scarborough} (1975), 4 O.M.B.R. 303 at 304. In this instance, the Board was satisfied that the provision of apartments, particularly if these were to be seniors’ apartments, overrode council’s reasons for refusing to give approval.
\end{itemize}
opinions of residents as to the impact of a proposed home for retarded adults,\textsuperscript{522} where council had relied on a technical report that later appeared to be of doubtful validity\textsuperscript{523}, and where evidence of likely flooding had not been adequately addressed by council.\textsuperscript{524}

The Board’s position had changed to some degree by the 1987-94 review period. Its amended position was clearly expressed in \textit{Nicholson}, in which it stated that:

Counsel for the immediate neighbour … cited Hopedale … to stand for the proposition that the board should be specially reluctant to overturn the decision of council in refusing a by-law, particularly so when they had refused three times. More recent cases [none cited here] have distinguished Hopedale to the extent that there is no greater onus in considering the validity of a by-law already refused by council than one approved by it.\textsuperscript{525}

This position was further developed in \textit{Maiocco}, in which it stated that being asked to interfere with a council decision was only one of the matters it must consider.\textsuperscript{526} The Board was thus still prepared to interfere with council decision where warranted, but it was now treating the act of decision-making as the only consideration, and was no longer prepared to give greater weight to a council refusal than to a council approval. In any event, the number of decisions during 1987-94 in which section 35(22) decision-making was specifically addressed was too small to provide any indication of a policy trend.

\section*{3. Decision data}

The decision data show significant changes between the two review periods in the degree of emphasis accorded to interference with council decisions as a matter for the Board’s consideration. As Table 5-6 shows, this matter was specifically addressed during the 1971-78 period in 62

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{522} \textit{Sarnia and District Association for the Mentally Retarded v. City of Sarnia} (1974), 2 O.M.B.R. 396 at 399. See also \textit{Re Preston Sand and Gravel Co. Ltd.} (1976), 5 O.M.B.R. 209 at 216.
\item \textsuperscript{523} \textit{Toronto Airways}, supra note 247 at 379.
\item \textsuperscript{524} \textit{Regional Municipality of Sudbury Official Plan Amendment} (1976), 5 O.M.B.R. 462.
\item \textsuperscript{526} \textit{Maiocco v. City of Guelph} (1991), 25 O.M.B.R. 211. The importance of this statement should not be overstated, however, as it is clear that the majority of the decisions reviewed have been based on consideration of multiple policy areas.
\end{itemize}
\end{footnotesize}
decisions, or 18% of the 348 decisions analysed for that period. During the 1987-94 period, however, it was considered in only 11 decisions, or 3% of the 321 decisions analysed. While it is a difficult point to prove, I believe that this change in emphasis reflects a maturation of the planning process between the two review periods. The frequent consideration of the matter during the earlier period indicates an uncertainty at that time as to the appropriate degree of interference with council decisions, and the consequent desire of the parties to test the limits of the Board’s position in this regard. It reflects also its desire to make clear the circumstances under which it would interfere or refuse to interfere with council decisions. The infrequency with which this issue was addressed during the 1987-94 period can therefore be read as reflecting a stable situation, one in which the “rules of interference” have been generally established and accepted by the parties and need not be constantly reiterated by the Board.

Interference is an issue that has arisen almost exclusively in the context of official plan and/or zoning by-law applications. Such applications were considered, either singly or in combination, in 92% of the 1971-78 decisions, and in 82% of the 1987-94 decisions. This reflects the fact that official plans and zoning by-laws are the major planning tools to which councils must direct their attention and give significant policy consideration. Other types of applications, plans of subdivision, severances and minor variances, tend to lead to disputes between neighbours and not to require policy-based decision-making by councils. The latter is not strictly true with respect to severance applications, as municipalities frequently oppose them on policy grounds. In such instances, however, councils are not making policy but are attempting to uphold their official plan policies pertaining to severances.
TABLE 5-6

Interference - Decision Data

<table>
<thead>
<tr>
<th>Types</th>
<th>1971-78</th>
<th></th>
<th>1987-94</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>%</td>
<td>No.</td>
<td>%</td>
</tr>
<tr>
<td>Application</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Official plan (1)</td>
<td>17</td>
<td>27</td>
<td>4</td>
<td>36</td>
</tr>
<tr>
<td>Zoning by-law (2)</td>
<td>49</td>
<td>79</td>
<td>8</td>
<td>73</td>
</tr>
<tr>
<td>Int. Cont. by-law</td>
<td>n.a.</td>
<td></td>
<td>1</td>
<td>9</td>
</tr>
<tr>
<td>Plan of Subdiv.</td>
<td>2</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Severance</td>
<td>3</td>
<td>5</td>
<td>2</td>
<td>18</td>
</tr>
<tr>
<td>Minor variance</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Supports</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Province</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Municipality</td>
<td>38</td>
<td>61</td>
<td>5</td>
<td>45</td>
</tr>
<tr>
<td>Owner</td>
<td>44</td>
<td>71</td>
<td>9</td>
<td>82</td>
</tr>
<tr>
<td>Neighbour</td>
<td>8</td>
<td>13</td>
<td>1</td>
<td>9</td>
</tr>
<tr>
<td>Opponents</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Province</td>
<td>2</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Municipality</td>
<td>28</td>
<td>45</td>
<td>7</td>
<td>64</td>
</tr>
<tr>
<td>Owner</td>
<td>10</td>
<td>16</td>
<td>2</td>
<td>18</td>
</tr>
<tr>
<td>Neighbour</td>
<td>46</td>
<td>74</td>
<td>7</td>
<td>64</td>
</tr>
<tr>
<td>Other Board</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Adeq. of decision</td>
<td>15</td>
<td>24</td>
<td>3</td>
<td>27</td>
</tr>
<tr>
<td>Prematurity</td>
<td>9</td>
<td>15</td>
<td>1</td>
<td>9</td>
</tr>
<tr>
<td>Interest Evaluation</td>
<td>27</td>
<td>44</td>
<td>7</td>
<td>64</td>
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<tr>
<td>Good planning</td>
<td>19</td>
<td>31</td>
<td>5</td>
<td>45</td>
</tr>
<tr>
<td>Neighbourhood char.</td>
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<td>15</td>
<td>3</td>
<td>27</td>
</tr>
<tr>
<td>Social housing</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>36</td>
</tr>
<tr>
<td>Decision (3)</td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Approve</td>
<td>34</td>
<td>55</td>
<td>7</td>
<td>64</td>
</tr>
<tr>
<td>Refuse to approve</td>
<td>26</td>
<td>42</td>
<td>4</td>
<td>36</td>
</tr>
</tbody>
</table>

(1) Includes both comprehensive official plan and official plan amendment referrals.
(2) Includes both comprehensive by-law and by-law amendment appeals.
(3) Excludes 2 multiple application decisions in 1971-78 involving both approval and refusal.

As Table 5-7 shows, the Board has obviously interfered with council decisions in respect of both types of applications. In the 1971-78 period it refused to approve 38% of the applications made by municipalities, while in the same period it approved 41% of the zoning amendment requests which councils had refused. During both review periods, interference was most frequently addressed in connection with the Board’s substantive policy areas. Forty three of the 62 1971-78 decisions, or 69%, included consideration of these matters, with interest evaluation being addressed in 44% decisions and good planning in 31%. Its substantive policies were also addressed in all of the 11
1987-94 decisions, with interest evaluation being addressed in 64% and good planning in 45%. The Board gave less consideration to its procedural policy areas when dealing with interference. During the 1971-78 review period, 24% of the decisions dealt with the adequacy of council decision-making while, during the 1987-94 period, 27% of the decisions dealt with this matter.

TABLE 5-7

<table>
<thead>
<tr>
<th>Interference - Municipal Applications (1)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1971-78</td>
</tr>
<tr>
<td>No.</td>
</tr>
<tr>
<td>Total decisions</td>
</tr>
<tr>
<td>Approve</td>
</tr>
<tr>
<td>Refuse to approve</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Interference - Private (section 35(22)) Applications</th>
</tr>
</thead>
<tbody>
<tr>
<td>1971-78</td>
</tr>
<tr>
<td>No.</td>
</tr>
<tr>
<td>Total decisions</td>
</tr>
<tr>
<td>Approve</td>
</tr>
<tr>
<td>Refuse to approve</td>
</tr>
</tbody>
</table>

(1) Official plans and/or zoning by-laws, plus municipal expenditures.

E. PREMATURITY: The handy all-purpose refusal tool

The OMB has frequently, in both review periods, been called upon to decide whether an application was premature or, as it often stated, was "premature and not in the public interest". A review of the decisions in which the Board has addressed prematurity shows that it has not developed a policy with respect to the meaning or application of the term. It has, however, used prematurity in different ways: as a ground for refusal of planning applications in its own right, and as a portmanteau term encompassing, if not always specifically referring to, its own procedural or substantive planning policies.
The Board's consideration of prematurity differs from the other matters analysed here in two ways. Premature is defined as "occurring, existing or done before the proper time; too early, over-hasty". The issue facing it when considering prematurity has generally not been whether an application should be approved at all, but whether it should be approved now. Implicit in this decision is that, if the matters causing an application to be found premature are resolved, it could then be reconsidered. Secondly, prematurity is a hybrid matter. Areas of policy development reviewed here and in Chapter six pertain to either procedural or substantive elements of planning. The Board's treatment of prematurity has encompassed both elements, although primarily the procedural. Acting with limited statutory guidance and no policy direction, it has found planning applications to be premature in certain well-defined circumstances.

The Board has received no policy guidance with respect to most elements of planning, particularly substantive planning considerations, and has in response developed policies in certain areas to provide its decisions with a degree of consistency. It has, however, received limited statutory and judicial direction with respect to prematurity, and has throughout both review periods had an obligation to consider prematurity when dealing with certain types of applications. The Planning Act requires the approval authority for a plan of subdivision, which includes the Board on an appeal of a plan or of conditions of approval, to have regard to "whether the proposed subdivision is premature or in the public interest". Similarly, in deciding whether to approve a consent to sever, it must have regard to the matters set out in subsection 51(24). It must, however, exercise its discretion judicially when deciding whether a proposed subdivision is premature or whether the other conditions in subsection 51(24) have been met. The Court of Appeal stated in Highbury that:

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528 Shorter Oxford English Dictionary.

529 There may be little practical difference, however, between refusal for prematurity or for other reasons. A refused development proposal may well not be resurrected in the same form at a later date, when both the owner's and the external circumstances might have changed.

530 Subsections 51(34), (39) and (48).

531 Clause 51(24)(b).

532 Subsection 53(12).
... it is clear to me that "premature" as used in cl. (b) [now clause 51(24)(b)] means that a proposed subdivision may be premature in the sense that it is presented too soon for any real need or demand for housing of the type contemplated or is perhaps being put forward before finalization of a pending official plan as defined in the Act or before final determination of zoning provision under current consideration in a municipality. I make no attempt completely to define the application of the word - merely to illustrate the meaning which I think ought to be given within the context of the Act.533

As described below, the Board has subsequently applied these considerations in deciding whether an application is premature, but it has also taken full advantage of the caveat to bring other considerations to bear also. It has more recently expressed its position in Clutterbuck, stating that:

What is or is not premature or unnecessary in the public interest is a matter which the Minister is required by s. 33(4) of the Planning Act [now subsection 51(24)] to have regard for when considering an application to approve a plan of subdivision. The Minister's decision would appear to be a matter of judgement, having regard to possible financial difficulties to which the development might commit the township, the undesirability of permitting new developments where they cannot be serviced economically and the requirement of the local Council and Ministry of Housing to endorse the most suitable development of the locality in the public interest. The judgement must take into account the interest of the public at large, not only that of the local electors.534

The Board has not limited its consideration of prematurity to subdivision and severance applications, although there is no statutory requirement for it to do so when dealing with other types of application. It has, as the decision data shows, made such consideration a matter of policy in hearing zoning appeals. As it stated in West Nissouri:

... when the board is considering a zoning by-law we must consider among other things:
(1) conformity to the official plan;
(2) prematurity; and
(3) whether the zoning is in the interest of good planning.535

The circumstances under which the Board has found prematurity to exist are described below.

533 Re Highbury Estates (1957), 8 D.L.R. (2d) 694 at 699, per Aylesworth J.A., affd. Highbury cited at S.C.R. supra note 489. The court held that the Board had erred in deciding that the provision of adequate school facilities was a matter to be addressed in determining whether a plan of subdivision was premature. The Planning Act was subsequently amended to include the adequacy of school sites as a matter to be addressed (clause 51(24)(j)).


1. **Process Elements of Prematurity**

The OMB has most frequently considered prematurity in connection with the planning process. The areas it has addressed pertain to the status of official plans and planning policies generally, the existence of planning studies pertaining to the matters before it and, to a lesser extent, the adequacy of certain types of applications.

**(a) Status of Official Plans and Planning Policies**

The Board has always considered it important that planning applications be supported by a municipality’s planning policies, particularly those in its official plan. This is not notable in itself.

The preparation and approval of an official plan lies at the heart of the planning process, and the Board has an obligation to consider the application of official plan policies to the matters before it.\(^{536}\) The *Planning Act* is static, however, in that it deals with the formal status of official plans but does not address the dynamic of their application. It provides no guidance as to how the Board is to deal with appeals in the absence of any local planning policy or official plan, or where policies and plans are under consideration, but have not reached the stage of approval or adoption. It is in responding to applications in which these circumstances occur that the Board has made creative use of what might be termed the doctrine of prematurity.

The Board has frequently, in both review periods, been called upon to consider the application of planning policies which are being developed, or are contained in official plans for which approval is pending. It has generally held that it would be premature to approve applications while official plan policies are still being developed. In *Bezemer*, for example, it stated that the approval of a severance which conformed to the municipality’s current planning controls was premature “because the existing Official Plan and zoning by-law are out of date and a new plan to guide future development is being prepared.”\(^ {537}\) This was particularly so where a proposed development, while not currently prohibited, would run counter to policies currently being considered for inclusion it

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\(^{536}\) Subsection 24(1) of the *Planning Act* reinforces the need for conformity by stating that once an official plan is in effect [i.e., has been approved by the Minister or the Board] no by-law may be passed that is not in conformity with it.

\(^{537}\) *Re Bezemer and Regional Municipality of Hamilton-Wentworth* (1975), 4 O.M.B.R. 149 at 151. See also *Davies v. Township of South Dumfries* (1 February 1971), No. R 3325-70 (O.M.B.).
in an official plan. As it stated in refusing to approve a severance: "At a time when the official plan is in the final stages of approval, and the municipality is beginning to take a more positive role in planning matters, approval of the proposed land division at this time would appear to be premature."\textsuperscript{538} It stated more pointedly, in another decision to refuse a severance, that "applications for consent or development by amendment to the zoning by-laws should not be processed where they would frustrate the establishment of the planning scheme."\textsuperscript{539} Calling an application premature is, in this context, a useful shorthand expression of its view that planning is an ongoing activity, and that the interests being expressed through the development of local planning policies should not be frustrated by the approval of applications which might prove to be incompatible with those policies.

The Board developed a further variant of this approach to dealing with plans during the 1987-94 review period in response to developments in planning tools. It was becoming common by this time for municipalities to prepare secondary plans containing detailed policies to govern the development of specified areas, although these were not necessarily to be adopted as official plans. The Board's finding of prematurity in decisions where secondary plans were required by an official plan, but had not yet been prepared, appears to have turned on the nature of the applications before it. Thus, in a zoning application which it concluded would have an adverse impact, it held that approval was premature until the secondary plan had been prepared.\textsuperscript{540} Where it was dealing with official plan amendments setting out general development policies, it held that it was not premature to approve these in the absence of the called-for secondary plans, as the latter were required later when specific development proposals were brought forward.\textsuperscript{541}

The Board has, on occasion, further extended this application of prematurity by using it as a reason for refusing to approve applications which were in conformity with official plans currently in force.

\textsuperscript{536} Stroobant, supra note 467 at 56.

\textsuperscript{537} Regional Municipality of Ottawa-Carleton v. Patterson (1976), 5 O.M.B.R. 201 at 202. See also West Nissouri, supra note 535; Morrisburg, supra note 468; Gray v. Township of March (1977), 6 O.M.B.R. 380.

\textsuperscript{540} JNS Developments Limited v. City of Stoney Creek (1989), 22 O.M.B.R. 292.

\textsuperscript{541} North York, supra note 454.
but which might run counter to newer, emerging policies. In *Walden Point* it found a rezoning for a waterfront apartment building to be premature, even though it was in conformity with the official plan, because a study to determine shoreline parks requirements, which could affect the development of the subject property, was still in progress.\(^{542}\)

During the earlier review period, when the use of official plans was not as widespread as it later became, the Board occasionally held the lack of planning controls to be an indication of prematurity. In refusing to approve a severance in a township having neither an official plan nor a zoning by-law, it stated that:

*It is not sufficient to say that development of this kind should be allowed to continue merely because a municipality lacks land use controls. ... I am not satisfied that there is any planning justification at all of the urban uses proposed. ... The fact that there are similar uses around the subject property does not justify the continuation of what undoubtedly is an unplanned disorderly growth. ... In my opinion, in the light of the county's entering into the planning field this appeal must be deemed premature.*\(^{543}\)

In other decisions plans of subdivision were held to be premature because, *inter alia*, the municipalities lacked any planning controls,\(^{544}\) or lacked a development plan upon which to base the required zoning by-law for the subdivision.\(^{545}\)

The Board has on occasion used prematurity as a policy tool. In the *Scarborough Transportation Corridor* decision, it refused to approve a strongly opposed application for funding to purchase portions of a proposed expressway corridor not yet in private ownership. The ability of Metropolitan Toronto to finance the purchase was not in issue. The construction of the expressway had not yet been approved, and the Board concluded that "until an ultimate use is determined which would eliminate any uncertainty for the borough [of Scarborough] and adjoining city residents, and

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\(^{542}\) *Walden Point Ltd. v. Town of Burlington* (1974), 2 O.M.B.R. 389. See also *Bezemer*. *supra* note 537.

\(^{543}\) *Stewart*. *supra* note 467 at 336.

\(^{544}\) *Clutterbuck*. *supra* note 534.

\(^{545}\) *Re City of Windsor Restricted Area By-law 4138* (1973), 1 O.M.B.R. 167.
determine the necessity for some specific purposes, the application is premature.\textsuperscript{546}

(b) Planning Studies

The OMB has frequently held applications to be premature on the ground that they were not supported or given justification by planning studies.\textsuperscript{547} Its use of prematurity in this context has served to shed light, as did its usage of the term discussed above, on its understanding of the planning process. Its approach has frequently been project-focused. It has held applications to be premature when their proponents have failed to provide evidence of planning studies justifying them and responding to objections, particularly objections based on adverse impact. These decisions have generally turned on substantive planning matters.

The Board has also taken a broader outlook focussed on planning policy development, holding that applications lacking justification from supporting planning policy studies pertaining to the area within which they are proposed are for that reason premature. Thus, in refusing to approve a zoning by-law locating sites for pit and quarry uses, it stated that "the evidence made clear that By-law 896 was enacted without any such study having been made and even without knowledge of any requirements for the issuance of permits. In these circumstances, the enactment of By-law 896 is premature."\textsuperscript{548} In some of these decisions it held approvals to be premature until studies under way had been completed. Examples include studies to determine long-term residential use patterns,\textsuperscript{549} to determine shoreline parks requirements,\textsuperscript{550} to establish boundaries for the expansion of urban development,\textsuperscript{551} to establish adult entertainment policies for inclusion into an official plan,\textsuperscript{552} and

\textsuperscript{546} Supra note 348 at 506.

\textsuperscript{547} This matter has overlapped to some extent the Board's policy development pertaining to the adequacy of decision-making.

\textsuperscript{548} Mono. supra note 329.

\textsuperscript{549} Wuthering Heights Limited v. Town of Oakville (1973), 1 O.M.B.R. 292.

\textsuperscript{550} Walden Point. supra note 542.

\textsuperscript{551} Amaranth, supra note 503.

\textsuperscript{552} Rowlan and City of Peterborough (1990), 23 O.M.B.R. 81.
to establish front yard parking policies.\textsuperscript{553} It appears that, in these instances, it was unknown at the time of the hearings if these studies would support the applications. The equation applied by the Board appears to have been that prematurity arises from the uncertainty regarding land use policies that will ultimately be developed and applied, and uncertainty as to whether approving an application now may create long-term land use incompatibilities and other problems.\textsuperscript{554}

In most of the decisions in this area, however, studies were not underway, and the Board went farther by stating that applications were premature because studies it considered necessary had not been undertaken. While it appears to have taken a more proactive position in this regard during the 1971-78 review period, its clearest expression was found in a more recent decision refusing approval of a waterfront plan of subdivision: "Without the benefit of comprehensive planning, involving public input, it would be premature to permit more residential development, which could well interfere with land uses that might be found desirable once planning is undertaken."\textsuperscript{555} The Board has thus held, for example, that it would be premature to approve high density residential development in a mixed use area until the municipality had undertaken studies to determine a reasonable land use pattern for the area,\textsuperscript{556} to permit a new shopping centre "before Council has made such a determination as to the total amount of acreage to be set aside for shopping centre development",\textsuperscript{557} to approve rezoning of a large area for industrial development until an overall plan for the development and servicing of the lands has been undertaken\textsuperscript{558} or, more recently, to approve


\textsuperscript{554} Alexandra v. Township of Sombra (25 November 1971), No. R 4360-70 (O.M.B.).

\textsuperscript{555} Lapointe, supra note 300 at 499. It is of interest that this was one of several reported decisions during the 1990s in which the province actively opposed the approval of plans of subdivision and severances in territory in northern Ontario without municipal organization. It is arguable that the province’s strong opposition based on its public policy concerns encouraged the Board to take the clear position quoted here.

\textsuperscript{556} Darwon Investments Limited v. Borough of Scarborough (20 December 1971), No. R 3518 (O.M.B.).

\textsuperscript{557} Re City of Niagara Falls Official Plan and Restricted Area By-law 70-211 (1973), 1 O.M.B.R. 433 at 435. See also Re Borough of Scarborough Official Plan Amendment 304 (1976), 5 O.M.B.R. 1.

\textsuperscript{558} Re Township of Hamilton Restricted Area By-law 3192 (1976), 5 O.M.B.R. 435. See also Re Town of Kincardine Restricted Area by-law 2242 (1974), 2 O.M.B.R. 207; Albemarle, supra note 408.
development in environmentally sensitive areas until the necessary hydrogeological and other studies have been undertaken. While the Board treated the lack or inadequacy of planning studies as determinative of prematurity, the need for or adequacy of such studies remained a matter for it, not objectors, to determine. Thus, it refused to await completion of studies for adjoining lands before approving a high-density residential designation. It approved residential development within an environmentally sensitive area where it was satisfied that environmental matters had been exhaustively reviewed and addressed. It refused to hold the approval of a large scale redevelopment scheme to be premature on the ground that only a part of the entire planning area was included, stating that "proper planning policies can be pursued for an identified part of a planning area which, as here, does not share significant features or planning history with the rest of the area, in advance of a plan for the entire planning area."

(c) Adequacy of Applications

The Board has occasionally, during both review periods, used prematurity as a ground for refusal when it has not been satisfied that the type of application before it provides sufficient opportunity for the full consideration of planning issues. It has addressed this also as a matter of the adequacy of approval procedures. Thus, in Innisfil it refused to approve a multiple severance application, holding that:

... if allowed this consent would in fact amount to subdivision by the consent method inasmuch as three lots and provision for a road allowance would be created. This is contrary to the Planning Act and does not allow for adequate consultation with the various agencies as would be required by a plan of subdivision. Such consultation is desirable for proper development.

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561 Durham, supra note 343 (area subject to Oak Ridges Moraine Area Implementation Guidelines).

562 Etobicoke, supra note 297 at 133 (headnote).

563 Minister of Municipal Affairs v. Township of Innisfil, supra note 466 at 2. See also Township of Cardiff v. Thompsett (1977), 6 O.M.B.R. 496.
It has also found multiple severances requiring an amendment to a zoning by-law to be premature on the ground that the in-depth study required for approval of a by-law had not yet been undertaken.\(^{564}\) During the 1987-94 review period, by which time site planning was an established planning process,\(^{565}\) it refused to approve zoning by-laws which left much of the detail with respect to design, servicing and traffic matters to be resolved in the site plan review process.\(^{566}\) In both types of decisions prematurity arose from the fact that the application type selected did not provide an adequate process for the consideration of matters that had to be addressed before approval could be given.

2. **Substantive Elements of Prematurity**

While the OMB has most frequently considered prematurity in the context of the planning process, it has also applied the term in addressing a substantive planning issue, the provision of municipal services. For the most part, its concern has been with the provision of hard services - water, sewers and roads - but it has considered the provision of adequate open space in this context also. As it stated in *Clutterbuck*, it must have regard in this connection to "the undesirability of permitting new developments where they cannot be serviced economically."\(^{567}\) It has thus held that it was premature to approve development applications where municipal services were not available,\(^{568}\) where existing services were recognised as being inadequate,\(^{569}\) or where the provision of services required for the

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\(^{565}\) Development control provisions had in fact been introduced into the Act by *The Planning Amendment Act, 1973* S.O. 1973, c. 168, s. 10.

\(^{566}\) *Goderich, supra* note 429; *Stanley, supra* note 452.

\(^{567}\) *Supra, note* 534 at 236.


proposed developments had not yet been resolved.\textsuperscript{570} Where, on the other hand, it has concluded that existing services were adequate, it has rejected claims of prematurity and given approvals.\textsuperscript{571} More recently, taking a broader policy perspective, it has held development proposals in unorganized territory to be premature because services would have to be provided by nearby municipalities which had no responsibility for and had not agreed to do so.\textsuperscript{572}

The Board occasionally found applications to be premature in other circumstances. Severances for farm retirement lots, for example, have been held to be premature where the applicants were not planning to retire for the foreseeable future.\textsuperscript{573} A rezoning was held to be premature where no demonstration that the removal of high quality agricultural land from framing for commercial use was in the public interest.\textsuperscript{574} In the great majority of these decisions, however, lack of services provided the rationale for a finding of prematurity.

3. Decision Data

As Table 5-8 illustrates, the OMB addressed the question of prematurity during both review periods. It in did so much more frequently during the 1971-78 review period, however, addressing prematurity it in 18\% of its 1971-78 and only 9\% of its 1987-94 decisions. It addressed prematurity even though there was no statutory requirement for this in many of the applications before it. It had

\textsuperscript{570} D'Antimo, supra note 424 (provision of sewers); Fabbri, supra note 295 (provision of connecting road); Walden Point, supra note 542 (possibility of acquiring part of subject property for open space as yet unresolved); Re Township of Cumberland Restricted Area By-law 2222 (1979), 9 O.M.B.R. 363 (possibility of acquiring subject property for park use to be explored).

\textsuperscript{571} Re Village of Cookstown Restricted Area By-law 135 (1977), 6 O.M.B.R. 197 (septic tanks considered adequate for subdivision). The Board has been criticized for permitting development on septic tanks rather than requiring full municipal sewer services. I do not propose to enter this debate, but only to note that the Board has considered the adequacy of services in the circumstances of each application. It has not held development on private services to be premature where it is satisfied that these are adequate. The question of adequacy turns, of course, on impact, which is discussed elsewhere. See also Caledon East, supra note 336.


\textsuperscript{574} Thorold, supra note 278.
### TABLE 5 - 8

#### Prematurity - Decision Data

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(1) Includes both comprehensive official plan and official plan amendment referrals.
(2) Includes both comprehensive by-law and by-law amendment appeals.
(3) One 1971-78 multiple application involved both approval and refusal.

An obligation to do so only in plan of subdivision or severance appeals, which represented only 43% and 48% of the decisions in the two review periods, respectively. Most of the remaining decisions were in respect of official plan and zoning amendments, for which it faced no such obligation. It is therefore clear that the Board was of the view that prematurity was a legitimate concern that it

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Supplementary information:

575 The Board considered subdivision appeals infrequently during both review periods. Prematurity was an important consideration in the few such appeals it did hear, however. It was addressed it in 4 of the 8 1971-78 subdivision appeals, and 3 of the 8 such 1987-94 appeals.
must, potentially, take into consideration regardless of whether it had a statutory obligation to do so.

The pattern of the Board's refusal and approval of planning applications is of interest. During the 1971-78 review period 82% of these decisions were refusals, a figure well in excess of the overall refusal rate of 56%. The disparity still existed during the 1987-94 review period but was less marked, the refusal rates being 66% and 53% respectively. It is difficult to determine the influence of prematurity itself in its decision-making, as in most instances other policy considerations were also addressed. There are, however, data not included in the table which suggests its importance to the Board. In every decision in both review periods, it refused to approve an application it considered to be premature. It gave approvals only where the issue of prematurity was raised, but it concluded that the applications were not premature. It thus appears that the Board has consistently found prematurity to be an absolute bar to approval.

F. DISCUSSION

In the introduction to this chapter I posed several questions, including: Where the province or its ministries have expressed policy in certain areas, does the Board go beyond these policies by, for example, imposing more stringent requirements than those established by that policy? Where provincial policy pertaining to various procedural or substantive areas of planning is lacking, does it develop and apply its own policies? If so, what jurisdiction does it have to engage in such policymaking? A number of answers have emerged from the analyses in this and the following chapter.576

1. The OMB has been actively engaged in policy development.

The analyses of the Board's treatment of matters of planning procedure in this chapter, and of planning substance in Chapter six, confirm what knowledgeable observers have noted: it has indeed been long engaged in significant policy development. The analyses show how a regulatory tribunal has sought to bring order out of the chaos of the multitudinous applications and fact situations

576 The division between Chapters five and six is to some degree artificial, as there is a degree of policy overlap, and many comments will apply to both. In this and the Chapter six commentary I note policy matters which are common to both areas, but I endeavour to avoid repeating material.
placed before it by developing and applying, in a reasonably consistent manner, policies which
provide guidance to both its members and the participants in the planning process. More
particularly, they show how the Board has developed and applied its own policies, in certain key
areas of planning process and substance, in exercising its regulatory jurisdiction under the *Planning
Act*. The areas selected for examination in this chapter have been the adequacy of approval
procedures followed by councils when considering planning applications, the adequacy of decision-
making by councils, the circumstances under which it has interfered with council decisions by
refusing to uphold them upon referral or appeal, and the manner in which it has dealt with the issue
of prematurity. The following are a number of significant conclusions arising from the analyses:

2.  *The OMB has developed policies with respect to procedural matters which have gone
beyond the provisions of the Planning Act and other policy or judicial guidelines.*

In 1972 the Macbeth Committee, which reviewed the mandate of the Board early in the review
period, concluded that, "... in at least two types of cases the OMB obviously makes policy. ... A
second occurs when the Board has only a generalized government policy to guide it and feels
obliged to make detailed policy applicable to the issues before it." This statement is correct as
far as it goes, but it suggests that the Board has limited its policy development to refinements
"within the four corners" of general statements of policy, of which the procedural provisions of the
*Planning Act* are a good example. Its treatment of the adequacy of approval procedures shows,
however, that it has gone well beyond statutory limits. The Act sets out procedures for the public
consideration, approval and appeal of various types of planning applications, and says little more
regarding them. The Board could have limited itself to a technical interpretation of these
provisions and decisions but, instead of doing so, it made significant policy contributions.

3.  *In dealing with the adequacy of approval procedures the OMB has, as a matter of policy,
established standards for public participation beyond those required by the Planning Act.*

I have noted that public participation plays a greater role in the Ontario planning system (compared

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577 MacBeth Report, supra note 6 at 3.

576 The processing of official plan and zoning applications, for example, are governed by sections
17 and 34 of the *Planning Act*, plus several important court decisions regarding notice and participation.
with the British system) to the extent that the ensuring of participation and public notice appears to be the only explicitly recognized legal ideology.\textsuperscript{579} It is probably more correct to say that the provision of participation and notice in a judicialized decision-making process is a dominant element in the prevailing legal ideology in the province, and has been so particularly since the McRuer Report was released in 1968.\textsuperscript{580} The Board has been an enthusiastic proponent of this ideology throughout the entire review period. Its policy with respect to public participation has evolved over time. There was limited evidence during the 1971-78 review period that it was looking beyond the minimal statutory requirements of the time to require a higher degree of participation. Evidence from the 1987-94 period, however, strongly suggests that it was by then imposing its own standard. It was not enough that notice be given and public meetings be held. The Board had to be satisfied that both the content of the notice and the circumstances of the meetings were such as to ensure adequate consideration by the affected public of the policy issues inherent in planning applications and, by extension, to ensure public confidence in the planning approval process.

The Board's application of this policy resulted also in its refusal to accept, in certain circumstances, the adequacy of the statutory approval procedures for minor variance, site plan and interim control by-law applications. It often expressed the view that these procedures did not, by their very nature, provide sufficient opportunity for the public consideration of planning policy in those situations where it believed that public policy considerations, and not just the particulars of the applications, should be addressed. Minor variance applications were thus refused on the ground that they warranted the full study and public consideration possible only under the zoning review process. This standard reflected back on notice also, as the Board determined the notice required for these applications to be adequate only if it made an appropriate level of public participation possible.

4. \textit{The OMB's decision-making with respect to other matters of planning process has been driven to a great extent by its own substantive interest evaluation policies.}

I have reviewed several areas in which the Board has gone beyond statutory or judicial requirements

\textsuperscript{579} See Chapter one, Section E.

\textsuperscript{580} Honourable J.C. McRuer, \textit{Royal Commission Inquiry into Civil Rights} (Toronto: Queen's Printer, 1968).
or, where these directives do not exist, has created and applied its own standards. Why has it done so? One reason has been to further its policy, discussed above, of providing a maximum degree of public participation. A second, equally important, has been to give expression in procedural contexts to its underlying policies of evaluating interests, particularly its policy of not subjecting properties, and their owners, to adverse impacts from new development. The nature of these policies is considered in Chapter six, but they are evident in a number of areas addressed here. The Board has refused to approve zoning by-laws excluding building bulk and location details, to be dealt with in subsequent site plans, on the ground that impacts on neighbours require a full consideration which is possible only through the zoning review process. It has often found planning studies to be inadequate because they fail to address the impact of proposed developments, or address the concerns of neighbours, or have not been sufficiently comprehensive to address impacts on larger areas. Its primary reason for interfering with decisions of councils has been its conclusion that they had failed to give sufficient consideration to the impact of proposed developments. The common thread running through these disparate examples has been its policy of ensuring that any potentially adverse impacts on neighbouring properties have been fully addressed.

5. The OMB has, in the absence of policy guidance, developed standards for evaluating the adequacy of decision-making by local councils.

The Board could have chosen to accept council decisions as givens, not look behind them, and decide each application before it solely on its substantive merits. This approach would have been consistent with its stated deference to and reluctance to interfere with council decision-making discussed in this chapter. As with the issue of interference, however, the evidence regarding its treatment of the adequacy of council decision-making shows that it has, on its own initiative, developed standards which local councils ignore at their peril. 581

The Board's main role in this area has been to establish, as a matter of policy, standards of study and analysis which municipalities must meet in preparing official plans and zoning by-laws, and

581 The decision data show that, where the adequacy of municipal decision-making has been an issue, the Board was much more likely to refuse to approve a municipally initiated or supported application than where this was not an issue. See Table 5-5.
which committees of adjustment must apply in considering severances and minor variances. The policy has been focussed on the adequacy, comprehensiveness and timing of the planning studies that councils have relied on. These standards have sometimes been applied to the consideration of planning policy, but they appear most often to have been related to the adequate consideration of impacts on affected properties. The Board’s decisions have also reflected another consistent element in its approach. While public participation has been considered important, it has been necessary also that councils and committees, when making planning decisions, have available to them adequate studies on which to base their decisions. This is not to say, of course, that councils and committees have not themselves required adequate levels of supporting documentation, but that the Board has established a benchmark which active participants in the planning process cannot help but be aware of.  

6. The OMB has, as a matter of ritual, expressed deference for council decision-making, yet has not hesitated to use the application of its own policies as grounds for overruling council decisions.

As Chapter six, Section B shows, the Board has clearly adhered to the “group public interest” theory discussed in Chapter one. As a result, it has spoken of the decisions of locally-elected municipal councils with respect to official plan and zoning matters as being the most legitimate expression of this local public interest. Yet the evidence shows it has not followed the logic of its frequently stated position. The manner in which it has actually interfered with council decisions, rather than its statements in this regard, is the better indicator of its understanding of its role as a review agency. Its decisions reveal two aspects of this understanding: what it has said and what it has done. The Board vigorously expressed the view throughout both review periods that it should interfere with the decisions of elected councils only with caution, only when there were cogent and serious reasons for doing so. In adopting this position, it was saying that it was prepared to accept the decisions taken by a council as being higher or more inclusive expressions of the public interest than the interests of those who, for whatever reason, are opposed to those decisions. The ritualistic nature of these statements must, however, be considered in the context of its pattern of decision-
making. As Table 5-7 shows, it frequently refused to support municipal applications. Looking at its response to municipal decision-making as a whole, it refused during the two review periods to approve 44% and 39% respectively of applications which were supported by municipalities.\textsuperscript{583} The sheer volume of these decisions is evidence that its openly stated policy of deference to council decisions was frequently subordinated to other considerations. A second indicator is found in examining the circumstances under which the Board has chosen to support or refuse to support council decisions. It is evident that this choice is based, not on any abstract notion as to the preeminence to be accorded to such decisions, but rather on the application of its own policies, particularly its policies discussed in Chapter six, pertaining to the evaluation of interests and good planning. It is in these areas that the Board has not hesitated, on the basis of the evidence placed before it, to interfere with and overrule decisions of councils.

7. \textit{The OMB has adopted a policy of using prematurity as a legitimation for decisions it wishes to make for a range of other policy-related reasons.}

Prematurity is a concept rather than a policy, but the Board has found it to be a flexible concept and has put it to creative use. The analysis shows that it has treated prematurity as a "handy all-purpose tool" enabling it to refuse approval or, as generally used, providing it with an additional reason to refuse approval, even in those situations where there was no statutory requirement that it do so. It has been difficult to find an easily discernable pattern in the Board’s use of this concept. It has held the approval of development proposals in areas lacking planning controls to be premature, yet at the same time it has given approvals in similar circumstances. It has frequently treated prematurity as an additional reason for refusal where it felt that others of its policies were being contravened. On the other hand, where planning controls existed, it has refused to approve applications which complied with older but approved official plan policies while running counter to emerging but as yet unapproved policies. Prematurity has thus provided legitimation, in these instances, for the

\textsuperscript{583} Of the 188 1971-78 decisions in which municipalities appeared in support of an application, the Board refused to approve 83. Comparable figures for 1987-94 were 137 and 53. This measurement provides only partial data, as it does not disaggregate municipal applications from private applications supported by a municipality, and it excludes decisions in which councils have refused to approve zoning amendment applications under section 35(22) and its successors. Nevertheless, it makes clear that the Board has refused to support council decisions with great frequency.
Board's decision not to apply the "law", i.e. the approved official plan policies, but to give weight to emerging policies which lack any formal status. It has linked prematurity to its policy regarding the adequacy of decision-making in holding applications lacking adequate supporting planning studies to be premature for that reason. It has also linked prematurity to its policy regarding the adequacy of planning procedures by holding applications which provide insufficient opportunity for a full consideration of planning issues to be premature for that reason. Moreover, it has not limited prematurity to consideration of the adequacy of or compliance with statutory procedures, but has extended the term to encompass certain of the elements within the planning system from which applications derive their justification. These elements provide a threshold that applications must achieve if they are to be considered for approval and, by extension, a window into the Board's thinking as to what the planning process requires. By calling applications premature because certain elements of the process have not been undertaken, are not yet completed or are inadequate, it has been saying that, as a matter of policy, it requires planning applications to meet certain minimum process requirements.

8. The OMB has, through its development of policy in the procedural areas reviewed here, established standards for the processing of planning applications that municipalities must meet to ensure consideration of the merits of their applications.

This conclusion arises from the review of several procedural policy areas. The Board imposed the standards described above with respect to the municipal planning approval process and refused to approve applications, even where there were no significant substantive planning problems, where municipalities failed to meet them. By establishing these standards, it sent a message to all municipalities that the failure to meet them could result in the rejection of their applications. Similarly, it established standards with respect to the adequacy, comprehensiveness and timing of planning studies which, if not met, could also lead to the refusal of applications without consideration of their substantive merits. It frequently cited prematurity as a reason for refusing to approve applications, with the specific elements of prematurity including a lack of supportive planning studies, the inadequacy of such studies as had been undertaken, and the inadequacy of the approval procedures followed.

The Board's decision to treat the adequacy of council decision-making as an issue has given it a
considerable "power of reservation" over such decision-making. It has often chosen to uphold or reject municipal decisions on the basis of the planning process followed by council, regardless of the substantive merits of the decision itself. The data, particularly for those decisions in which applications were refused because it concluded that the standard had not been met, are indicative of the influence that it can exercise over municipal planning practices. Its decisions, particularly if they are seen to follow a consistent pattern, have come to provide benchmarks that municipalities recognize they must meet if their planning decisions are not to be overturned.

This conclusion is illustrated also in the pattern of the Board's interference with council decision-making. The data with respect to this suggests a maturation of the planning process between the two review periods. The frequent consideration of this matter during the earlier period suggests an uncertainty at that time as to the appropriate degree of interference with council decisions, and the consequent desire of the parties to test the limits of its position. It reflects also the Board's desire to make clear the circumstances under which it would interfere or refuse to interfere with council decisions. The infrequency with which this issue was addressed during the 1987-94 period can therefore be read as reflecting a stable situation, one in which the rules of interference have been generally established and accepted by the parties and thus raised with less frequency at hearings. If there was any development of policy in this area, therefore, it was most likely to be observed during the earlier review period.

I concede that this is a speculative conclusion. It cannot be proved that, in the absence of these Board policies, municipalities would have subjected their planning applications to lower standards of scrutiny by councillors, officials or the public, or established better groundwork for their decision-making. Nevertheless, it seems highly likely that as municipalities have become aware that the Board has been applying these procedural policies they have sought to ensure that the standards being set by it were met. Otherwise, they would have run the risk of having their applications dismissed on procedural grounds alone, without consideration of their substantive merit.
9. *A near total lack of provincial involvement has left the OMB free to develop policies to guide its decision-making in these procedural areas.*

The above conclusions focus on the manner in which the Board has interpreted its mandate. The evidence of the province’s role, or the lack thereof, is a significant indicator of the relationship between the province and its creation. The former has established, through the *Planning Act*, procedures to be followed in preparing, adopting and appealing official plans, zoning by-laws and other planning tools. What is noteworthy is its subsequent lack of involvement in the ongoing application of these statutory policies. Provincial policy statements deal primarily with substantive, not procedural matters. The province has rarely been a party in hearings in which the procedural matters reviewed herein have been addressed. Where it has been a party, its concerns have been with substantive planning issues, not procedural matters. It is not surprising, therefore, that the Board has filled this vacuum with its own procedural and substantive planning policies. It is in the development of these policies that it has shown its “independence” of the province, an independence arising from the decision of successive provincial governments not to deal directly with these matters but to leave them for resolution by the Board.

10. *The procedural policies developed and applied by the OMB have reflected its private interest-focused legal ideology.*

The significance the Board has attached to these procedural policy areas is generally indicative of its espousal of a private interest legal ideology. These procedural requirements are directed to ensuring the adequate participation of and, through this, the protection of the various interests engaged in the planning process. The requirements for adequate participation and supporting studies and the use of application procedures making greater provision for public involvement are directed at protecting private interests, as the inadequacy in these areas affects private property owners and their neighbours far more than municipal or other public agencies.
CHAPTER SIX
THE BOARD'S DEVELOPMENT OF SUBSTANTIVE PLANNING POLICY

A. INTRODUCTION
This chapter provides an excellent example of “private” policy development by a regulatory tribunal in a situation where public policy is largely lacking, and where there is little statutory or judicial foundation for such development. It shows also how policy developed by a tribunal, which regulatory theory suggests should be applying public policy, has been given precedence over such expressions of public policy as have existed from time to time.

The role of the OMB is to make decisions with respect to the appeals and referrals placed before it. Its consideration of the procedural aspects of these applications is important, and Chapter five reveals its policy development in these areas. Yet, unless it is able to find flaws in the processing of applications, it must decide on the basis of substantive planning grounds whether or not they should be approved. Because of this, the analysis of its development of substantive planning policy brings us to the heart of its decision-making activity. This chapter shows how a tribunal, acting largely without policy direction from the province or jurisdictional guidance by the courts, has developed an elaborate set of substantive planning policies which have provided an underlying consistency to its decision-making in a wide variety of factual situations. It shows also how that tribunal's self-developed policies have provided it with a rationale for the overriding of provincial statements of policy that was discussed in Chapter four.

The following sections deal with a range of selected policy areas which have often been addressed, directly or by implication, in many of the Board’s decisions. The evaluation of interest provisions encompass several significant examples of policy development. The most important of these, its “adverse impact” test, is really a “meta-policy” underlying in varying degrees all of its more specific policy initiatives reviewed in this chapter. The Board has, at least partly through the application of this test, developed policies for determining what constitutes the public interest and for balancing both the public and private interests and competing private interests. Its determination of what constitutes good planning, while not a policy in itself, relies heavily on its interest evaluation policies. Similarly, its policies with respect to the preservation of neighbourhood character and the
requirements for the approval of interim control by-laws are derived from the application in these specific contexts of its interest evaluation policies and its concept of what constitutes good planning. The manner in which it deals with issues pertaining to social housing and commercial competition illustrates its policy development role in areas where there is significant public policy or public interest. The manner in which it interprets and applies the term "minor" in minor variance applications illustrates its policy development role in a specific, technical planning area, based on a statutory provision, in which public policy interest is largely lacking. Summary data for these policy areas is given in Table 6-1.

**TABLE 6-1**

*Summary of Board Substantive Policy Areas*

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Total Decisions</td>
<td>348</td>
<td>100</td>
<td>321</td>
<td>100</td>
</tr>
<tr>
<td>Policy</td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Interest evaluation</td>
<td>160</td>
<td>46</td>
<td>148</td>
<td>46</td>
</tr>
<tr>
<td>Good planning</td>
<td>73</td>
<td>21</td>
<td>95</td>
<td>30</td>
</tr>
<tr>
<td>Neighbourhood char.</td>
<td>75</td>
<td>22</td>
<td>52</td>
<td>16</td>
</tr>
<tr>
<td>Interim control by-laws</td>
<td>n.a.</td>
<td></td>
<td>18</td>
<td>6</td>
</tr>
<tr>
<td>Commercial compet.</td>
<td>19</td>
<td>5</td>
<td>20</td>
<td>6</td>
</tr>
<tr>
<td>Social housing</td>
<td>8</td>
<td>2</td>
<td>31</td>
<td>10</td>
</tr>
<tr>
<td>Minor</td>
<td>26</td>
<td>7</td>
<td>42</td>
<td>13</td>
</tr>
</tbody>
</table>

As noted above, a salient feature of the areas of the Board's policy development reviewed in this chapter, other than its treatment of minor variance applications and, to a lesser degree, of interim control by-laws, is the almost total absence of a statutory or judicial foundation for its decision-making. The *Planning Act* is largely silent regarding these areas and, as they are substantive rather than procedural, the courts have had almost nothing to say about them. Policies revealed through the following analyses are thus illustrative of policy-making by an administrative tribunal directed to "filling in the gaps" in its mandate arising from a lack of policy direction by its creator.
B. THE EVALUATION OF INTERESTS: The Heart of the OMB's Decision-making

The Board's evaluation of the interests of the parties appearing before it and its balancing of these interests within the context of the larger public interest lie at the heart of its adjudicative function. As Cullingworth has stated:

Planning is not an independent operation: it seeks to adapt the decisions of private interests (which seek their own benefit) to the decisions of public interests (which seek public benefits). To a considerable extent these interests and benefits are in opposition, and though the public sector provides a framework for private decisions, it is limited to the extent which it can override them.\textsuperscript{584}

As the Board stated in Chedoke: "Although the Planning Act does not explicitly address the matter of hierarchy of rights, the core idea that informs the Act throughout is a concern for the balancing of the different interests and therefore different rights."\textsuperscript{585}

The evaluation of interests is not in itself a policy, but rather an umbrella under which the Board has developed and regularly applied several important policies. The most noteworthy finding has been the importance it has attached to the protection of private property interests. This is a surprising conclusion to be drawn from analysing the decision-making activity of a tribunal whose role is ostensibly to interpret and apply public policies developed in the public interest. Nevertheless, its most important policy, one which may be considered as a "meta-policy" underlying much of its decision-making, is what is best described as a policy of "adverse impact". Its decisions show time and time again that if, in its opinion, a proposed development will have too great an impact on the interests of neighbouring property owners, it will not give its approval, even if the development is in accordance with and serves to implement expressions of public policy. This policy reveals, moreover, its strong reliance on private rather than public law. Its impact policy is, in essence, a refinement of the law of nuisance in the context of policy-oriented decision-making. In addition, the Board has addressed the question of what constitutes the public interest in the various matters it must deal with, and has clearly adopted the concept of "group public interest"

\textsuperscript{584} J.B. Cullingworth, Ontario Planning: Notes on the Comay Report on the Ontario Planning Act (Toronto: Department of Urban and Regional Planning, University of Toronto, Papers on Planning and Design, Paper No. 19, October 1978) at 27.

\textsuperscript{585} Supra note 339 at 494.
that was discussed in Chapter one. It has sought to achieve a balance between the public interest and private interests on the one hand, and between competing private interests on the other, and the application of its impact test has been crucial in achieving a balance in both situations.

The remainder of this section deals, in sequence, with the Board’s determination of the public interest, a description of its adverse impact test, and the manner in which it balances public and private interests. While the various aspects of its interest evaluation role have been separated for analytical purposes they are clearly inter-related. It is engaged primarily in adjudicating disputes between parties supporting or opposing specific development proposals, but its role is not limited to evaluating, as in a *lis inter partes*, the interests of each of the parties. It recognizes that there is a public interest element to its deliberations; that, as a provincially established review agency, it has a duty to apply public policy considerations to its evaluation of these private interests. Yet as we shall see it regularly subsumes these interests to those of private property owners, and does so in a manner which reveals its strong private law orientation.

1. The OMB’s Concept of the Public Interest: An Example of the Application of the Group Public Interest Theory

“In the public interest” is a term the OMB frequently invokes to justify its decisions. While it is a provincial tribunal, it is clear that it has favoured what was described in Chapter one as the group public interest theory, a belief that the public interest is embodied in the policy decisions of local “publics”: there is not a single overriding public interest and what is referred to as the public interest is in reality the interest of the dominant groups in any given situation. Given the nature of the matters before it, the Board has frequently identified municipal councils as the representatives of this interest, and official plans adopted by these councils as its best expression. It has also identified smaller communities as being the public whose interests must be protected, but it has applied this approach in such a manner that public and private interests have become indistinguishable. What is of particular note, moreover, is the infrequency with which it has identified provincial policies as representing the public interest.

Whether the public interest exists and, if it does, how it is to be determined, has been the subject
of considerable debate and discussion among philosophers and political scientists which can only
be noted here.\textsuperscript{586} It has been claimed that there is no such thing as a general public interest, but only
the interests of different groups which, if sufficiently influential in the context of the issues under
regulatory consideration, may come to be considered as the public interest.\textsuperscript{587} Despite this, there
is support for the view that the public interest can be determined, not as an absolute, but within the
context of a given set of social and political values. As Flathman states, after reviewing the
philosophical bases of public interest claims: "We have tried to demonstrate that "public interest"
is a normative concept or standard, used to commend and justify, and that its logic generates a set
of criteria which must be satisfied if "public interest" is to be properly applied."\textsuperscript{588} Held, after a
similar analysis, concludes that the public interest is a societally determined construct which can
exist in conjunction with private interests:

The assertion that the action or policy is in the public interest is a normative claim, requiring
normative justification, but it is up to the political system to declare it valid. When, however, such an assertion that a given x is or is not in the public interest has been
determined as valid by the authority - however diffuse it may be - of the political system,
this does not mean that individual interests may not continue to conflict with it.\textsuperscript{589}

Levin similarly emphasizes the social context of the concept:

For decades the American courts used the legal expression 'business affected with a public
interest' in their judgements and were in complete agreement about what this meant. If they
were to do so again, it is likely that the meaning of the expression would be different since
the ideological context has changed.\textsuperscript{590}

\textsuperscript{586} There is a considerable literature pertaining to the concept of the public interest. The following
are useful summaries of and contributions to the discussion: C.J. Friedrich (ed.), \textit{Nemos V: The Public
Interest} (New York: Atherton Press, 1962); G. Schubert, \textit{The Public Interest: A Critique of the Theory of
a Political Concept} (Glencoe, Illinois: The Free Press of Glencoe, 1960); R.E. Flathman, \textit{The Public
Interest: An Essay Concerning the Normative Discourse of Politics} (New York: Wiley, 1966); V. Held, \textit{The
Public Interest and Individual Interests} (New York: Basic Books, 1970); W.J. Meyer, \textit{Public Good and
Public Authority: A Pragmatic Proposal} (Port Washington, N.Y.: Kennikat Press, 1975); L. Lewin, \textit{Self-

\textsuperscript{587} See Chapter one, Section D.1.

\textsuperscript{588} Flathman, \textit{supra} note 586 at 192.

\textsuperscript{589} Held, \textit{supra} note 586 at 196.

\textsuperscript{590} Lewin, \textit{supra} note 586 at 23.
By whom is the public interest to be determined? Held speaks generally of the determination arising through the operation of the political system. Flathman puts the matter more directly, stating that "[i]t is the responsibility of those in authority to determine the descriptive meaning of "public interest" as issues arise" and "[w]e can also say that it is the duty of those in authority to implement or effectuate the public interest in any specific case." The PARC was certainly of the view that, while there might have in the past been commonly shared views which constituted a public interest, "[t]here is equally little doubt that in many places there is today a wide disparity in the values held by different groups in the community, and by different public agencies dealing with common situations." Despite these views, the Board has not hesitated to invoke the public interest in a wide range of situations, and to attribute a high status to it. The decisions analysed here make it clear that it has accepted the view that there is such a thing as the public interest, and that it must determine what constitutes that interest within the context of its role in the planning review process. It has stated that "[a]t the core of the board's decision-making in planning cases is, at all times, the determination of the public interest" and that "[t]he board is obliged, when considering an application for consent, to have regard for whether the proposal is in the public interest ... this determination is at the heart of decision-making in planning cases.

(a) The Equation of the Public Interest with Municipal Interests

The evidence from both review periods shows that the Board has consistently addressed the public interest in a community context. Furthermore, the lack of deviation in its views between the two periods strongly suggests that those views, which can certainly be considered as expressions of its

591 Flathman, supra note 586 at 189.

592 Supra note 7 at 23. It should be noted that the Committee identified what it admitted were recognized and often well organized interest groups, and that it "acknowledged from the outset that the way in which the review was structured would not give us access to the views, interests or concerns of the individual residents of the Province." (Paragraph 2.10)


594 Elgin, supra note 268 at 440.
policy, were well established prior to 1971. It gave consideration to the source of public interest early in the review period in the Spadina Expressway decision. Both the majority of the panel and the dissenting member clearly believed that council had a central role to play in determining the public interest. The majority stated that “[i]t is not necessary that the board project itself into the position of Council to determine the appropriateness of the intended works. To do so would, in my opinion, be a usurpation of the intended legislative powers conferred on Council.” The Chair, dissenting as to whether on the balance of interests the scheme should be approved, stated in agreement with the majority that “there is a general principle that the needs of the greatest number must prevail. The fundamental duty of Government is to protect the greatest common good.”

The Board's community-oriented view of the public interest has been shown also in an analogous matter, its treatment of official plans. These represent an amalgam of local and provincial interests. The Minister of Municipal Affairs must, in approving them, ensure that their policy statements based on local interests are in general conformity with, or at least do not conflict with, broader provincial policies and interests, and he frequently approves official plans with modifications to meet these provincial concerns. When the Board is dealing with the referral of an official plan it is not determining a *lis inter partes*, but is standing in the shoes of the Minister. In doing this, it

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595 *Supra* note 490. In this decision, the Board approved a funding application by Metropolitan Toronto for the construction of the Spadina Expressway into central Toronto. This decision is important both for its subject matter (even though the Board’s approval was overturned by Cabinet) and for both the majority and minority dissenting opinion with respect to the public interest and, as discussed more fully below, the balancing of different interests.


597 *Ibid.* at 4. One other matter this decision illustrates is that the Board has looked to local council decisions as expressions of the public interest because there has rarely been any higher level of public decision-making for it to look to. At the time of the Spadina hearing, there had been no statement of a provincial position as to the desirability or otherwise of the expressway scheme. The province took a position only when the board’s decision to approve the funding was petitioned to it, at which time Cabinet concluded that proceeding with the scheme was not in the public interest.

598 The Board’s role in this regard was established early in the evolution of the planning process in Ontario, as the Planning Act, 1946 stated that:

Where under this Act the approval of the Minister is required, the Minister may, and upon application thereto shall, refer the matter to the Ontario Municipal Board in which case the approval
must consider the public interest as reflected in the policies of that plan. As it stated in *Maxine*:

"The Board's function in dealing with an Official Plan upon reference is much different than its function in determining other matters. It goes without saying that the public interest is of paramount importance." It stated in *Toronto Airways* that, in considering official plans it must "ensure that, as far as possible, larger considerations in the public interest are identified and addressed." Nevertheless, it has often looked to official plans, not to some objective standard beyond them, for substantive expressions of the public interest. It has during both review periods shown a willingness to weigh expressions of provincial policy against community interests, as expressed in official plan policies.

It has stated, either directly or by implication in both review periods, that the public interest is to be equated with the policies adopted by municipalities in their approved official plans. Its position was well put, albeit negatively, in *Krah*, a severance appeal: "approval of the request may not be in the public interest because there has been no opportunity for the municipality to formulate, adopt and then present official plan policies as to land use and development for...

of the Board shall have the same force and effect as if it were the approval of the Minister.

Although the Act was subsequently subject to many amendments, and to re-enactment in 1983, the Board's role upon the referral to it of an official plan remained essentially unchanged throughout the two review periods.

599 Supra note 244 at 63.

600 Supra note 381 at 5. In this instance, it should be noted, the Board complained about the lack of provincial or regional policy directives, stating that it "has no provincial or regional policy to assist it in its deliberations" and therefore had to make a decision about the proposed designation of large areas for commercial-industrial development "with no common goals except how to service it." (at 7) See also the Board's discussion of its duty in considering an official plan amendment in *Brampton*, supra note 414 at 452.

601 In *Roamin' Stables*, supra note 283, the Board decided on the basis of an official plan policy to encourage the preservation of historic buildings, which contravened both official plan severance policies and the Food Land Guidelines agricultural protection policies. In *Petch v. City of Cambridge* (1993), 28 O.M.B.R. 117, it refused to approve the use of apartments in cellars for affordable housing, although this use complied with the Housing Policy Statement, because it contravened the City's official plan policy of prohibiting such accommodation.

ministerial review and approval. It has held in shopping centre decisions that the public interest lies in protecting the existing planned commercial structure of municipalities, as set out in their official plans.

The OMB has given similar consideration to what constitutes the public interest in dealing with referrals of draft plans of subdivision. During both review periods the Minister and, upon referral the Board, have been required under the Planning Act to consider, inter alia, "whether the proposed subdivision is premature or in the public interest". The implications of this requirement have rarely been addressed in subdivision referrals, but the Board did give a clear statement of its position in the Caledon East decision:

It is harder to determine whether the proposed subdivision is necessary in the public interest. Again, what is "public necessity" is a matter of opinion and not a matter of law or fact. ... The fact of approval from time to time by council and by agencies charged with the responsibility of expertly considering subdivisions is an important element in considering what is or is not in the public interest.

The result, once again, was that a particularistic, contextual concept of the public interest prevailed.

Despite the importance the Board accords to approved official plans, it has not been consistent in equating council decisions with the public interest. In Bezemer it stated that "[a] matter of this nature is to be decided more on planning principles, the interests of the Municipality and the public interest than on advantage or hardship to an individual." In Amaranth it identified the council as only one such source, stating in refusing to approve a council-initiated official plan amendment that such approval "would create a serious situation of future problems to the inhabitants of the subject

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603 Supra note 572 at 216.


605 Planning Act, R.S.O. 1990, c. P.13, cl. 51(24)(b). It is interesting to note the distinction in the Act between this criterion and that in clause (a), "the effect of the development of the proposed subdivision on matters of provincial interest as referred to in section 2", which was added in 1983.

606 Supra note 336 at 203-04.

607 Supra note 537 at 151 (approval of a plan of subdivision).
property, to future industrial users, to future Township councils and is not now in the public interest. These statements imply the existence of a normative public interest by which an individual council decision, or even council policy as embodied in its planning documents, may be judged. This broader source appears to be found in the board’s concept of good planning.

Zoning appeals have been the type of application most frequently addressed by the Board, but its position with respect to the public interest has depended on the source of these appeals. Where they have arisen from the enactment of zoning by-laws, its position has been to treat them, because they were passed by municipal councils, as being expressions of the public interest. As it stated in approving a zoning by-law implementing an official plan, “the policy decision has already been made, and any zoning by-law that would have to be brought into effect must be in conformity with the official plan.” Where, on the other hand, the appeal arises from the refusal or neglect of council to pass a requested zoning by-law, it has tended to treat the appeal as a lis inter partes, and to direct its mind to balancing the interests of the parties in the manner described in subsections 3 and 4, below.

(b) Linking the Public Interest with Good Planning

The Board has regularly, throughout both review periods, linked the public interest with good planning, but its shifting views of the relationship between these two concepts have made it more rather than less difficult to determine its concept of the former. This linkage was clearly enunciated in Toronto Airways:

Where the parties have satisfied their own objections or problems, it still remains for the board to hear sufficient evidence to enable findings to be made that what is being proposed

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608 Supra note 503 at 42.

609 Re Township of Oro Restricted Area By-law 1061 (1975), 4 O.M.B.R. 407 at 409. This is, in any event, a statutory requirement. Section 24(1) of the Planning Act states that, where an official plan is in effect, no by-law shall be passed, with specified exceptions, that does not conform with the plan.

610 See Chapter five, Section D for a related matter, the circumstances under which the Board will interfere with a council decision to pass a zoning by-law amendment and refuse to approve private requests to amend a zoning by-law.

611 See Section C for a discussion of what the Board considers the term good planning to encompass.
is sound and in the public interest, or at least not inconsistent therewith. Matters such as prematurity and any prejudice arising therefrom, appropriateness of use or uses proposed, location, need, environmental impacts, feasibility of the project, suitability of the land, and consistency with fundamental and accepted planning principles all must be considered in order to meet that test.\(^{612}\)

It frequently spoke of the public interest and good planning conjunctively, stating after reviewing evidence and arguments that a proposed development either "is not in the public interest and does not represent sound and good planning"\(^{613}\) or the opposite. Yet it is unclear whether it has meant that the public interest and good planning are two ways of expressing the same concept; i.e. that it is in the public interest that the principles of good planning be respected, or that good planning contributes to but is not the totality of the public interest. Despite the variability in the Board’s statements in this regard, the latter appears to be a better expression of its position. This was clearly stated in the Ottawa-Carleton decision in which it approved a comprehensive regional official plan:

> Although none of the provisions [of the Planning Act] need be set out here, it is necessary to discuss and clarify the Board’s interpretation of the planning process and of good planning generally that have developed from the use of the Planning Act over many years and must be recognized as being in the interests of the public as a whole.\(^ {614}\)

The constant invocation of the public interest, often without further explanation\(^{615}\) and in such differing contexts, might lead to the conclusion that the Board has had no consistent view of what constitutes the public interest. I do not believe this to be the case. It has certainly found there to be a public interest in a wide range of planning-related matters, such as obtaining increased

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\(^{612}\) *Supra* note 381 at 6.


\(^{615}\) An exception occurred, for example, in *Di Nardo, supra*, note 602, where the Board stated that the proposed severance was not in the public interest because it contravened official plan policies and because it was not good planning to permit the removal in this manner of lots from an approved plan of subdivision.
assessment, environmental protection, protecting good farmland, providing various forms of social housing, obtaining an orderly pattern of development, meeting pressures for urban growth, developing land rather than keeping it undeveloped for the benefit of neighbouring residents, retaining the character of established single-family residential areas and protecting historic elements of the urban fabric. Looking behind these specific examples, however, it is evident that the Board has regularly relied on the decisions and policies of publicly elected councils as being sources of the public interest. To the extent that it has done so, it has given credence to a particularistic concept of the public interest. In equating the public interest and good planning, however, it appears to have transcended this geographically and politically local focus to articulate the views of another of its “publics”, one that might be broadly identified as the planning community. This is a very amorphous community, consisting as it does of public officials, planners and other experts, lawyers and other parties regularly engaged in the planning process. These parties will, of course, be appearing both in support of or opposition to individual applications. The key, however, is that they are significant players in the approval process who frequently appear on

616 Pickering, supra note 493


618 Coupland v. Township of Vespra (1975), 4 O.M.B.R. 445; Rush, supra, note 266.

619 Re City of Welland Restricted Area By-law 5442 (1973), 1 O.M.B.R. 427; Re Town of Walkerton Restricted Area By-law 74-29 (1975), 4 O.M.B.R. 259; Crofion. supra note 521.


621 Newmarket. supra, note 602; Oakville. supra, note 602.

622 Re Hamilton-Wentworth Planning Area Official Plan Amendment 97 (1976), 5 O.M.B.R. 117; Re Town of Stoney Creek Restricted Area By-law 204-75 (1976), 5 O.M.B.R. 175.


a day-to-day basis before the Board. It is their outlook, their views as to what constitutes good planning, that it is regularly exposed to. While it is beyond my mandate to examine these oft-expressed planning orthodoxies in detail, it is certainly arguable that the Board has been "captured" by these ever-present experts and officials in ways which it has not been in respect of formal parties.

(c) The lack of identification between Provincial Policies with the Public Interest

It might be expected that a provincial agency would consider expressions of provincial interest as providing an underlying, but vitally important element of the public interest. My conclusion, however, is that while it has occasionally noted a general public interest in the proper operation of the planning process and in "good planning",\(^{625}\) it has rarely identified specific provincial policies with the public interest.

Provincial interests can be expressed in various ways.\(^{626}\) The most relevant for the present purposes are the enactment of legislation and the promulgation of policies relating to specific matters that the government considers to be of direct interest to it. The province has, through its enactment of the Planning Act, created a system for the regulation of land use. This Act is so fundamental to the Board's exercise of jurisdiction with respect to planning matters that it does not appear to have considered its enforcement as being a matter of public interest to which it needs to refer. While it has not identified a public interest at this level of generality it has, nevertheless, spoken of the public interest inherent in the carrying out of certain planning functions which clearly take place under the Act, such as ensuring that development occurs and pressures for urban growth are met in an orderly fashion.\(^{627}\)

What is notable in a provincial tribunal, however, is the infrequency with which the Board has

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\(^{625}\) See Section C for a detailed discussion of this aspect of the board's policy development.

\(^{626}\) See Chapter four, Section A for a review of these.

\(^{627}\) Newmarket, supra note 602 at 327; Oakville, supra note 602 at 429; Hamacher, supra note 620.
addressed specific statements of provincial policy as being expressions of the public interest.\textsuperscript{628} In \textit{Maxine} it established a direct link between local planning, provincial policy and the public interest in stating that,

The Board is satisfied that the Official Plan designations by the municipality and its implementing by-law are the best public interest in view of the role that Barrie will be expected to assume under the general provisions of the Toronto Centred Region Plan.\textsuperscript{629}

In the more recent \textit{Elgin} decision it affirmed the primacy of the public interest:

This public interest is different from the private interests of the parties; private interests may coincide with or further the public interest, or they may not. The \textit{Planning Act} and the various provincial policies and guidelines to which the board is required to have regard make it clear that it is not enough for private interests to be served.\textsuperscript{630}

The position expressed here is that the public interest is to be found in provincial policy and, by citing the \textit{Planning Act}, in local policy as expressed in duly approved official plans. Other than this, the Board occasionally indicated that achieving certain general goals, which may or may not have been expressed in provincial policies, was in the public interest. In \textit{Rush}, for example, it spoke of the public interest in the preservation of good agricultural land embodied in provincial policy.\textsuperscript{631} In other decisions, it spoke of a public interest in the provision of low cost and senior citizens' housing, for which both the federal and provincial governments provided funding assistance as a matter of policy.\textsuperscript{632} During the later review period it occasionally noted that it was in the public

\textsuperscript{628} Moreover, as described in Chapter four, where the board has spoken of the provincial interest as being expressed in provincial policy statements, it has given these no greater weight than other matters that it must address in making its decisions.

\textsuperscript{629} \textit{Supra} note 244 at 64. The board refused to approve the redesignation of a large area from industrial to residential on the ground, \textit{inter alia}, that the existing official plan designation was best suited to the achievement of the goals of the province's Toronto-Centred Region Plan.

\textsuperscript{630} \textit{Elgin. supra} note 268 at 440.

\textsuperscript{631} \textit{Rush. supra} note 266 at 259. The reference here was to the FLG and its predecessor policies. See also \textit{Thorold. supra} note 278 at 292.

\textsuperscript{632} In \textit{Re City of Toronto Restricted Area By-laws 377-74 and 58-75} (1976), 5 \textit{O.M.B.R.} 385, the board noted at 398 the public interest in "the provision of housing for those who cannot afford to acquire it on the private market." See also \textit{City of Welland Restricted Area By-law 5442} ((1973), 1 \textit{O.M.B.R.} 427; \textit{Crofton. supra} note 521.
interest to have regard to statements of provincial interest and that it was not in the public interest to contravene provincial policies, but its decisions were based on other grounds.

It is arguable that the Board has looked to local council decisions as expressions of the public interest because there has rarely been any higher level of decision-making for it to turn to for guidance. The Spadina Expressway hearing provides an example of this. The proposed expressway was clearly a matter of great importance to the public at large, but there had as of the time of the hearing been no statement of a provincial position as to its desirability. The province took a position only when the Board’s decision to approve the funding was petitioned to it, at which time Cabinet concluded that proceeding with the scheme was not in the public interest. In Toronto Airways the Board complained about the lack of higher level policy directives, stating that it “has no provincial or regional policy to assist it in its deliberations” and therefore had to make a decision about the proposed designation of large areas for commercial-industrial development “with no common goals except how to service it”. In both of these instances, however, the Board was faced with the problem that provincial policy, at least after the demise of the TCR Plan, was of such a general, aspatial nature as to be of little assistance in dealing with the specific matters before it.

(d) The uncertain and shifting Distinction between Public and Private Interests
The Board has, as a result of its adoption of the group public interest theory, identified the interests of different groups within the larger body politic as being , in differing circumstances, the public interest. The ambiguity inherent in this approach has only been increased by the Board’s attempts to distinguish between what it is prepared to characterize as public and as private. At what point, for example, do the interests of neighbouring property owners, which are undoubtedly private, metamorphose into the interests of the community, which it has tended to characterize as public? When "private" becomes "public" must be a matter of judgement. The Board has adopted different positions in making such a judgement and balancing these interests which reflect its ambiguity in

633 See, for example: Standard Aggregates, supra note 316 at 382.


635 Toronto Airways, supra, note 381 at 7. See also the Board’s discussion of its duty in considering an official plan amendment in Brampton, supra, note 414 at 452.
defining the public interest.

The Board has dealt with this issue on two levels. In the majority of its decisions the effect of a development proposal on owners and persons in the immediate community has been in dispute, and it has distinguished between those identifiable persons and a broader, generally undefined, larger community. Ambiguity has arisen in its disparate attempts to define this community. The public interest has included, at one end of a continuum, those matters which it has considered to be of general benefit to society as a whole: the protection of good agricultural land and of the environment generally, and the provision of social housing. At a step below this level of generality, the Board has considered the public interest to be that of a broad, but geographically defined community. The community whose interests are to be considered paramount has often been conterminous with the municipality. In Clutterbuck, it stated the following as a “fundamental principle” in refusing to overturn a decision of council:

... the obligation imposed on the municipal council to plan for the growth and development of the community demands recognition of the necessity for means to compel the observance of rights of the community to determine and enforce the direction in which the community should be shaped, and that in this regard the rights of the community are paramount to the rights of the owner.636

Such a clear statement is uncommon, however, and the difficulty often lies in determining what the Board has meant by such a community. The relativistic nature of its position was clearly expressed in Malahide:

Of even greater importance is the effect on the properties which make up the neighbourhood and the uses to which they are entitled because the interests of the individual ... may have to give way to the interests of the neighbourhood. Similarly, a major planning change may require that the special interests of an individual neighbourhood be sacrificed for the common good of the municipality as a whole.637

Here the community was the low-density single-family neighbourhood within which an apartment development was proposed, and refused.638 The Board has identified the public interest as the

636 Clutterbuck, supra note 534 at 237. The board is here quoting, with approval, the words of the Supreme Court of Ontario in Re Bruce and City of Toronto, [1971] 3 O.R. 62 at 67.

637 Malahide Developments Ltd. v. City of London (1973), 1 O.M.B.R. 334 at 337.

638 See also Preston, supra note 522.
interest of the geographically and probably numerically larger community, and the private interest as that of the smaller community. Which is the larger and which the smaller community has depended, of course, on the facts in each application. Moreover, as the Board has been required to address the interests of ever smaller and more geographically circumscribed communities, on the scale of the neighbourhood or individual street, it has found it increasingly difficult to distinguish between the public interest of a given socio-spatial association and the private interests of its individual members. It has not been able to resolve this matter in a consistent fashion. In the recent Price Club decision, for example, it referred to the benefits of the proposed commercial development to the citizens of Metropolitan Toronto, the City of Scarborough, and the Wexford community near which the development was to be located. In yet other decisions, the interests of the larger community in the provision of a public facility has been set against the interests of the more immediate community, or neighbourhood, in which that facility is to be located. As it stated in Central Cancer Institute,

The preceding has attempted to lay out a framework for what the board has determined is a major issue facing the success of the hospital's proposal and that is simply whether, as now proposed, is it too much to ask of the community. In other words, how much is too much to be sacrificed for the greater good?

At the other end of the public-private continuum are those decisions in which public and private interests have become indistinguishable. The Board has, for example, held that there is a public interest in maintaining the character of neighbourhoods, particularly single-family neighbourhoods, by refusing severances to create lots smaller than those generally found in the neighbourhood, even where such severances would meet the requirements of the zoning by-law. As it stated in

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The Board is of the opinion that the lots created conforming to the minimum [by-law lot frontage requirement] would not be compatible in aesthetic terms with the existing development and thus would not be in the public interest or the interests of good planning.\textsuperscript{641}

Given that the larger public interest has been, in such instances, expressed through the enactment of the zoning by-law, the only "public" which has clearly benefitted from such a decision has been the property owners and residents adjacent to the subject properties. In other decisions interests of this nature in the protection of neighbourhoods and the expectations of property owners that only certain types of development are to be permitted in their community have been treated as private interests.\textsuperscript{642} Yet the Board has rarely gone to the extreme of equating the public interest with the interests of private property owners. On one occasion it did state, with respect to a proposed zoning amendment, that "it may be regarded as potentially having an effect upon public interest in the sense of the rights of adjacent landowners,"\textsuperscript{643} but this equation of the rights of property owners and the public interest is unusual. There is, however, a strong but implicit sense underlying many of the Board's decisions, not that protecting the rights of landowners is the public interest, but that one aspect of the public interest is protecting the rights of private property owners to the extent that this can be done without unduly compromising or failing to have adequate regard for those various other sources of the public interest reviewed above.

2. The Adverse Impact Test: The Law of Nuisance in a new Guise

(a) The adoption of a Common Law Test by an Administrative Tribunal

It might be thought that the Board's prime role as an appeal tribunal was to ensure that local planning decisions and development applications were subject to consideration in the context of broader public policy. This has not been the case. \textit{It is clear from the decisions reviewed herein that it has strongly espoused a private law ideology, even in the face of express statements of public interest.}\textsuperscript{642}


\textsuperscript{642} See Section D.1 for further discussion of this point.

\textsuperscript{643} \textit{Muskoka Lakes}, supra note 407 at 149.
policy. It has adopted and transmuted the common law remedy of nuisance, based on measurable harm to private property, into a remedy based on both potential harm to property and the perceived concerns of property owners. Yet, while its prime concern has been the protection of private property interests, there has been a conflict inherent in its beliefs and its approach. This was well expressed in Motosi:

The second matter of significance that must be kept in mind when thinking about the variances requested, ... is the principle or proposition found in many of the earlier cases dealing with land use, namely, that an owner of land ought to be able to use his land as he wishes, provided, that in doing so, he is not breaking any law, and not creating some unacceptable adverse impact on his neighbours. This proposition has served as a starting point from which all land use planning has proceeded and is as valid today as when it was first enunciated many years ago.644

On the one hand, a property owner has the right to develop her land. On the other, an owner has the right to enjoy the use of her property free from the harm, nuisance or inconvenience of unduly adverse impacts arising from the proposed use of the property of others, including uses which further public policy goals. The Board has recognised the tension between these two positions and its consistent approach to resolving it has been that once development rights are in place, they can be overridden only if the impact, or “nuisance”, imposed on other property owners is unduly adverse or if there is a strong public interest in doing so. As it stated in refusing to cap the existing expansion potential of a shopping centre, “[t]he space was legally created and used. It is unreasonable and of insufficient public benefit in this case to remove rights once exercised when unacceptable adverse planning impact has not been demonstrated.”645 This reasoning lies behind the Board’s development and application of the adverse impact test to the matters before it. The test has proved in its hands to be most adaptable, being equally applicable in balancing both public and private interests and competing private interests, and in providing an underlying rationale for the

644 Motosi v. Bernardi (1987), 20 O.M.B.R. 129. This quotation reveals a degree of confusion in the Board's thinking regarding this matter. The issue is not whether an owner is breaking the law. By making a planning application, he is seeking to amend the law to permit that which is not currently permitted. It must be remembered that if an owner is acting within the law, and does not require a zoning or other approval in order to develop his lands, he can do so regardless of the impact such development will have on his neighbours. The commonly held assumption is that the planning controls in place would prevent development having an adverse impact.

more specific substantive planning policies reviewed below.

The private interest addressed by the Board has been at its most fundamental level the right to enjoy one’s property, a right which lies at the heart of the tort of private nuisance. There is a certain poetic justice in this. The Board has played a central role in the land use control process, dealing with zoning and other similar direct land use controls which were created as a means of public regulation to correct the deficiencies of private regulation as exercised through the courts, most notably through the application of the law of nuisance. In adopting this approach it could be said to have come full circle, but it has in fact gone beyond what the courts can accomplish. The law of nuisance has had a long and varied history, and new causes of action are constantly being accepted by the courts. Whereas such actions were originally limited to tangible physical harm to property, they have been expanded to include other kinds of interference, such as fumes, smoke, noise and vibration, whose harm is imposed as much or more on the occupant rather than on the property itself. Nevertheless, the courts are limited to dealing with harms that have occurred and are therefore measurable. Because the Board is a tribunal whose role is to apply policy it has not been bound by the court-determined actionable causes of nuisance. It has acted firmly in the tradition of planning, epitomised by zoning and other similar direct land use controls, as being a means of public regulation to correct the deficiencies of private regulation as exercised through the courts. In doing so it has, by implication, adopted the concept of nuisance and applied it in its regulatory

\[\text{\textsuperscript{546}}\] For a general discussion of the development and application of the tort of nuisance see B. Bilson, \textit{The Canadian Law of Nuisance} (Toronto: Butterworths, 1990), particularly Chapter 2. See also R.A. Buckley, \textit{The Law of Nuisance} (London: Butterworths, 1996) for a more recent review of English law in this area.

\[\text{\textsuperscript{547}}\] The only exception is the \textit{quia timet} injunction, granted to temporarily prohibit a prospective harm to a property. This is, however, uncommon and difficult to obtain.

\[\text{\textsuperscript{548}}\] I do not mean to imply, in characterizing the Board’s approach in this manner, that the board’s role in this matter is indistinguishable from that of the courts. The former does address policy issues, seeks to determine the public interest in the matters before it, and is not limited to determining if a legal remedy is applicable. The point I wish to make here is that the nature of the private interests against which the Board balances the public interest is directly analogous to the interests protected by the law of nuisance.
activities, but it has also had far more freedom than the courts to develop and apply grounds of impact to meet the wide range of concerns which have arisen in the context of the planning approval process.

The major elements of impact which the Board has developed can be characterized as follows:

Direct, measurable impact on neighbouring properties:
These elements, such as shadowing, noise, traffic volumes, air, water or soil pollution, are objectively measurable, for the most part, and form the traditional basis of both the law of nuisance and the rationale for land use controls. They are referred to regularly throughout the Board’s decisions and are often noted here. The one vitally important difference between the treatment of these impacts by the Board and the courts is that the latter are limited to addressing actual impact while the former has the jurisdiction, and the need as a planning review tribunal, to consider prospective impacts. In considering the latter the Board has developed the following tests of impact which have extended its consideration of nuisance beyond that contemplated by the courts.

Credible perception of harm by neighbours:
Unlike private nuisance actions, in which a plaintiff can obtain damages or other relief only if he can prove that he has suffered harm, parties opposing a development application need only satisfy the Board that they have reason to fear an adverse impact for the onus to prove that such an impact will not occur to be shifted to the proponent. As it has stated, after noting that all of the expert evidence was on the side of the proponents: "The concerns of the people who have a stake in the local community always form an important part of the board’s deliberations and testing of the evidence." It has regularly accepted expressions of concern from neighbours regarding impacts,

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649 It should be noted also that the Board has performed a role analogous to that of the courts in dealing with “traditional” nuisance claims in its frequent consideration of claims of potential air, water and soil pollution. The author has dealt with this aspect of the Board’s activities at length in supra note 154.

650 Oshawa, supra note 327 at 351. The Board decided in this case, however, that the expert evidence had answered most of these concerns, and approved the proposal with modifications pertaining to the remaining concern with environmental impact. See also Re City of Toronto Official Plan Amendment 579 and Zoning By-law 678-91 (1993), 28 O.M.B.R. 32 at 46.
particularly where the latter are able to demonstrate that there are existing problems, such as pollution problems, which they claim will be exacerbated by the proposed developments. It has accepted that "it is a valid function of planning ... to recognize the objectors' perception of harm." Nevertheless, the concern must relate to a feared impact: merely calling a proposal "unacceptable" is not enough. The Board's view is that "its obligation ... is to decide on the evidence as to impacts, and not to provide a referendum.

The interests the Board has recognized have covered a wide spectrum. They have frequently been tangible, thus corresponding closely to the types of harm required to support nuisance actions. Beyond these, interests considered worthy of protection have depended on the type of land uses affected. Where such uses have been residential, the Board has addressed more subtle interests. These may be termed perceptual interests, such as the effect of shadowing, or of a building being considered out of scale because it looms over its neighbours or, on a larger scale, traffic congestion. While impacts of this nature can often be measured, their impacts are to a large extent subjective. These interests merge into what might best be described as psychological interests, which combine varying elements of a desire to preserve the environment, amenities and/or lifestyle one has achieved with an underlying fear of psychological and/or economic loss, the latter expressed through loss of property value, if these "goods" are threatened by proposed development.

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See Lafreniere v. City of Sault Ste. Marie (1991), 25 O.M.B.R. 328 at 336. Common examples would be, in urban areas, existing traffic and parking problems, or the adequacy of public services to meet current needs. In rural areas, common examples include the adequacy of groundwater supplies or the ability of soils to handle additional sewage from septic systems.

Re Town of Richmond Hill Interim Control By-law 110-88 and Zoning By-law 126-88 (1989), 22 O.M.B.R. 150 at 156. The neighbours' concern here was the impact of a proposed day nursery on the value of and their enjoyment of their homes. The Board approved the nursery, but at a greatly reduced scale than proposed.

Re City of Waterloo Temporary Use By-law 86-86 (1987), 20 O.M.B.R. 69 at 74.

Shadows that will be cast at different times of day and in different seasons can be precisely plotted; vehicle trips likely to be generated by a proposed development can be calculated with a reasonably high degree of accuracy.

One person may consider the shadowing of her property by a new building a matter of real concern, while another may not be bothered at all by the same shadowing.
These interests and concerns may be highly subjective, but they can be real enough to those holding them, even if they are not actionable in the courts. Where neighbouring uses have been commercial, industrial or agricultural, the affected interests have been more directly economic. Commercial neighbours are concerned about competition from proposed shopping facilities. Industrial and agricultural neighbours are concerned that permitting new residential development adjacent to them may lead to pressure from the new residents to curtail their operations.

The expectations principle - The Board has accorded protection to the expectations of property owners regarding future development in their vicinity:

The Board has responded to these various interests largely through the application of its policy of determining whether the impact of a proposed development is so adverse as to outweigh its benefits. As noted above, proof of impact has not been required: credible perception has been enough. In dealing with tangible interests, this determination can be a relatively straightforward matter of assessing the evidence. The evaluation of perceptual interests is similar, at least to the extent that impacts affecting these interests can be measured. Where they cannot be measured, and where the psychological interests of neighbours are in issue, the Board has been faced with the more difficult task of establishing a rationale for its evaluation of such interests. Its answer has been the development and application of the expectations principle. The underlying rationale has been that persons who have purchased property in an area where certain uses are permitted and standards imposed have a right to expect that these uses and standards will be maintained, except where the Board is satisfied that a proposed change is desirable in its own right and will not impose

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656 It is beyond my intention, and my competence, to discuss the psychological aspects of this. It is manifestly clear, however, that the Board is frequently dealing with interests of this nature, and my purpose here is only to consider the manner in which it deals with them.

657 The Board does not address these economic interests directly, but does so in the context of making what it considers to be appropriate planning decisions. As discussed below in Section F, for example, the Board has a clearly formulated policy for assessing commercial competition in planning terms.

658 What "harm" is caused, for example, by permitting within a residential area a lot or dwelling which will be smaller than its neighbours?
an unacceptably adverse impact on existing uses.\textsuperscript{659} This principle is expressed in widely varying contexts and, because it involves a balancing of interests, whether a decision favours proponents or opponents will depend on the facts and the quality of the evidence presented in each case. While it is infrequently given explicit expression it is, in my view, a principle which is implicit in many of the Board's decisions, a principle arising from its private law orientation which enables it to apply its double onus test even where objective indicators of harm are lacking.

The expectations principle, and the limits of its application, were discussed in \textit{Chedoke}:

Over a period of time certain expectations with respect to the development of a property come to be formed by people who live and/or work in the area. However, that expectation is contingent upon the following two conditions:

1. The circumstances and interests of the different publics originally involved and currently involved remains essentially the same after the present designation and zoning came into effect. ...

2. The character of the existing built and natural environments remains essentially the same after the designation and zoning came into effect.

If any one of the above two conditions change, then the expectation is unlikely to be fulfilled. It is in recognition of the contingent nature of expectation that the \textit{Planning Act} has provisions for amendments to official plans and zoning by-laws.\textsuperscript{660}

Yet the Board ensures that such expectations will be fulfilled by often refusing to approve development proposals which will have the effect of changing the character of the existing environments.

\textbf{(b) The Majority v. Minority Rights Test}

During the tenure of J.A. Kennedy, Q.C. as chair, from 1960 to 1972, the Board sought to balance the rights of the majority, as represented by council decisions, with the rights of a minority, those persons adversely affected by such decisions. This appeared to be a public law-oriented test of interest evaluation, but it was essentially a variant of its private law orientation. The Board's 1969 Annual Report asserted that:

The function of the Board in this area, which consists of reviewing decisions by local

\textsuperscript{659} This rationale underlies the Board's treatment of neighbourhood character, discussed below in Section D.

\textsuperscript{660} \textit{Chedoke, supra} note 339 at 442.
elected representatives, is to protect the rights of individuals and minorities. Democracy is by definition the rule of the majority, but if democracy is to promote justice it must have a built-in mechanism to protect the rights of the individual, the minority. This is basically the role of the Board under The Planning Act. 661

The role here being articulated for the Board was that of "ombudsman", the protector of the individual or minority against arbitrary or harmful decisions of public authorities. 662 This approach was addressed in a number of important decisions during the 1971-78 review period, although with a shift away from the following extreme position which Kennedy expressed in his dissent in the Spadina Expressway decision:

Of course, there is a general principle that the needs of the greatest number must prevail. The fundamental duty of Government is to protect the greatest common good. But these needs should prevail over minority and individual rights and interests only if the project proposed in the public interest can be justified and supported. In my respectful opinion this proposed expressway cannot be justified or supported without further study. 663

The majority, which approved the borrowing required for the expressway, also spoke of majority v. minority interests, but sought to achieve a more even balance between the two: "There is, of course, a duty on this Board to protect minority rights, but not at the expense of majority interests. Surely it is axiomatic that when there is a conflict between minority and majority interests, the plan which favours the common weal is paramount. 664 In the Metro Centre decision Kennedy also moved away from his extreme position in distinguishing between the board's position in dealing with zoning and official plan matters:

In exercising this jurisdiction under the Planning Act with respect to the approval of land use (zoning) by-laws this Board has conceived its duty primarily to be to protect the rights of individuals and minorities, if they are being overlooked in measures intended to serve the

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662 It is of interest that the provincial government does not appear to have taken any position, at least publicly, with respect to this policy position. An examination of this aspect of the government/Board relationship is beyond the scope of this thesis, but some speculation is possible. It may be that the government sought to recognize the Board's independence of decision-making by not attempting to constrain it. It is also possible and, in my opinion, more likely, that the government did not intervene because its interests were not threatened by this approach. As the Board was reviewing municipal decisions almost exclusively, the only interests being challenged by this approach were those of municipalities.

663 Spadina Expressway, supra, note 490 at 5.

664 Ibid. at 24.
greatest common good. In Official Plan matters such as these, however, the function of the Board is somewhat different. The Court has ruled, as must be evident from the statute, that in Official Plan matters this Board "stands in the shoes" of the Minister. The function of the Minister is not only to protect the rights of individuals and minorities but also to see that the provisions of these plans follow sound planning principles and are for the benefit of the community.\textsuperscript{665}

Similarly, the Board held in the City of Toronto’s “45-foot by-law” decision that ratepayer organizations had too much influence over the council, stating that “[w]hile public participation in planning debates is not to be discouraged, it is wrong in our view that decisions finally made be based on narrow interests and not the wider objectives as expressed in an Official Plan.”\textsuperscript{666}

This philosophy is, on its face, a curious one for adoption by a tribunal which recognized its obligation to address the public interest. Yet, when examined more closely, it may be considered a variant of the Board’s dominant, private law oriented approach to balancing public and private interests. It was articulated in cases involving major public decisions.\textsuperscript{667} There was clearly a general public interest in the outcome and there were broadly based “minorities” in opposition. Yet these minorities were not opposed solely for the public good. They also had direct interests, either in the protection of their neighbourhoods, the preservation of their development rights, or protection from what they considered to be unacceptable impacts that the proposed developments would impose upon them. The underlying rationale for protecting the individual and minorities was the protection of these parties from undue harm resulting from a decision intended to benefit the majority. It is not difficult to conclude, as the Ontario Economic Council noted in 1973, that there was “an apparent danger of the Board of becoming recognized as a sort of ombudsman for property owners.”\textsuperscript{668} This private law focus has been more clearly evident in those decisions, the great majority, in which the Board was addressing the public interest in the context of decisions pertaining to specific

\textsuperscript{665} Ibid. at 7-8.

\textsuperscript{666} Toronto, supra note 465 at 235.

\textsuperscript{667} These were, in the three decisions, the approval of funding for an urban expressway, and the approval of planning policies affecting all of downtown Toronto or for a huge redevelopment project involving the Railway Lands in that area.

\textsuperscript{668} Subject to Approval, supra note 7 at 24.
development applications having more limited, if any, public policy considerations or impacts.

3. The Balancing of Public and Private Interests: The Subordination of the Public Interest to the Adverse Impact Test

The Board has clearly recognised the existence of a public interest, but it is equally clear that it has subjected the furtherance of this interest to the application of its adverse impact test in any given hearing. This has been the case even where it has been addressing the public interest as expressed in statements of government policy. It has recognised also the existence of a range of public and private interests and the need to achieve a balance among them, but has received little policy direction in respect of achieving such a balance. As it stated in Chedoke:

Although the Planning Act does not explicitly address the matter of the hierarchy of rights, the core idea that informs the Act throughout is a concern for the balancing of the different interests and therefore different rights. The explicit statement of public interest in the Act does not derogate from other interests but simply instructs all the parties to take account of it.\footnote{Chedoke, supra note 339 at 494. The “public interest” reference here is to section 3 of the Act, which required all parties to have regard for statements of provincial interest. This is very different from the interest provision in the 1921 legislation cited below.}

This recognition is not new. Section 399a.2(b) of the Municipal Act, enacted in 1921, required the Board to consider, in determining whether or not to approve an amendment to a zoning by-law, "[t]he desirability of the proposed repeal or amendment in the interests of the owners of the land in the district affected and of the community as a whole."\footnote{The Municipal Amendment Act, 1921 11 Geo. V, c. 63, s. 10, adding zoning provisions, s. 399a, to the Municipal Act.} This language neatly encapsulated the balancing act the Board, from the inception of its planning mandate, was required to perform. It was not included in the Planning Act, however,\footnote{This provision remained in the Municipal Act, but was dropped when statutory authority for zoning was moved to the Planning Act by The Planning Amendment Act, 1959, S.O. 1959, c. 71.} and other than the references to the public interest in sections 2, 3 and 51 the Act provides no guidance as to how the OMB is to achieve such a balance.

As the balancing of interests is inherent in land use decision-making, it is no surprise that the
Board's decisions exhibited a well-developed policy from 1971 on. These matters had clearly received substantial consideration prior to 1971, and the review of post-1971 decisions reveals an underlying policy in respect of these matters which changed little throughout the period. The essential elements of its approach have been,

1. While there may be what is accepted as being a public interest in a development proposal, there is also a private interest that must be taken into consideration.
2. If the impact of the proposed development on a private interest is considered by the Board to outweigh the public interest, it will not approve the proposal.

Despite this, there have been some differences between the two review periods. During the earlier period the Board appeared still to be exploring and establishing a balance between public and private interests, while during the later period it focused was more on engaging in the balancing operation than in exploring its parameters.

The relative weight the Board has given to public and private interests has varied over the review period. It spoke strongly of the primacy of "individuals and minorities" in the Metro Centre decision. The balance swung the other way in a more recent decision in which it saw a "true battle between private interest and the public good". It was called upon to approve the severance of a lake front lot in the face of Ministry of Natural Resources opposition, and held that "all things being equal, the protection of the public good carries a heavier weight than the recognition of an individual's interest in a matter." Yet it immediately went on to qualify and limit the application of that statement by saying that,

Having said this, is there thus an implication that if a reasonable doubt exists, that it should always be in favour of the public interest, or that there is less of an onus on those vested with the protection of that public interest to define what is a reasonable doubt? Is that responsibility of protecting the public good so onerous or so important that it justifies

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672 Supra note 357. This decision strongly reflected Kennedy's view that the board was to function as an "ombudsman" protecting the rights of the individual. See Subject to Approval, supra, note 7 at 24. While this particular expression of the board's function did not survive Kennedy's retirement, its relative weighting of public and private interests appears to have remained largely unchanged.


674 Ibid. at 69.
giving precedence to policies, regulations or standards which may not have kept up to date with the evolution of technology or science, or with the changes in social or cultural values.\textsuperscript{675}

and that,

... assessing the merit of this application requires that consideration be given to whether the interpretation of the notion of reasonable doubt should favour the public interest, or whether there is room to accommodate within that interpretation the reasonable aspirations of an owner to develop his or her land.\textsuperscript{676}

The balance was weighted more strongly in favour of the landowner in another recent decision involving the use of former power line right-of-way for limited commercial use, where the owner had claimed that any restrictions on his use amounted to expropriation without compensation: "The issue was the conflict between what is considered to be in the public interest and what is in the private interest. The owner of the land should be able to obtain as much economic gain as possible so long as it does not override, to any significant degree, the public interest."\textsuperscript{677} These and other decisions discussed below illustrate what can, broadly speaking, be called the Board's policy pertaining to the act of balancing the public interest with the ever-present private interests.

The most revealing example of the Board's policy of balancing the public interest with private interests is found in the line of decisions pertaining to affordable housing applications.\textsuperscript{678} Most of these included consideration of the Housing Policy Statement, thereby requiring the Board to address provincial interests as well. It recognized in these decisions a clear public interest in the production of affordable housing, both to meet a demonstrated need for such housing and to comply with the requirements of provincial policy. It regularly balanced this need, however, with

\textsuperscript{675} Ibid. at 69-70.

\textsuperscript{676} Ibid. at 72.

\textsuperscript{677} West Hill Redevelopment Co. v. City of Scarborough (1995), 31 O.M.B.R. 218 at 229. The public interest here was expressed through the City's proposed official plan amendment to limit the subject property, located adjacent to open space, to a limited range of commercial uses. The Board approved the amendment with some additional commercial uses permitted.

\textsuperscript{678} See Chapter four, Section C.5 for a more general discussion of the Board's treatment of provincial policy statements.
an equally clearly defined private interest, the interest of neighbouring private property owners to be protected against adverse impacts arising from such developments. *It thus appears that the Board evaluated affordable housing applications no differently than it did private residential proposals, despite the recognized public interest attached to the former.* Its position in this regard was summarized in *Woodgreen*:

The board finds further that the proposed development conforms to the provisions of the Land Use Planning for Housing Policy Statement by providing affordable housing which represents good planning and is without serious adverse impact on abutting and adjacent land uses.679

and in *Von Zuben*:

The board is well aware of the deplorable state of the availability of affordable rental housing in Ontario, particularly in its urban centres. Enlightened tolerance must be the rule of the day as it relates to the applicability of zoning standards in order to assist in the creation of a greater supply of such housing stock. Such tolerance must be underlaid with respect for the rights and reasonable expectations of the immediate neighbours.680

Where the Board has been satisfied that there would be no adverse impacts on neighbouring properties, it has approved the applications.681 Where it has been satisfied that adverse impacts could be alleviated by design modifications, it has approved them subject to such modifications.682 Where it has concluded that the impact on neighbouring properties outweighed the public interest in providing affordable housing, it has refused to approve the applications.683

In zoning hearings, whether dealing with a municipal by-law or a private request for a rezoning, the Board has seen its primary role as that of protecting private interests. Even in official plan hearings, where the public interest was clearly to be addressed, the protection of private interests remained

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679 *Supra* note 320 at 24.


682 *Woodgreen*, *supra* note 320; *Tahanen*, *supra* note 325; *Toronto*, *supra* note 323.

important. Yet in both types of applications the onus appeared to be on the proponents of the public interest, not of private interests, to make their case.

Decisions pertaining to appeals against interim control by-laws, under which private development rights are temporarily frozen while the municipality engages in planning studies to determine the best development pattern for the area covered by them, illustrate how the Board has dealt with a clear and specific conflict between public and private interests. It has concluded in most such decisions, as it stated in *Westmeath*, that it "is satisfied that the public interest in proper land use and environmental planning and public safety outweighs the temporary restriction of private rights." The ascendancy of the public interest is not unlimited, however. The need to balance the two elements was stated in *Oshawa*:

> While the board shares the concerns of the individuals with respect to the hardships involved with the processing of a s. 37 interim control by-law, the board must recognize the rights of the municipality to impose such a by-law. The real question which the board must face on this matter is the timeliness of the city's actions - to ensure that the added cost to the individuals is kept to a minimum.\footnote{685}

It has refused to approve such by-laws where no planning (i.e. public interest) rationale has been established for imposing such a by-law on some properties,\footnote{686} or where it has concluded that the hardships to affected owners outweigh the benefit to the general public of keeping their development rights frozen.\footnote{687}

4. **The Evaluation of Private Interests: Impact and nothing but**

The main theme running through the Board's decisions has been a need to balance the rights of owners wishing to develop their property in some manner with the rights of their neighbours who might be adversely affected by such development. The impact test which it has regularly applied can


\footnote{685} *Re City of Oshawa Interim Control By-laws 134-89 and 105-90* (1992), 26 O.M.B.R. 71 at 79.

\footnote{686} *Re City of Mississauga Interim Control By-law 551-92* (1993), 29 O.M.B.R. 300.

\footnote{687} *Tan-Mark, supra* note 433 at 390.
be considered from the perspective of developers or neighbouring property owners, but the result is the same: If the impact of a proposed development on neighbouring properties is sufficiently adverse, the right of an owner to develop will be overridden by the right of neighbouring owners to be protected from such impact. Conversely, the right of an owner to continue a land use will not be overridden unless there is clear evidence that the use is creating an adverse impact on other uses. The balancing of private interests is well expressed in Dalfen:

The owner has the right to seek to develop his property as he best sees fit and the neighbourhood has the right and the responsibility to question that development as to whether it will have direct and indirect adverse impacts on the welfare of immediate homeowners and the neighbourhood in general. The board has the responsibility of determining whether the relief requested ... should be given.

The policy developed by the Board may be characterized as a double onus test. Starting from the proposition that an owner has a right to develop, the onus is on her neighbours to establish at least a credible perception of harm. It they so to the Board's satisfaction, the onus shifts to the proponent to show that her development proposal will not have an unduly adverse impact on her neighbours. Where she fails to do this, or fails to respond to their concerns, the proposal will most likely be refused. The “credible perception of harm” can, of course, include the wide range of matters referred to in Subsection 2, above.

While this test may be simply stated, it is subject to variable interpretation by the Board, and it can be difficult to trace a consistent thread through the widely varying range of factual situations faced

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688 The language used herein, "sufficiently adverse" and "unacceptably adverse" is significant. The Board recognizes that any change will create some impact, and that neighbours cannot be protected from any adverse impact whatsoever. It must apply the de minimus rule to avoid wasting its and the parties' time and resources on dealing with trivial impacts.

689 Welland, supra note 451. See also Re City of Scarborough Official Plan Amendment 759 (1991), 25 O.M.B.R. 305 at 307; Ottawa, supra note 645 at 347.


691 In Pittsburgh, supra note 450 at 459, the Board refused to approve a commercial use in a residential area, stating that "the board accepts the objections of the ratepayers as real and legitimate concerns that were not satisfactorily answered." See also Re Township of Kingston Official Plan Amendment 77 (1991), 24 O.M.B.R. 364; Stanley, supra note 452 at 13.
by it. The question of balancing these disparate private interests arises in zoning, severance and minor variance decisions, but infrequently in official plan referrals. This is reflective of the differing nature of these applications, as the focus in official plan referrals is on the policy issues dealt with in the plan, while the focus in the other application types is on the intended uses, density, etc. proposed for specific properties. It reflects also the differing jurisdictions of the Board when dealing with different application types. It has stated, for example, that it "is of the opinion that a zoning by-law for a developed area is intended to protect the existing development from development that will have an adverse effect" and that it "agrees that the impact of a proposal on neighbours and the area should be of prime concern in any decision to grant a variance."

The Board has occasionally applied this principle in a simple and direct form in cases involving the loss of views occasioned by proposed developments. Its position has generally been that of the courts: "The board knows of no rule, law or principle of planning that requires [the applicant] to continue to provide a view of her backyard or down Westgate Blvd. for her neighbour." Despite this, the Board has held also that the loss or diminution of a view was a matter that had to be addressed, whether characterized as an impact or as a matter of equity where homes had been sited so as to take advantage of a view.

Note that it is exclusively the interests of the existing owners and neighbours which the Board takes into account. This is particularly apparent in decisions involving affordable or social housing, where the inchoate interests of those who need such housing are rarely addressed, except in the

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692 Other than where both official plan and their accompanying zoning by-law amendments are in issue, which is frequently the case.

693 Cott. supra note 425 at 412.


broad public interest terms discussed above, and are certainly not accorded any weight against the interest of existing owners in not suffering adverse impacts. There are occasional exceptions, such as where the Board states that the Housing Policy Statement requires a supply of:

... living accommodation for people and not just people who would like to have small lot coverages, not just people who would like to have comfortable homes, but for people who, because of financial straits, have to do with things that are perhaps less than they would eventually hope for. In particular, small basement apartments.\(^{698}\)

but such comments are notable for their infrequency.

There is some recent evidence that the Board is taking a broader look at the costs and benefits to the various affected parties. In *Price Club* it stated that: "Today's economic realities require the board not only to protect residents from abuse from developers, but also to look critically at the price of neighbourhood opposition. This is a reasonable project with significant community benefits."\(^{699}\) This does not suggest, however, that its policies of evaluating impacts on the different affected parties and of imposing a double onus test in the evaluation of such impacts are undergoing any significant change.

5. **Decision Data**

Table 6-2 shows that the evaluation of interests has arisen in the context of all types of planning applications. Its importance in the Board's dealing with appeals of interim control by-laws should be noted, as it was addressed in 15 of 18 such appeals. *The most notable finding, however, is the minimal direct provincial participation either in support of or opposition to planning applications. This does much to explain why the Board, in considering the public interest, has rarely meant by this term the provincial as opposed to more localized "public" interests.*\(^{700}\) Similarly, the fact that provincial policies were addressed rarely in the 1971-78 decisions or, other than the Housing Policy Statement, in the 1987-94 decisions, is an additional indicator of the lack of provincial presence

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\(^{698}\) *Rebelo, supra* note 681 at 481.

\(^{699}\) *Price Club, supra* note 639 at 274.

\(^{700}\) As noted elsewhere, however, these figures underrate provincial interest, as official plan referral have generally been accompanied by ministry staff reports setting out their positions and concerns in respect of these official plans.
when the Board was developing its substantive policies.701

### TABLE 6-2

**Evaluation of Interests - Decision Data**

<table>
<thead>
<tr>
<th></th>
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</thead>
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<tr>
<td></td>
<td>No.</td>
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<td><strong>Total decisions</strong></td>
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<td><strong>Application Types</strong></td>
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<td>19</td>
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<tr>
<td>Zoning by-law</td>
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<tr>
<td>Severance</td>
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<td>17</td>
</tr>
<tr>
<td>Minor variance</td>
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<td>8</td>
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<tr>
<td><strong>Supporters</strong></td>
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<td></td>
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<tr>
<td>Province</td>
<td>1</td>
<td>*</td>
</tr>
<tr>
<td>Municipality</td>
<td>97</td>
<td>61</td>
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<tr>
<td>Owner</td>
<td>124</td>
<td>78</td>
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<tr>
<td>Neighbour</td>
<td>12</td>
<td>8</td>
</tr>
<tr>
<td><strong>Opponents</strong></td>
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<td></td>
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<td>4</td>
</tr>
<tr>
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<td>33</td>
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<tr>
<td>Owner</td>
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<td>11</td>
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<tr>
<td>Neighbour</td>
<td>120</td>
<td>75</td>
</tr>
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<td><strong>Provincial Policy Area</strong></td>
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<td></td>
</tr>
<tr>
<td>Housing pol. stat.</td>
<td>n.a.</td>
<td></td>
</tr>
<tr>
<td>All others</td>
<td>16</td>
<td>10</td>
</tr>
<tr>
<td><strong>Other Board policy areas</strong></td>
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<td></td>
</tr>
<tr>
<td>Approval procedures</td>
<td>7</td>
<td>4</td>
</tr>
<tr>
<td>Decision-making</td>
<td>20</td>
<td>13</td>
</tr>
<tr>
<td>Interference</td>
<td>27</td>
<td>17</td>
</tr>
<tr>
<td>Prematurity</td>
<td>18</td>
<td>11</td>
</tr>
<tr>
<td>Good planning</td>
<td>39</td>
<td>24</td>
</tr>
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<td>Neighbd. character</td>
<td>41</td>
<td>25</td>
</tr>
<tr>
<td>Int. cont. by-law</td>
<td>n.a.</td>
<td></td>
</tr>
<tr>
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<tr>
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<td>3</td>
</tr>
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<td>48</td>
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</tr>
<tr>
<td>Approve</td>
<td>86</td>
<td>54</td>
</tr>
<tr>
<td>Refuse to approve</td>
<td>75</td>
<td>47</td>
</tr>
</tbody>
</table>

(1) One 1971-78 decision involved two applications. One was approved and one refused.
* Less than one per cent.

701 Provincial policies were addressed so rarely in the Board's consideration of other substantive policy areas that their inclusion is not warranted in the tables in the following sections.
Table 6-2 shows also that interest evaluation was commonly addressed in conjunction with one or more of a range of the Board’s other policy areas, although it received by far the most frequent consideration. It is of interest to note that in both review periods the Board showed a greater tendency to give approvals as it focussed more closely on interest evaluation. As Table 6-3 shows, its overall approval rates were 44% and 47% in 1971-78 and 1987-94, respectively. Its approval rates when addressing the evaluation of interests were 54% and 53%. When interest evaluation was the only policy area the Board addressed, its approval rates increased to 63% and 70%. While no definitive conclusion can be drawn from this trend, it does suggest a predisposition on the part of the Board, as other considerations are stripped away, to favour the interests of proponents rather than opponents.

**TABLE 6 - 3**

*Comparison of Approval and Refusal Rates*

<table>
<thead>
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<tbody>
<tr>
<td></td>
<td>No.</td>
<td>%</td>
<td>No.</td>
<td>%</td>
</tr>
<tr>
<td>Total decisions (1) All Approve</td>
<td>344</td>
<td>100</td>
<td>320</td>
<td>100</td>
</tr>
<tr>
<td></td>
<td>151</td>
<td>44</td>
<td>151</td>
<td>47</td>
</tr>
<tr>
<td>Decisions in which evaluation of interests addressed All Approve</td>
<td>160</td>
<td>100</td>
<td>148</td>
<td>100</td>
</tr>
<tr>
<td></td>
<td>86</td>
<td>54</td>
<td>78</td>
<td>53</td>
</tr>
<tr>
<td>Decisions in which only eval’n. of ints. addressed All Approve</td>
<td>48</td>
<td>100</td>
<td>40</td>
<td>100</td>
</tr>
<tr>
<td></td>
<td>30</td>
<td>63</td>
<td>28</td>
<td>70</td>
</tr>
</tbody>
</table>

(1) From Table Intro-2.

**Addendum: Has the OMB been Captured?**

It is clear from the above analysis that the Board has developed policies for the evaluation of interests which are central to its decision-making. Can it be said that the application of these policies
has led to its capture by the interests it is supposed to be regulating, in keeping with the capture theory as described in Chapter one? This appears not to be the case, but the evidence suggests that certain groups do have influence over its decisions.

The essence of the capture theory is that organized interest groups which are subject to regulation by a tribunal are able, through constant contact with it and the regular, well-financed and professional presentation of their arguments to it, to bring it around to holding their views as the norm that should be upheld. As a former Chairman of the U.S. Administrative Conference has stated:

The cardinal fact ... is that governmental agencies rarely respond to interests that are not represented in their proceedings. And they are exposed, with rare and somewhat insignificant exceptions, only to the view of those who have a sufficient economic stake in a proceeding or succession of proceedings to warrant the substantial expense of having lawyers and expert witnesses to make a case for them. Non-economic interests or those economic interests that are diffuse in character tend to be inadequately represented ... 702

The standard capture model is not applicable to the Board because it does not regulate a single industry, but oversees a process in which both private and public organizations play important roles. Nevertheless, the influence of two major groups, the development industry and municipalities, can be determined to some extent by noting the frequency with which the Board accepts or rejects the positions taken by them in support or opposition to matters before it. Because of methodological limitations, the following analysis can be suggestive only. The patterns of support and opposition can vary considerably, and it is not possible to know what factors, or interests, influenced the outcome of each hearing. The determination of which of the named parties are members of the development industry703 cannot be certain in all instances.704 With these limitations kept in mind,

702 R.C. Crampton, "The Why, Where and How of Broadened Public Participation in the Administrative Process" (1972), 60 Georgetown L.R. 525 at 529.

703 Those property owners who are regularly engaged in the business of land development, as opposed to owners who wish to undertake development of their own property for their own use.

704 Each decision was reviewed to determine, if possible, the character of the owner supporting the application. These were most often companies which, from their names or from descriptions of their activities, were clearly engaged in the business of land development. A few others were individuals who, from the decisions, appeared to be engaged in the business of land development, as opposed to merely seeking approval to put their properties to new or expanded residential, commercial or other uses. The numbers of developers
data pertaining to the frequency with which the Board has approved or rejected applications supported or opposed by municipalities or developers, or a combination of the two, provides a general indication of their ability to, as noted above, persuade the tribunal to accept their views.

The analysis summarized in Tables 6-4 and 6-5 contains two general findings. The first is that, with few exceptions, the approval and refusal rates given different categories and combinations of parties have been within a few percentage points for the two review periods. It therefore appears that, certainly by 1971, a pattern had developed in the relationship between the Board and the province, municipalities and development industry, a relationship which did not exhibit any significant changes as either the planning system was revised through legislative changes, particularly the enactment of the Planning Act, 1983, or the province came to play a more proactive role in the system. The second general finding is that, in dealing with these interest groups, the Board was more likely to approve an application in the 1987-94 review period than in the 1971-78 period. This could be interpreted in various ways: a greater willingness on its part to encourage development during the later period than in the more ebullient economic conditions of the earlier period, the application of a higher threshold of “undue impact” as a basis for refusing approvals, or the submission of generally stronger cases by proponents. the absence of further analysis, these can be matters of speculation only.

(f) Developers

The group of owners who constitute what is loosely defined as the development industry is most comparable to the regulated industry in “classic” capture theory. They are relatively few in number. Their activities, while not invariably subject to Board hearings, are potentially exposed to consideration by the tribunal whenever their activities require, or are affected by, various types of planning changes. They seek through associations such as the Housing and Urban Development Institute of Canada (HUDAC) and the Ontario Home Builders Association (OHBA) which are able to represent its interests strongly, not on individual applications, but with respect to general planning policy discussions at the provincial level, including consideration of the role to be accorded
to the Board in the planning process.\textsuperscript{705} Despite this, the evidence shows that developers have not been sufficiently successful as to have captured the Board. Table 6-4 shows that their success rate has been greater than that of property owners as a whole during both review periods, and of non-developer property owners also, but not to the extent that they can be said to have captured the tribunal. Their rate of success likely reflects the fact that they are normally able to retain counsel and expert witnesses and thus to effectively make their case and respond to concerns raised by opponents. Their success can thus be seen as a result of the manner in which the hearing process operates rather than as a general acceptance of their views by the Board.

\begin{table}[h]
\centering
\caption{Influence of Owners, including Developers}
\begin{tabular}{|l|c|c|c|c|}
\hline
 & No. & % & No. & % \\
\hline
Total Decisions (1) & All & 344 & 100 & 320 & 100 \\
 & Approved & 151 & 44 & 151 & 47 \\
Owner support & All & 289 & 100 & 260 & 100 \\
 & Approved & 121 & 42 & 115 & 44 \\
Developer support & All & 132 & 100 & 90 & 100 \\
 & Approved & 67 & 51 & 51 & 57 \\
Non-developer owner support & All & 157 & 100 & 170 & 100 \\
 & Approved & 54 & 34 & 64 & 38 \\
\hline
\end{tabular}
\end{table}

(1) From Table Intro-2.

\textbf{(b) Municipalities}

Municipalities do not constitute an organized, regulated interest group, but they do share a general and substantial common interest in persuading the Board to uphold their decisions. The latter could

\textsuperscript{705} The industry was well represented through its associations, as were municipalities through the Association of Municipalities of Ontario, at the hearings of the MacBeth Committee, the Planning Act Review Committee and the Sewell Commission. See notes 6 and 7. It is my understanding that the industry has more recently had a major role in discussions with the Minister of Municipal Affairs and Housing leading in 1996 to Bill 20, another major revision to the \textit{Planning Act}. 
therefore be said to have been captured by municipalities if it consistently upheld their decisions to approve or refuse to approve planning applications. The evidence suggests that municipalities have achieved, not capture, but a significant degree of influence with the Board. As Table 6-5 shows, approval rates have been substantially higher where municipalities supported applications during both review periods than where they were opposed.

Municipal positions have also influenced the success rates of developers. As Table 6-5 shows, municipal support or opposition has meant considerable differences in the success rate of developers. The 79% approval rate of approval during the 1987-94 review period for appeals having both municipal and developer support suggests that these two interest groups acting in combination had the ability to capture the Board but, because the nature of the development process meant that they were frequently in opposition, capture was not likely.

### TABLE 6-5

(a) Influence of Municipalities

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>%</td>
<td>No.</td>
<td>%</td>
</tr>
<tr>
<td>Total Decisions</td>
<td>All</td>
<td>344</td>
<td>100</td>
<td>320</td>
</tr>
<tr>
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(b) Influence of Municipal Positions on Developers

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<td>23</td>
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</table>
(g) Summary
The data suggest that the interest group situation underlying the capture theory is applicable to some extent to the Board. The producers are few in number compared with the consumers, those members of the public potentially affected by its decisions, and even in comparison with the active consumers, those who choose to take an active part in its hearings. There are limitations in this representational pattern, however, which limit the applicability of the classic capture theory to the Board.

One limitation arises from the fact that governments exert a direct and highly significant influence on the planning and development process, an influence which may be exerted on behalf of either the producers or consumers. Municipal influence is most direct, as local councils are the initial decision-makers, the gate-keepers of the system, and the evidence shows that the Board has been influenced by the positions taken by municipalities. Provincial ministries and agencies exert a less direct but often important influence through their policies and guidelines pertaining to various aspects of development and through their review of planning applications, particularly official plans and amendments. Both levels of government are independent of the producers and consumers, although they are obviously influenced by them.

Another limitation is that, in the rationale underlying the classic capture theory, consumers are diverse, diffuse, fragmented and have little interest in and are able to have little influence on individual decisions. While this characterization of consumers and their interests may apply to the Board's dealings when looked at globally, it does not apply where it counts, at the level of individual hearings. Consumers have had a strong interest, in the great majority of cases in which they have taken part, in opposing the applications under consideration. They have generally been a distinct, or at least an easily definable group. Their numbers have often been small. They have been strongly motivated to obtain information and take part in the process. They have been, in many cases, the initiators of the appeals or referrals under consideration by the Board. Moreover, the majority of the owners seeking development approvals have been individual property owners whose position, resources and influence may differ little from, or even be inferior to those of their opponents. There has therefore been less likelihood of the disparity arising between the situations of producers and
consumers which has provided the underlying rationale for the operation of the capture theory.

The situation is rather different with respect to the development industry. While the approval and rejection figures suggest that the industry has not captured the Board, if capture means that industry positions are normally accepted by the regulatory tribunal, it has certainly been more successful than owner/proponents as a whole. Moreover, if the producer is defined as the industry and municipalities working in tandem, with municipalities approving and supporting developers' applications, then the approval rate has approached a rate which suggests, if not capture, then at least a very high degree of influence with the Board. 706

It is difficult to say that these results reflect a policy on the part of the Board. Rather, they have resulted from its application of its policies, discussed here and in other Chapters. The results do not reveal a policy to favour one interest group or combination of groups over others. They do suggest, however, that research into other areas beyond the scope of this thesis, such as an examination of the Board's hearing procedures and of their impact on different parties and interest groups, might prove fruitful. 707

C. THE PRINCIPLES OF GOOD PLANNING: A Motherhood Issue providing an Example of the OMB's Balancing of Public and Private Interests

The OMB has regularly given or refused approvals on the ground, inter alia, that the proposals did or did not constitute "good planning". It has so frequently failed to explain what this term means that it might be seen as a mantra rather than an expression of policy. Nevertheless, the Board has developed a complex policy on this matter, a policy reflecting a tension between its treatment of public and private interests. In its public aspect, the policy has been that development which is in conformity with approved official plans is, ipso facto, good planning. Yet in its private aspect the

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706 A difficulty with the capture theory is determining what degree of success by an interest group is required to constitute capture. It is fair to say, however, that the combination of municipal and developer support was much harder to overcome at Board hearings in 1987-94 than in 1971-78.

707 See the discussion of the possible capture of the Board by experts and officials in Subsection 1(b), above. See also Chipman, supra note 154 for a limited discussion of this aspect of the Board's operation.
policy has been that developments which cause an adverse impact or are incompatible with their neighbours do not represent good planning, even if they are in conformity with official plan policies. Most tellingly, where these two elements have been in conflict the private aspect has prevailed.

It is a truism that a planning appeal tribunal should promote good planning. Yet this has proved to be a notoriously slippery term to define, and its contents have not been susceptible to any widely agreed-upon definition or application. The PARC has spoken of it as being a matter of local preference, but subject to provincial (i.e., Board) override:

One matter that should not be of provincial interest is whether municipalities engage in "good planning" per se. Whether a municipality's planning is considered to be good or not depends very much on whose interests are being served. Where the provincial interest is being violated by a municipality's planning actions, the Province should be in a position to prevent or secure change in such actions. Beyond this, good planning is a matter of local norms and standards and should be left for the municipality and its inhabitants to settle among themselves.\(^7\)

Jaffary and Makuch accept that good planning has a political dimension, but they have taken the Board to task for demonstrating what they consider to be an over-reliance on technical expertise in determining the contents of the term:

When the Board acts, it generally wishes to do so on the basis of evidence of "good planning". "Good planning" seems to mean the considered opinion of qualified planning experts. The Board has taken considerable exception to the injection of political value judgements into the planning process. ... The Board feels it can protect the public interest as well as the private interest from a "wrong" decision by council. The question must be asked as to whether the value judgement of what is "good" can ever be made solely on the basis of expertise in the field of urban planning.\(^8\)

The evidence shows that the Board has accepted these political value judgements, as embodied in official plan policies, but only when they do not conflict with its own judgement with respect to impact. Moreover, it has certainly not subordinated these policies to provincial policy.

While the Board has generally taken the need for good planning as a given, it has occasionally spoken explicitly of its importance. As it stated in Ottawa-Carleton Official Plan:

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\(^7\) Comay Report, supra, note 7 para. 4.3 at 30.

\(^8\) Supra note 378 at 84.
... the Board is aware of some legislative provisions as well as a number of recognized principles flowing from the proper and intended use of the planning process and planning experience, all of which must be recognised by the Board throughout its deliberations on its decision and consideration of the evidence adduced.

... it is necessary to discuss and clarify the Board’s interpretation of the principles of the planning process and of good planning generally that have been developed from the use of the Planning Act over many years and must be recognized as being in the interests of the public as a whole.\footnote{Supra, note 614 at 337-38. The Board then spelled out very general principles relating to acceptance of official plan policies, the roles of the participants in the planning process, and ensuring public participation in the process.}

Despite the stated need to “discuss and clarify”, it is not always clear what it has meant by good planning, particularly in the many decisions in which it has made only a bald statement, without further explanation, that applications do or do not constitute good planning.\footnote{The Board made specific reference to good planning in 73 of its 1971-78 decisions and 95 of its 1987-94 decisions.} In other decisions the Board stated specifically what it meant by the term, or it has been possible to determine what it meant from its expressed reasoning.\footnote{It can be assumed that the Board has sought in all of its decisions to further what it considers to be good planning. One could therefore examine every decision to determine what it has meant by the term. I have chosen to limit the analysis to those decisions in which it has made specific reference to good planning and, particularly, in which it has also given its reasons for concluding that an application did or did not represent good planning.} \textit{The range of elements that it has held constitute good planning, or whose absence or inadequacy constitutes bad planning, is extreme.}\footnote{The following are some of the matters the Board has held to be determinants of good planning:}{
- adequacy of land use control by-law
- adequacy of open space
- adequacy of planning reports
- adequacy of roads and of water and sewer services
- availability of public transit
- avoidance of piecemeal development
- buffering of incompatible uses
- building and site design features - adequate setbacks, parking
- compatibility with existing development in vicinity
- conformity with adopted official plans
- establishing clear urban-rural boundaries
- environmental protection provisions
- Health Unit approval}
matters are so dependent on the circumstances of each application, it can be difficult to trace common elements, but the analysis shows that they have generally fallen into the following categories:

(1) conformity with approved planning policies;
(2) impact and compatibility;
(3) adequacy of process.

The Board has addressed the first two categories most frequently, and has often given consideration to the relative importance to be attached to each. These matters are analysed in this chapter. In the third category, good planning is equated with the adequacy of planning studies supporting an application and, less often, with the adequacy of the approval process itself, particularly public participation. The latter have been considered in Chapter five, Sections B and C. There are, in addition, some substantive elements of good planning which, while linked to the above categories, are sufficiently distinct to be analysed as policy areas in their own right. Those selected for such analysis are the determination of prematurity, addressed in Chapter five, section E, and the impact of development on neighbourhood character and on the planned commercial structure of a municipality, considered in Sections D and F, below. Many of the comments in this section will apply to those policy areas also.

1. Conformity with Approved Planning Policies: The Public Interest Aspect of Good Planning

The Board has demonstrated a limited acceptance of policies in approved official plans as being determinative of good planning, and has treated statements of provincial policy as being, at most, the equivalent of official plan policy statements. Its belief that conformity with an official plan is an important element of good planning was clearly illustrated in the following statement of principle in the Ottawa-Carleton decision:

The Board in this case must accept the plan at face value and assume that the policies

- impacts on existing commercial facilities
- meeting of housing needs
- prevention of strip development
- public involvement in the planning process
- separation from single family residential areas
- subdivision design matters
therein state the intent of council after careful and thorough consideration and that the policies reflect the objectives and purposes intended in the plan to the best of council's ability under the circumstances at the time of its decision.714

Yet it immediately conditioned this statement with the following caveat: "[t]his does not mean that the Board need agree with any specific statements in the plan, but the Board will not assume that any of council's decisions were made in bad faith or that there is any underlying intention to act irresponsibly in implementation of the policies."715 While it thus accepted the centrality of official plan policies in determining good planning, it did not limit itself to a mechanical application of those policies. In Oshawa it noted, in approving a zoning by-law, that the by-law was in conformity with the official plan, but it went on to say that:

The findings in respect of conformity with the official plan do not mean some automatic acceptance of a zoning by-law. The board must still direct itself to whether the by-law is consistent with accepted principles of community planning and to relevant issues within that ambit such as whether it presents impacts on some other uses or on services which are unacceptable or whether it is premature in the circumstances.716

This was a clear statement of its view that good planning included matters independent of conformity with the official plan, and might well provide grounds for over-ruling this adopted statement of policy.

In both of the above decisions the Board was dealing with the approval of municipally-adopted zoning by-laws. In Metcalfe, an appeal from a refusal of council to pass a requested amendment to a zoning by-law, it established an even stronger distinction in the tests the appellants had to meet to succeed in persuading it to reverse council's decision: "[f]irst, the development as proposed must conform with the official plan. ... Secondly, the proposed use must, on the application of good planning principles, be compatible with adjacent uses permitted in the R2 zone".717 Despite its expressed reluctance to rely solely on official plan policies, however, the Board regularly concluded

714 Supra note 614 at 338.
715 Ibid. at 338.
716 Oshawa, supra note 327 at 351.
717 South and Metcalfe, supra note 371 at 375.
that applications did or did not represent good planning because, *inter alia*, they were or were not in conformity with policies in official plans. Examples of this, drawn from both review periods, include compliance of a senior citizens apartment building with official plan guidelines for high density development, failure of a severance to comply with official plan policies in respect of retention of good agricultural land, failure of a shelter for battered women proposed for single family residential area to conform with official plan policies for such areas, and conversion of vacant commercial building into residential condominium implementing official plan policy to encourage housing intensification. The consistency with which the Board decided on this basis is even more telling. During each review period it approved every application which it had concluded was in conformity with the official plan, and refused to approve every application which was not. It has held that lack of conformity with an official plan is in itself sufficient reason to reject an application, even where the evidence showed that the proposed development was otherwise good planning. Other policies were also addressed in these decisions, of course, so it cannot be said that conformity was the only issue, but it was clearly of great significance.

The Board has drawn a clear distinction between policies in approved official plans and policies under consideration for inclusion in official plans. It has stated that it can consider only the former as relevant, as emerging policies do not yet represent public policy and may never be adopted or

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716 Re City of Niagara Falls Restricted Area By-law 72-107 (1973), 1 O.M.B.R. 547.


720 South and Metcalfe, supra note 371.


722 During the 1971-78 review period, the Board approved all 7 applications that were in conformity with their official plans, and refused to approve all 7 which were in not conformity. During the 1987-94 period, the comparable numbers were 9 and 15, respectively.


724 Broatch v. Town of Haldimand (1989), 22 O.M.B.R. 126. The evidence had indicated that, except for the lack of conformity with the official plan and the FLG, the proposed severance was good planning.
While the Board has regularly treated conformity with official plans as an important element of good planning, it has rarely referred to provincial policy in this context in either review period. During the 1971-78 period it associated provincial policy with good planning, but was unclear as to the nature of the association. The few 1987-94 decisions in which it addressed this matter revealed a greater awareness of government policy as an element of good planning but did nothing more than treat it as being the equivalent of official plan policies. It thus held that applications were not good planning because they were not in conformity with either government policy or official plans. It noted also the same conflict between government policy and good planning as between official plan policies and good planning, stating that “[t]he board ... finds it a most difficult problem to resolve a confrontation between government policy [the FLG] and ‘good planning’ in the opinion of qualified planning experts. It creates a ‘no win’ situation.” It thus came to the same conclusion that lack of conformity with government policy must outweigh other indicia of good planning. Nevertheless, the paucity of such consideration is indicative of the limited status that it has accorded to provincial policy.

A related matter, considered in connection with the Board’s application of the provincial Housing Policy Statement, has been the manner in which it has established that where housing policy goals


726 Deschamps and Lafontaine (1974), 2 O.M.B.R. 368 at 369 (apparent reference to UDIRA); Re Seven Links Planning Area Official Plan (1979), 9 O.M.B.R. 483 at 485 (“policy” of requiring waterfront lots to have frontage on public roads also).

727 Young, supra note 318 (mineral aggregates resources policy); Elgin, supra note 268 at 441 (Food Land Guidelines). In the latter, the board held that the proposed severance was not good planning because it was, inter alia, “not consistent with” the Guidelines. This was a rare example of the Board using this language, established by the 1994 amendments to the Planning Act, rather than the previous “have regard to” requirement, but as the use of the term was not considered further in the decision it gave no indication of how the Board would interpret and apply it.

726 Brantford, supra note 725 at 496.
and good planning are in conflict, the latter will displace the former.\textsuperscript{729} This Board-created hierarchy of policy evaluation was described in Chapter four, Section A, and need not be reviewed here in detail. What should be noted here is that it has, as an implicit matter of policy, decided that its own determination of what constitutes good planning will outrank even formally adopted provincial policy where it sees a conflict.\textsuperscript{730}

2. Impact and Compatibility: The Determination of Good Planning within a predominantly Private Rights-driven Legal Ideology

Despite the Board’s acceptance of official plan policies as representing good planning, it has to a great extent treated good planning as a subset of its underlying policy for the evaluation and balancing of private interests. Its determination of what constitutes good planning has frequently been derived from the application of its adverse impact test.

The Board has always been ambivalent about merely accepting conformity with an official plan as the sole determinant of good planning. It has developed its own views as to what constitutes good planning which are independent of official plan policies, and which it has applied in its evaluation of development proposals. It has regularly used the terms “impact” and “compatibility” in the majority of the decisions in both review periods in which it specifically addressed good planning. These terms have related but not identical meanings. Impact is operational in nature: the effect that the actions of A have on B. Compatibility refers to a state of being. It may be defined in this context as a harmonious relationship between different uses of land, such that one use will not have adverse effects on other uses or on the ability of the occupants of other lands to use or enjoy them.\textsuperscript{731} The

\textsuperscript{729} This statement applies equally to other policy statements, but the conflict has appeared most frequently, and most clearly, in decisions concerning the Housing policy Statement.

\textsuperscript{730} In mitigation, the Board’s position, as clearly expressed in Ottawa-Carleton, is that its role is to apply general provincial policy in specific fact situations. It is true that the Board must do this, but it is not at all clear that this gives it the power to override provincial policy in favour of its own policy.

\textsuperscript{731} An example of the differing meanings given to these terms is found in Sarnia, supra note 522, in which the Board approved the use of a former convent as a group home for mentally retarded adults. It stated, with respect to impact, that the building was in existence and was therefore not an invasion of a single family area. It said, with respect to compatibility, that evidence showed that group homes were compatible in other residential areas.
terms have been applied in various decisions in which the Board has explicitly addressed good planning to encompass a range of impacts on property and persons which fall into two categories, those affecting immediate neighbours and those affecting a larger area. With respect to the former it is clear, as described in the previous section, that where the Board has been faced with development proposals which it believes will have unacceptable adverse impacts on adjacent properties, it has held them to not be good planning and has either refused to approve them or approved them with modifications to reduce these impacts to what it considered to be an acceptable level. These impacts have generally been of a physical nature, involving the design, bulk or density of proposed buildings which would create shadowing or affect the privacy of adjacent properties, particularly of single-family residences. With respect to the latter, it often concluded that applications which would have adverse impacts on the neighbourhoods within which the proposed developments were to be located and, less frequently, on the larger community, also failed to constitute good planning. Given the larger areas affected, however, the types of impacts differed from those affecting immediate neighbours. One important element of the test was compatibility with the surrounding area, particularly where the area contained single-family dwellings. Traffic impact has often been addressed also. In a broader context, the location of the proposed development in relation to other uses in the neighbourhood, the availability of public transit, 

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732 The creation of four new residential lots within two existing lots was permitted, over the objections of neighbours, on the ground that, inter alia, there would be no impact on neighbours other than aesthetic: Nicholson, supra note 525.

733 Edison Centre Inc. v. City of Toronto (1991), 24 O.M.B.R. 489; Woodtree. supra note 324; Toronto, supra note 650.

734 South and Metcalfe, supra note 371.

735 Dolbear v. Town of Strathroy (1988), 21 O.M.B.R. 235; South and Metcalfe, supra note 371; Brensylvanian Properties Ltd. v. Town of Markham Committee of Adjustment (1990), 23 O.M.B.R. 253. See also the analysis in Section D of the Board’s treatment of neighbourhood character in primarily low-density residential areas.

736 Sevendon. supra note 613; Nicholson. supra note 525; Martin. supra note 449.

737 Woodtree. supra note 324.

the adequacy of existing schools, parks and other municipal soft and hard services,\textsuperscript{739} and the impact of the proposed development on these services,\textsuperscript{740} have also addressed as elements of good planning. In the majority of the decisions in which good planning has been addressed, however, the Board made reference to impacts which may adversely affect property, either in the immediate vicinity or the larger neighbourhood.

In its application of an impact test to determine what constitutes good planning, the Board, despite its obligation to address a wide range of policy issues, has engaged in an activity which is tantamount to the hearing of private actions in nuisance. In doing this, it has seen its role as one of protecting the interests of property owners. Its activities illustrate a judicialization of the planning review process, with the consideration of private property rights given pride of place. The following statement appears to underlie it's consideration of impact, even where not so explicitly stated, "[g]ood planning implies, firstly, a recognition of property rights, and secondly, fairness. There is no doubt that, in the planning field as elsewhere, justice must not only be done, it must appear to be done."\textsuperscript{741} The term "justice" appears to mean, in this context, the protection of private property from undue adverse impacts which may be generated by new development. \textit{Good planning is thus reduced to an adjunct of property rights protection, with the Board treating consideration of the larger public policy elements that the term might be expected to encompass as being secondary to the application of its impact policy.}

3. Decision Data

Table 6-6 confirms that good planning has been frequently addressed during both review periods. What is most evident, on comparing this table with Table Intro-2, is the lack of significant differences between the mix of application types, supporters, opponents and results in those decisions in which good planning was addressed and the overall decision data. The only notable difference was the more frequent consideration of this matter during the 1987-94 review period of

\footnotesize
\textsuperscript{739} Oshawa, supra note 327.

\textsuperscript{740} Tahanen, supra note 325.

good planning where official plan and zoning applications were under consideration. Note also that
good planning was normally raised in the context of other Board policies, particularly interest
evaluation.

| TABLE 6-6 |
| Good Planning - Decision Data |

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D. THE PROTECTION OF NEIGHBOURHOOD CHARACTER: Social Engineering in the Guise of Land Use Planning

The OMB's policy with respect to the preservation of neighbourhood character, a sub-set of its
interest evaluation policy, provides a pure example of its adoption of a private law ideology
unhampered by consideration of the public interest. It also reveals, more particularly, the Board's
The protection of neighbourhood character has always loomed large in land use control. The protection of residential areas, particularly “prime” residential areas of substantial single-family homes, from the smoke, noise and general incompatibility of industrial, commercial and higher density residential uses was a major reason for the creation of zoning and other development control tools. In Ontario, the authority to pass zoning by-laws was given to local municipalities in 1921. The Board was given a controlling role at that time, as such by-laws were not to come into force without its approval. The nature and purpose of zoning by-laws was made clear in the legislation: “For prohibiting the use of land or the erection or use of buildings within any defined area or areas or abutting on any defined highway or part of a highway for any other purpose than that of a detached private residence.” Since then, the scope of zoning control has been widened to include all land uses, but the protection of residential areas, particularly single-family and other low-density residential areas, has remained an important component of planning, and of the Board’s review of local planning decisions.

The Board engaged during the 1960s in an important debate, revelatory of its policy development activities, in considering how to deal with more contemporary intruders into prime residential neighbourhoods than smoky or smelly factories. During this period there was substantial pressure in larger urban centres for approval of site-specific rezonings to permit high-rise apartment buildings in single-family residential areas. This became a matter of major concern for the Board, a concern reflected in both its decisions and its private deliberations. While an analysis of its

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742 The Board has often referred to both single-family and low-density residential areas. The terms have considerable overlap but are not interchangeable. The meaning of single-family residential neighbourhood is clear. Low-density residential neighbourhood consist predominantly of single-family detached homes, but may include some other residential uses whose building form and density of development are similar to single-family. These would include duplex and semi-detached homes, and row houses in more urban contexts.

743 Clause 2(b) of s. 399a of the Municipal Act, added by Mun. Act 21, supra note 181 s. 10.

744 Ibid. para. 1.
decisions during this period is beyond the scope of this thesis, it is useful to note its deliberations on the matter, both as an indicator of its thinking with respect to this aspect of neighbourhood protection and as background to the analysis of its decisions in this area during the later review periods. A review of the minutes of Board members’ meetings reveals that, even at this time, it was attempting to develop a consistent policy of protection for such areas. Thus, in 1962:

The consensus of [Board members’] opinion appeared to be that it is sufficient to prevent the construction of higher density residential buildings if it appears that the amenities of the neighbourhood will be affected injuriously and that the character of the street will be changed. Of course a far greater danger exists always in cases where the by-law or proposal, as the case may be, would result in spot zoning for higher density use in a lower density area and especially in a single family area.\(^745\)

The discussion continued and, in 1964:

Higher density and apartment development was again the subject of discussion. The chairman reported that he had suggested to the Minister that if the Board is to hold its present policy against strong pressure the Board would expect the Cabinet [on petitions to it from Board decisions] to uphold these decisions should objections be made. The Minister has indicated that he supports the policy of the Board in this regard.\(^747\)

The application of this policy was noted at the time by an active participant in the Board’s process:

The Board’s decisions have certainly made it clear that the Municipality must regard legitimate complaints and rights of neighbouring property owners. For instance, all of you know that if the facts and circumstances in a particular area have not changed from the time a subdivision is developed in a single family area, that you have practically no chance at all

\(^745\) Ontario Municipal Board, Minutes of meeting, October 15, 1962.

\(^746\) Ibid. May 29, 1964.

\(^747\) Ibid. September 21, 1964. This and the preceding quotations are of particular interest as indicators of the close relationship between the Board and the government. The reference to “uphold these decisions” is a reference to the right of a party to petition the Cabinet to reverse or amend a decision of the Board. This right was taken away in respect of planning matters when the Planning Act, 1983 was enacted.
of getting an apartment zone in the middle of it because the Municipal Board will not approve it. 748

The accuracy of this observation, and of the existence of a clear Board policy, was reinforced ten years later:

It is merely following policy laid down in a long list of decisions of this Board to say that the intrusion of this 23-storey building in such close proximity to these residences will change the character of the area to a degree that the owners and other residents in the area should not be obliged to accept. 749

The only drawback of these statements is that they did not go far enough: the Board's policy has been one of protecting low-density neighbourhoods from development far less intrusive than 23-storey apartment buildings.

1. The OMB's Treatment of Low-Density Residential Neighbourhoods: Applying the adverse impact test to the perceptions and expectations of property owners

One might imagine that the prime determinants of neighbourhood character would be physical, relating to its appearance and amenities, such as the lack of adverse physical impacts. The Board has certainly treated these as important, but the heart of its policy of neighbourhood protection has involved responding to adverse impacts on the more abstract concerns of property owners. It has positively addressed the desire of owners, particularly of single-family homes, that neighbourhood stability be maintained and that the type of development now being permitted (and by extension the socio-economic standing of the residents the development would accommodate) be as close as possible to that currently existing within the neighbourhood. Moreover, its espousal of this position has been so strong that it has overridden development rights enshrined in zoning by-laws on order to ensure that development considered inappropriate by existing owners has not occurred.

While the Board has often referred to the character of neighbourhoods, the components of this character have been difficult to pin down. In the earlier review period the character of a neighbourhood, or at least of a single-family or otherwise low-density neighbourhood, appeared


to be anchored in the amenities experienced by its residents. The Board stated that, in refusing to extend commercial parking into a single-family residential area, it “must attempt to decide whether or not the residential amenities of the single-family user will be adversely affected by what is proposed.”750 Similarly, in approving higher density development close to a low-density residential area, it stated that “[i]n such cases this Board has, in the past, made it quite clear that such intrusion is not in keeping with a proper planning concept, particularly where the residential amenities of the abutting neighbours are going to be seriously interfered with.”751 These amenities were, at one level, the lack of adverse impact addressed in the context of the Board’s interest evaluation activities. They referred to such tangible matters as traffic, noise and overshadowing by larger buildings. During the later review period the Board described more specific indications of character, again primarily physical and design-oriented in nature, which included lot size and frontage,752 the general size and appearance of houses,753 the mix of residential types754 and the mix of land use types.755

750 Lindsay, supra note 453 at 388.


753 See, for example, Tri-Met, supra note 623; Cott, supra note 425; DeMarsico v. North York Committee of Adjustment (1991), 24 O.M.B.R. 324; Lawrie v. City of North York Committee of Adjustment (1991), 25 O.M.B.R. 442; Korkontzilas v. Borough of East York Committee of Adjustment (1993), 28 O.M.B.R. 186. These decisions appeared much more frequently in the later than the earlier review period, and are often associated with proposed “monster homes” in areas of much smaller older houses.

754 See, for example, Re City of Woodstock Restricted Area By-law 4538-70 (20 April 1971), No. R 4231-70 (O.M.B.) (row houses in single-family area); Welland, supra note 632 (semi-detached houses facing single-family houses); Walkerton, supra note 619 (row houses in residential area); Tishman v. Sault Ste. Marie (1990), 23 O.M.B.R. 119 (townhouses in single-family residential area); Casselman, supra note 410 (townhouses in single-family residential area). These decisions are indicative of the conflicts during the two review periods. It is the proposed locating of moderately higher density types of residential structures, not of high-rise apartment buildings, in low-density residential areas that is far most frequently the matter in contention.

755 See, for example, Meaford, supra note 441 (funeral home in residential area); Re Township of Woolwich Restricted Area by-law 101 (1976), 5 O.M.B.R. 458 (small shopping centre in residential area); Eickmeier v. Town of Pickering (1987), 20 O.M.B.R. 219 (day care centre in large-lot residential area);
What underlay these physical attributes of character, however, was its response to the perceptual and psychological concerns of residents. The latter were seen as having expectations that the physical environment they bought into and were accustomed to (at least in low-density residential areas) would be preserved. These elements of character, implicit in many decisions dealing with this issue, were addressed in *Erem*:

... the standards in an area, in due course, establish the character of the built form. The built form, together with the landscape, climate and aesthetic quality, constitute the physical environment of the area. Interaction with and the symbolic meaning derived from this physical environment, over time, creates the experience of place associated with an area. Residents of an area become comfortable with this experience of place and enjoy a sense of security that accompanies this comforting experience.

Finally, while it was never stated in so many words, there was an underlying socio-economic dimension to the Board's determination of neighbourhood character, a dimension inherent in zoning from its inception. Single-family properties and their owners were often afforded protection, not just from different uses but from other types of residential use considered less desirable, such as high-rise apartments, townhouses and mobile homes, or from the imposition of smaller lot sizes than are customary in the area. The whole range of considerations was neatly summarized in *Johnston*, in which it refused to approve a house expansion which would create a dwelling substantially larger than others in its vicinity: "... the board identifies the criteria of physical improvements on the land, social factors, and visual or aesthetic impact as contributing to the character of the neighbourhood."

Another example of the Board's application of the "expectations" principle has been its support for

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*Lafreniere, supra* note 651 (trucking operation in rural residential area).

756 The Board is clearly, even if not specifically, referring to property owners in most of its decisions. It rarely makes reference to tenants, or to the interest and expectations of tenants in preserving the character of their environment.

757 *Erem v. Richmond Hill* (1995), 31 O.M.B.R. 186 at 195 (refusal to permit the enclosure of a swimming pool on a residential property in a neighbourhood having no other enclosed pools). See also *Chedoke, supra* note 339 at 492 for a discussion of "experience of place".

758 Note 754 cites some of the numerous examples of this.

the protection of historic neighbourhoods and buildings, whose character is based on the building types of a particular period and the general environment created by these buildings rather than on land use *per se*. It refused to approve an official plan amendment to permit a substantial residential expansion of Kleinberg, a village of largely 19th century buildings in a rural setting. It held that development on the scale proposed would destroy the character of the village by surrounding it with a large amount of modern suburban development, but that a small amount of low-density development would not be out of keeping with this character.\textsuperscript{760}

The Board approved no applications for non-residential development in low-density areas in either review period, even though these applications involved site-specific redesignations to permit uses which would have little, or at least only local impact.\textsuperscript{761} Some uses refused were of a residential nature or least closely associated with residential use.\textsuperscript{762} Other uses refused were relatively unobtrusive, small-scale commercial in nature.\textsuperscript{763} In only two instances were industrial uses involved.\textsuperscript{764} It spoke generally of the incompatibility of these uses, or of the loss of amenities they would impose on their low-density neighbours. Thus, in *Lindsay* it refused to permit expansion of commercial parking into a single-family area, stating that,

> The Board in dealing with matters of this kind must attempt to decide whether or not the residential amenities of the single-family user will be adversely affected by what is proposed. ... It would not seem equitable that the single-family owner immediately abutting the subject property should be compelled to bear the brunt in loss of amenities in the course of any action by the municipality to remedy this situation.\textsuperscript{765}


\textsuperscript{761} There were seven such applications in 1971-78 and four in 1987-94.

\textsuperscript{762} *Vallentgoed v. Kingston* (1973), 1 O.M.B.R. 505 (nursing home); *South and Metcalfe*, supra note 371 (shelter for battered women); *Eickmeier*, supra note 755 (daycare centre).

\textsuperscript{763} *Meaford*, supra note 441 (funeral home), *Lindsay*, supra note 453 (commercial parking); *City of Barrie v. Brookdale Park Inns Ltd.* (1976), 5 O.M.B.R. 199 (motel expansion).

\textsuperscript{764} *Ashland Oil Ltd. v. City of Thunder Bay* (1976), 5 O.M.B.R. 54 (application to give conforming status to legally non-conforming asphalt plant); *Fulton*, supra note 613 (auto wrecking yard).

\textsuperscript{765} *Supra* note 453 at 388.
In refusing to permit the expansion of a motel into a single-family residential area it stated that "[t]o reduce the buffering to the degree proposed would seriously erode the amenities of the residential property owners. The difficulties ... do not weigh out the consideration to be given to the protection of the residential character of the neighbourhood." In refusing to approve a daycare centre it specifically linked good planning and the protection of neighbourhood character, stating that,

The board considers it neither appropriate nor good planning to permit a new and different use into such a neighbourhood as this without first determining the myriad of matters that must be decided to establish whether this change is compatible with the existing neighbourhood.

The Board frequently refused to approve residential uses in low-density residential areas ranging from high-rise apartments which were prima facie out of character with low-density areas to duplexes and semi-detached dwellings whose differences from single-family dwellings were harder to distinguish. It is clear that its concern with the amenities enjoyed by low-density residential neighbourhoods has been a subset of the dominant adverse impact test that has formed the heart of its interest evaluation policy. Its policy with respect to protecting such neighbourhoods was clearly illustrated in Hemus:

In my opinion, by far the most important factor to consider in appraising and giving effect to complaints or objections by ratepayers in the neighbourhood is the effect of the proposed development on the character of the neighbourhood. Amenities and the environment have become matters of the first importance in protecting the quality of life. If planning is for people then maintaining a desirable character of a neighbourhood must be of prime and in most cases decisive importance.

[after describing the good quality, single-family homes in the vicinity] In this area a high degree of maintenance mirrors a pride of ownership one comes to expect in so many neighbourhoods of this class. This is a community strength that should be encouraged.

Similarly, even where apartment buildings were permitted by the existing zoning, and did not therefore require spot rezoning, a severance application to permit two buildings was refused because "the regulations and restrictions embodied by By-law 1221 are not sufficient to provide

766 Barrie, supra note 763 at 201.

767 Eickmeier, supra note 755 at 224.

adequate protection for the amenities of the single-family homes which adjoin the subject property.\textsuperscript{769} While apartment projects have provided the greatest contrast and the greatest potential impact on low-density areas, lower-density and house-form proposals have also been found incompatible with a low-density residential character. Townhouse proposals for such areas have generally been refused on the ground that they would not be in conformity with the "established single-family character of the neighbourhood".\textsuperscript{770} The physical differences between townhouses and single-family units have also been important. As the Board stated in \textit{Tishman},

The subject site, however, is located in a low-density residential [sic] with suburban character. The majority of residential structures are small and one storey in height. The proposed development of 10 townhouses in one building mass, two storeys in height, represents an intrusion into the existing character of the area.\textsuperscript{771}

Even severances to permit semi-detached dwellings in areas of good quality single-family homes have been refused on this ground.\textsuperscript{772} The following quotation is more direct than most, but it appears to express the Board’s generally held position: "I do not think that people who buy in a single-family area should be forced to accept semi-detached houses on the opposite side of the street since this lowers the general prestige of the street."\textsuperscript{773}

The Board has dealt with applications to permit reduced area, frontage and set-back requirements

\textsuperscript{769} \textit{Re Knott} (1973), 1 O.M.B.R. 491 at 496.

\textsuperscript{770} \textit{Nurmi. supra} note 723 at 228. See also \textit{Woodstock. supra} note 754.

\textsuperscript{771} \textit{Supra} note 754 at 121.


\textsuperscript{773} \textit{Welland. supra} note 632 at 427. This decision presents a candid example of the interests of existing single-family owners overriding the interests of the future occupants of the assisted housing. The Board approved an assisted housing project including apartments and semi-detached houses, but required that the semi-detached units facing existing single-family houses be replaced with single-family, thereby increasing the cost of these affordable units. In addition, it limited units backing onto existing houses to two bedrooms to satisfy the objection of owners backing onto them that "there would be too many children playing in the back yards abutting theirs." (p. 428).
through the application of what might be referred to as the “preponderant character” test. This was clearly stated in *Derbyshire*, in which it approved forty-foot frontage lots in an area requiring a minimum of forty feet,

Laws, planning laws and by-laws, more or less well written, can easier change than physical circumstances can change. If the preponderant character of the neighbourhood shows 40-foot lots then under the circumstances the Board believes it would be more inequitable to the owner not to allow the variance than it would be inequitable to the neighbours to allow it.

This test has provided a specific example of the Board’s application of its adverse impact test, as it is the rationale for its frequent conclusion that reduced lot sizes or frontages should be approved only if they were generally in keeping with existing standards within the neighbourhood. As it stated in *Porter*,

> The evidence convinces the Board that the proposed development is not out of character with the surrounding neighbourhood. The proposed lot frontages, the proposed set-back for the houses and the type of houses all seem to be in conformity with that now existing on Menzie Avenue.

Conversely, it has generally refused to approve reduced lot dimensions which were below the existing standards in the neighbourhood. Its statement in *Richmond Hill* that “what is proposed in the creation of two smaller lots would not be in conformity with the lots in the subdivision as a whole, and would thus adversely affect the character of the neighbourhood” clearly shows how its adverse impact test has been applied to what is primarily a matter of perception, a smaller lot located within an area of larger lots, rather than a physically measurable impact. Allied with this has been the view that a house built on a smaller lot could not be in keeping with existing houses on larger lots:

> It is not only that the proposed area of the parcel would be less than that of most lots in the

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774 These terms are commonly applied in zoning by-laws as minimum figures. Lot area means the total area of an individual building lot. Frontage is the length of the lot line abutting a public street. Set-back is the distance a building or other structure on a lot must be set back from the front, side or rear lot lines.

775 *Derbyshire and Jones v. Portscheller* (1979), 9 O.M.B.R. 341 at 343-44.


immediate neighbourhood, but also because of the narrow flankage ... it is doubtful if a residence could be erected in a style consistent with the homes in the immediate neighbourhood.\textsuperscript{778}

The Board has applied these tests to refuse approval of reduced lot requirements even where the resultant lots would meet or exceed the minimum by-law requirements. It thus refused to approve the creation of a lot in an area of “fine old homes” in which the set-backs would be well in excess of the by-law requirements on the ground that a building located on it could not provide sufficient setbacks to fit into the character of the area.\textsuperscript{779} Similarly, it sympathized with objectors who wished to “preserve the stability of the area and maintain a general lot size in keeping with the average size in the area, which is somewhat greater than the one proposed.”\textsuperscript{770} The Board did not adopt this position consistently, as in \textit{Hamilton-Wentworth} it approved development on lots exceeding minimum by-law requirements but smaller than those in the neighbourhood on the ground that “it would be unreasonable to impose a zoning category on the subdivision lands having greater lot size restrictions than the existing zoning standards on the neighbouring lands.”\textsuperscript{781} Nevertheless, its approach throughout both review periods was generally that size, frontage and other standards prevailing in a single-family area should take precedence over lesser requirements in zoning by-laws where adherence to the latter would, in its opinion, have an adverse impact on the character of the neighbourhood.

\textit{The Board’s adoption of an “expectations” rationale for the preservation of the character of low-density residential neighbourhoods has led, as a further development of its private rights-driven ideology, to the creation of a property owners’ “right” to the preservation of the character of their

\textsuperscript{778} \textit{Strome v. Regional Municipality of Peel} (1978), 7 O.M.B.R. 174 at 175. This view was implicit in \textit{Project 90, supra} note 623, where the Board held that the proposed “long narrow lots” in an area of much larger lots containing “good quality residential houses” would, because of their size and configuration, not allow for the construction on them of houses in keeping with the character of the existing dwellings.

\textsuperscript{779} \textit{Tri-Met, supra} note 623.

\textsuperscript{780} \textit{Hobbs, supra} note 641 at 275. See also \textit{Bickell Estate v. County of Oxford Land Division Committee} (1990), 23 O.M.B.R. 371.

\textsuperscript{781} \textit{Re Hamilton-Wentworth Official Plan Amendment 126} (1979), 9 O.M.B.R. 162, headnote at 163.
neighbourhood. The emergence of such a right represents a move beyond the protections embodied in the law of nuisance. More tellingly for a tribunal deriving its jurisdiction from legislation, it represents the development of protection for property owners beyond that mandated by the Planning Act. A major function of the latter is to provide a process for the mediation of land use changes. The Board has, as a matter of policy, adopted an approach to the protection of neighbourhood character which, allowed to follow its logical progression, would militate against any but the most inconsequential land use changes. It has variously characterized this “right” as a public interest and, more frequently, as a form of property interest which adheres to the ownership of a single-family dwelling. A public interest rationale appeared briefly in 1977 and 1978. This was, as stated in Markham, that “[t]he public interest is to develop residential neighbourhoods as pleasant places for the inhabitants to reside in.” This interest was linked also to the public interest inherent in enacting zoning by-laws “to preserve and protect established neighbourhoods and the rights and privileges of property owners therein”, a statement indicating the Board’s continuing adherence to the original rationale for zoning controls.

The more significant line of decisions, however, one which appeared throughout both review periods, has applied the “expectations” rationale directly. This is of interest for two reasons. Firstly, it illustrated the Board’s solicitude toward low-density residential property, as it was cited in every instance in connection with the protection of such property from the adverse impact of “out-of-character” development. Secondly, it illustrated in specific circumstances the amorphous nature of the Board’s distinction between public and private interests addressed in Section B. The rationale was, early in the review period, based on the right of property owners to expect the continuation

762 Town of Markham v. Lufiman (1979), 8 O.M.B.R. 422 at 423. See also Richards, supra note 623; McDonald, supra note 641. In a later decision the Board spoke of the public interest in the “openness and space, pleasant surrounding, lack of fences, well manicured lawns [which] were the order of the day in this neighbourhood”: Lafferty v. Lennox and Addington Land Division Committee (1990), 23 O.M.B.R. 395 at 401.

783 Cassidy v. Infante Brothers General Contractors Ltd. (1978), 7 O.M.B.R. 149 at 152. See also Perry v. Borough of North York (14 April 1971), No. R 4204-70 (O.M.B.) for an earlier expression of this view.
of the zoning protection which was in place when they purchased their properties.\textsuperscript{784} The public interest lay in the protection of the integrity of the zoning by-laws, while the private interest lay in the protection the by-laws provided to owners in low-density areas against unexpected and potentially adverse development. This later developed into a more general rationale based on the expectations of low-density buyers at the time of their purchases. This was clearly expressed in \textit{Martin}: "It is clear to the board that when a person moves to a rural area to live in a relatively large single-family residence, he expects some "quiet life". When a property is purchased on a cul-de-sac in a rural area, in a country setting, that expectation is increased."\textsuperscript{785} Similarly, the Board refused to approve the severance into four lots of a 5 acre parcel on the ground that the severance "would seem unfair to the owners of all the other lots on the plan, who presumably purchased their property knowing that the minimum area at the time of purchase would be about five acres."\textsuperscript{786} In only one instance did it refuse to apply the "expectations" rationale as it related to a low-density residential area.\textsuperscript{787}

2. \textbf{The OMB's Treatment of Mixed Use and Marginal Neighbourhoods: Let them live with change}

The contrast between the Board's approach to preserving the character of low-density residential neighbourhoods and that of other types of neighbourhoods is striking. In the former situation its focus has been on the protection of private interests. In the latter, it has shown little solicitude toward private property interests and, by implication at least, has placed much greater emphasis on the public interest in having land use changes occur in an orderly fashion.

\textsuperscript{784} \textit{London, supra note 494; Perry, ibid; Re City of Welland Restricted Area By-law 5300 (1973), 1 O.M.B.R. 236; Re Township of Moore Restricted Area By-law 27 of 1972 (1974), 2 O.M.B.R. 324.}

\textsuperscript{785} \textit{Supra note 449 at 499.}

\textsuperscript{786} \textit{Marimpietri v. County of Victoria} (1976), 5 O.M.B.R. 498 at 500.

\textsuperscript{787} \textit{Re City of Kitchener Restricted Area By-law 73-194 (1975), 4 O.M.B.R. 87. This decision is, however, consistent with other decisions protecting neighbourhood character. In this instance the objectors lived in an enclave of large lots that had become largely surrounded by development on smaller lots. The Board held that it was unreasonable for them to object to further development in keeping with the higher density that was already common in the area.}
Mixed use neighbourhoods are those containing a mixture of residential, often single and multiple-family, institutional, commercial and possibly other uses. They are generally older areas and are often close to city or town centres. The term "marginal area", rarely used by the Board, applies to neighbourhoods in which a significant portion of the building stock is poorly maintained, if not vacant, little or no redevelopment or renovation is occurring and, frequently, the types of uses are changing.\footnote{While the mixed use and marginal categories may overlap, they need not do so. Mixed use areas are often stable areas with well-maintained buildings.}

The Board's treatment of mixed use neighbourhoods is the obverse of its treatment of low-density residential neighbourhoods, and serves to heighten its policy of protecting the latter. Its position was clearly stated at the beginning of the review period and remained unchanged throughout. In Oakville it permitted the establishment of a home for mentally handicapped adults and day nursery facilities, involving four buildings in total, on a large lot in a mixed use area. The objectors were concerned with compatibility and the loss of property values. The Board showed its differing approaches to the protection of low-density and other neighbourhoods in stating that,

If this were an application to inject a use into a neighbourhood where its compatibility with existing homes was in some doubt, I would have no hesitation in approving only part of the application, that for the first building, and refusing to permit the Planning Board or Council to decide the location by site plan of additional buildings without recourse to another hearing. ... I am satisfied that in this particular area with its mixture of residential, commercial and institutional uses, albeit some of them non-conforming, the use proposed does not represent a depreciation in the existing amenities of the ratepayers living in the area.\footnote{Supra note 751 at 10.}

Similarly, in St. Catharines it approved a detoxification centre on lands adjacent to a hospital and a residential area, stating that the use would not alter the established character of the neighbourhood because much of it was "not used for detached dwellings but for other purposes, namely, multiple dwellings, institutional and commercial."\footnote{Re City of St. Catharines Restricted Area By-law 73-337 (1975), 4 O.M.B.R. 97 at 100. See also Walkerton. supra note 619.} In these decisions, which involved the insertion of uses previously not in the area, it appears that the Board’s concern for compatibility
and the avoidance of adverse impact which lay at the heart of its treatment of low-density residential neighbourhoods was simply not addressed. Its position appeared to be that, as the areas already contained uses that would be incompatible in a purely residential area, the damage had been done, so to speak, and none of the uses, including the single-family dwellings, were entitled to protection from new uses. In other decisions, generally involving semi-detached and apartment applications in areas already containing those uses, it held that the neighbourhoods affected were already of a mixed residential character and the proposed developments would for that reason be compatible.

The obverse of the Board's treatment of low-density residential neighbourhoods is seen also in its views with respect to protecting the character of marginal neighbourhoods. There are no decisions dealing directly with neighbourhoods so identified, but there are decisions giving indications of its approach to dealing with them. In Ashland it refused to approve a rezoning to legitimize an existing asphalt plant located in an industrial zone near a residential area, stating that "[t]he Board does not find that this residential area [where objectors lived] is marginal. The houses, while not luxurious, appear from photographs to be well-maintained in a well-treed area." The implication here seems to be that, if the Board had found the residential area to be marginal, it might not have considered the noise, dust, odour and traffic impacts emanating from the asphalt plant to be sufficiently adverse to warrant refusing the application. In Darte, in refusing to approve a funeral home in a largely single-family neighbourhood, its position was consistent with that described in Section 1, above.

It stated, however, that,

Unless the ravages of time should bring with it such a depreciation in residential amenities that a change in a large part of the neighbourhood to commercial zoning would be necessitated the subject application would have to be construed as an intrusion into a

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791 Note however Re Willmott and City of North York (1990), 23 O.M.B.R. 33. The Board approved a large condominium building in an area containing a university campus, private club and established single-family residential uses, on the ground that there were already large institutional buildings in the area, but it reduced the height and bulk of the building to lessen its impact on the single-family homes.


793 Supra note 764 at 58.
residential area and, at best, spot rezoning.\textsuperscript{794}

The Board's reasoning suggests that its policy of protecting the amenities of single-family and other low-density residential development was meant to apply only to relatively "pure" versions of such development, and that it believed there to be a tipping point in neighbourhood change beyond which the remaining single-family and other low-density residences would no longer be entitled to such protection.

3. Decision Data

Table 6-7 illustrates the varying patterns during those two review periods of the decisions in which the OMB addressed neighbourhood character. There was little change in some areas. Neighbourhood character was frequently addressed during both review periods, although less so as time went on, being considered in 22% of the 1971-78 and 16% of the 1987-94 decisions. The approval rates of 43% in 1971-78 and 38% in 1987-94 showed little variation. As befits the fact that it was primarily private interests that were at stake in these decisions, most of them involved residential neighbours opposing owners who were most frequently seeking approval of residential projects.\textsuperscript{795} The data are indicative also of the province's largely hands-off role with respect to substantive planning issues. Despite the high profile accorded to high density residential rezonings during the 1960s, as noted above, the province did not appear as a party in any of the decisions in which neighbourhood character was an issue in either of the review periods.

The data reveal other features indicative of the nature of the matters addressed in evaluating neighbourhood character. Decisions involving official plan and/or zoning applications declined from 59% of the total in 1971-78 to 42% in 1987-94. The difference was more than made up by the increasing frequency between the two review periods, from 21% in 1971-78 to 50% in 1987-94, in which the Board considered minor variance applications, the most "local" and smallest scale type of application. This suggests an increasing importance of minor matters in the determination of


\textsuperscript{795} In the 1971-78 review period 84% of the decisions dealing with neighbourhood character involved residential applications, as opposed to 64% of all decisions. The corresponding figures for the 1987-94 period were 85% and 65%.
neighbourhood character. One distinct subset of decisions dealt with severances and, in almost every instance, the issue was the appropriateness of the proposed lot size within the neighbourhood. The pattern of municipal involvement changed also, with municipal support of applications in which neighbourhood character was an issue declining from 47% to 19% and municipal opposition increasing from 33% to 56%. These changes suggest a considerable heightening of municipal awareness of neighbourhood character concerns and a greater willingness to act to protect such character.

**TABLE 6-7**

**Neighbourhood Character - Decision Data**

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The Board's approval rates for applications involving low-density residential neighbourhoods is also indicative of its protective attitude toward them. There were 55 such decisions in the earlier review period and 35 in the later. The approval rates for such applications, 29% and 31% for the two
review periods, were well below the overall approval rates of 44% and 47% for the same two periods.

E. INTERIM CONTROL BY-LAWS: An example of creative policy development in the exercise of a statutory jurisdiction

The manner in which the OMB has dealt with interim control by-laws provides what is probably the clearest example of policy emerging from a specific statutory base. In other areas, its development of policy is inherent in its decisions, but the particular must be gleaned from textual and statistical analyses of these decisions. In dealing with interim control by-laws, however, it quickly developed and stated the policy it would apply in determining whether or not to approve them. This policy was largely a subset of its interest evaluation policy, but it included additional elements derived from the statutory context of interim control. These decisions thus illustrate how the Board has applied its interest evaluation policy to a specific application type, particularly in its balancing of public and private interests. They also show how Board policy with respect to this type of application has evolved over a relatively short period of time.

An interim control by-law is a tool for temporarily freezing or limiting the type of development permitted within a defined area pending a review to determine the most appropriate planning policies for that area. The Planning Act, 1983 stated that where the council of a local municipality has:

by by-law or resolution, directed that a review or study be undertaken in respect of land use planning policies in the municipality or any defined area or areas thereof, the council of the municipality may pass a by-law (hereinafter referred to as an interim control by-law) ... prohibiting the use of land, buildings or structures within the municipality or within the defined area or areas thereof for, or except for, such purposes as are set out in the by-law.

Such a by-law would be in effect for only one year from the date of its passing, but could be extended for up to two additional years. Unlike a zoning by-law, no prior notice of the passing

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796 i.e., cities, towns, villages and townships.

797 S.O. 1983, c. 1, s. 37(1).

798 Ibid. s. 37(2).
of an interim control by-law was required, but any person could appeal from its enactment to the Board.\textsuperscript{799} A second such by-law could not be imposed on an area for a minimum of three years after the first ceased to be in effect so as to prevent interim control from being used to impose a permanent fetter on development.\textsuperscript{800} These provisions remain largely unchanged in the current Act.\textsuperscript{801}

The only statutory guidance available to the Board in considering the appeal of an interim control by-law was found in the words of section 37(1) quoted above. Despite this, it quickly began to formulate a policy with respect to the evaluation and approval of such by-laws. In its first reported decision it stated, in refusing to give approval, that:

There are few guidelines as to what issues should be considered in determining the appropriateness of the municipality in enacting an interim control by-law. At the very least, however, a municipality is expected to observe those planning standards it utilizes in enacting a s. 34 [zoning] by-law given the extraordinary nature of an interim control by-law.\textsuperscript{802}

 Whereas the Board has not stated reliance on precedent on a regular basis, this decision was cited with approval in a number of subsequent interim control by-law decisions, thereby reinforcing the fact that it quickly and consciously adopted a policy in respect of such by-laws.

The words "extraordinary nature" quoted above provide the clue to the Board’s policy development. Municipalities had to be held to exacting standards because they were here given authority to severely limit or even freeze development activity without the need for any prior public input. Moreover, such by-laws were tools to be wielded by local councils in the public interest, and it was thus necessary to give consideration to the balancing of public and private interests in this particular statutory context.

\textsuperscript{799} Ibid. s. 37(3), (4).

\textsuperscript{800} Ibid. s. 37(7).

\textsuperscript{801} Now section 38. The only changes relate to the notice provisions and the continuation in effect of a by-law still under appeal when it expires. As these amendments were not made until 1994, they had no effect on the decisions being analysed here. See S.O. 1994, c. 23, s. 23(1)-(3).

The main elements of the Board’s policy were the development and application of a test establishing conditions precedent to the approval of an interim control by-law, the brief application of a double-onus test derived from its adverse impact test, and its unusual balancing of public and private interests.

1. The Conditions Precedent Test

The Board soon formulated the elements of the policy that were touched on in Gilbert as a four part test, loosely derived from the language of the statute, that had to be met as a condition precedent to the approval of interim control by-laws. It was stated in Tan-Mark, quoting from an unreported decision:

- section 37 must be interpreted strictly in view of the fact that it permits a municipality to negate development rights;
- the municipality must substantiate the planning rationale behind the authorizing resolution and interim control by-law;
- the by-law must conform with the official plan; and
- the authorized review must be carried out fairly and expeditiously. 803

This test constituted the threshold element of the Board’s policy, and all four parts had to be complied with if a by-law was to be approved. Almost every instance of refusal to approve arose from the failure of a municipality to meet one or more of these requirements. The Board refused approval most often where the planning rationale had not been substantiated, generally because the council had passed a by-law in response to a public outcry against a particular development proposal rather than for reasons of good planning. 804 It refused approval also where the municipality had not conducted its planning review in an expeditious manner. 805 If the four parts of the test were complied with, the Board subjected the by-law to its interest evaluation policy, modified to fit into the context of the interim control by-law policy expressed through the legislation.

803 Tan-Mark, supra note 433 at 389.
805 Tan-Mark. supra note 433; Newmarket. ibid.
2. **The modified Application of the Impact Test**

The Board briefly attempted to apply its adverse impact test, but quickly recognized that it must attach greater importance to public policy considerations than it did when dealing with other types of applications. This led to a fairly rapid evolution of policy on its part. It initially applied a double onus test, stating in *Gilbert* that:

> Given the extraordinary powers contained in s. 37(1), the board is of the opinion that once an appellant has demonstrated the potential or actual adverse impact of an interim control by-law upon him the onus shifts to the municipality to justify its course of conduct. To do so the municipality must not only substantiate the rationale behind the directing resolution but also show that the study which it authorized is being carried out expeditiously. It must also show that proper planning principles underlie the by-law.\(^8\)\(^9\)

This test was shortly thereafter applied in other decisions.\(^8\)\(^7\) In the *Archipelago* decision, however, the Board repudiated this element of the policy, and reduced the importance to be attached to allegations of adverse impact. It developed a modified test placing greater emphasis on other elements of the policy formulation, the establishment of a proper balance between public and private interests, and the need to encourage good planning, stating that:

> The board, in the *Oakville* [*Gilbert*] case, seemed to imply some special onus on the municipality once an appellant demonstrated potential or actual adverse impact. It is difficult to imagine a situation where an appellant would not experience some adverse impact of an interim control by-law. That belief, real or imagined, is generally the reason for an appeal. In any event, the board considers that a municipality always has an obligation to make decisions consistent with proper principles of community planning under any of the provisions of the *Planning Act, 1983* which it chooses to use.\(^8\)\(^8\)

The Board recognized that it must modify the application of its impact-based interest evaluation to reflect the public policy interests inherent in the statutory grant of authority to pass interim control by-laws. Nevertheless, this represented a shift in emphasis, not a real policy change. It continued to treat the four-part test as the threshold test, thereby leaving the municipality with the onus of showing that it had satisfied all conditions. At the same time, however, it reiterated its policy, expressed in the context of other public policies also, that the matters brought before it,

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\(^8\)\(^6\) *Gilbert, supra*, note 802 at 170.

\(^8\)\(^7\) See *Re Town of Markham Interim Control By-law 160-86* (1987) 20 *O.M.B.R. 5*1; *Ottawa, supra* note 456.

\(^8\)\(^8\) *Supra* note 684 at 49-50.
however justified by these policies, must also be supported by proper planning principles if they are to be approved. In any event, it made no further reported attempt to apply the double onus test.

3. The Subordination of Private to Public Interests

The Board’s treatment of interim control by-laws provides a unique example of deviation from its commonly applied policies to meet the demands of dealing with an unusual type of planning application. It regularly subordinated private interests to the public interest in interim control, and it refused to apply its adverse impact test if all properties were equally affected by the enactment of an interim control by-law. It took this unusual approach, in my opinion, because of the temporary nature of such by-laws.

The Board gave primacy to the public interest when dealing with interim control by-laws. It is of interest that it refused to approve the by-law in only one of the seven decisions in which it explicitly considered the balance of public and private interests. In Tan-mark it concluded that the lengthy delay in conducting the market studies constituted an adverse impact sufficient to outweigh any public benefit from the by-law. It was only in the Board’s repudiation of the double onus test, however, in Archipelago, when it accepted that interim control by-laws were by their nature bound to have some adverse impact on property owners, that it started to examine more closely the relationship of the public interest and the interests of property owners in the context of the policy expressed in section 37 of the Act. From that point on, it recognized the public interest in imposing interim control by-laws as paramount. It thus held that the public interest in determining the impact of additional dock construction and of commercial uses on resort lakes, in reviewing development policies in a central commercial area, in preparing development policies for riverfront lands and

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809 Tan-mark, supra note 433 at 390.
810 Archipelago, supra note 684; Re Township of Radcliffe Interim Control By-law (1993), 28 O.M.B.R. 141.
811 Caledon, supra note 684.
812 Westmeath, supra note 684.
in developing wetland protection policies\textsuperscript{813} all outweighed the temporary impact of restrictions on private property owners.

The Board quickly recognized that the creation of adverse impacts in the implementation of interim control by-laws was inevitable, and that a strict application of its own adverse impact test would negate the purpose of interim control. It therefore developed a variant of its policy for dealing with objections to interim control by-laws. Under this approach the allegations of adverse impact by objecting property owners were not subject to the Board’s normal impact test, but were weighed against the impact on the interests of other property owners within the area subject to the by-law. Where it concluded that all owners were being treated equally, even though their development rights were being fettered, it refused to either repeal the by-law or exempt the properties of objecting owners from it. This unique approach to the balancing of interests, and its subordination to the public interest in interim control, was illustrated in a decision in which the right to build on shoreline properties and within a floodway was suspended pending further study:

The board cannot find any reason for exempting [X’s] land alone from by-law 89-18 in order to allow them to do what no one else can do within the floodway of the Ottawa River. The same problem is occasioned (for) them as for other affected landowners until the by-law term ends, and the board is satisfied that the public interest in proper land use and environmental planning and public safety in these circumstances outweighs the temporary restrictions of private rights.\textsuperscript{814}

The test that the Board applied might be described as the “relative impact” test. As it stated in Shuniah:

The very nature of an interim control by-law, because it prohibits further development of land for a temporary period, is to affect the value of the land and the prospects of selling it. Since what [the owners] are unhappy with are the natural consequences of an interim control by-law, their hardship cannot be said to be of the special or unusual type that would justify the board amending the by-law to exempt their property from it.\textsuperscript{815}

and, in Ottawa:

\textsuperscript{813} Hamilton, supra note 455.

\textsuperscript{814} Westmeath, supra note 684, at 448.

\textsuperscript{815} Re Township of Shuniah Interim Control By-law 1601 (1990), 24 O.M.B.R. 377 at 382.
... the board is not satisfied that any of the appellants have demonstrated potential or actual adverse impact stemming from the interim control by-law, in that they have not effectively established any special or unusual type of hardship that would justify the board repealing the By-law or even exempting their property from it.\textsuperscript{816}

It determined that all property owners were equally affected in eight decisions, in each of which it refused to repeal the by-law or grant the requested exemptions.\textsuperscript{817}

4. Decision data

Interim control by-laws were considered in only 18 reported decisions during the 1987-94 review period.\textsuperscript{818} As Table 6-8 shows, these hearings were primarily disputes between the municipalities which had enacted the by-laws and property owners within the areas subject to them who sought either their repeal or to have their properties exempted from their application. The Board approved the by-laws in the majority of these decisions. The reasons for its approving or refusing to approve were found in its application of its interest evaluation policy as applied through the filter of the interim control legislative provisions.

\textsuperscript{816} Re City of Ottawa Interim Control By-law 72-91 (1993), 28 O.M.B.R. 72 at 79.

\textsuperscript{817} Examples include Markham, supra note 807; Re City of Burlington Interim Control By-law 4000-589 (1989), 22 O.M.B.R. 233; Caledon, supra note 684.

\textsuperscript{818} There were, in addition, 3 reported decisions in 1986. One of these, Gilbert, contained a significant statement of the Board's policy, and is quoted in this chapter. However, none of these decisions are included in the data, which is limited to 1987-94 decisions.
TABLE 6-8
Interim Control By-laws - Decision Data

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F. COMMERCIAL COMPETITION: The maturation of the adverse impact test to protect a public interest

The OMB’s treatment of commercial competition provides an example of the maturation of a tribunal’s policy from one focussed on impacts on private interests to one in which the impact on an important public interest becomes the prime consideration.

Commercial competition was not an explicit issue in the majority of commercial land use applications heard by the Board. These generally involved the impact of small-scale commercial facilities on their immediate neighbours, and it applied its adverse impact test here as it did to applications involving other land uses. The majority of commercial land use applications were small in scale. They involved service stations, convenience stores and neighbourhood shopping malls, for which the market studies discussed below
number of large-scale shopping centre development or expansion proposals. The Board has been required to address the larger consideration of how such proposals might affect either existing commercial uses or municipal policies in respect of commercial structure contained in their official plans, as they have had the potential to greatly affect commercial functions and associated land uses in the municipality as a whole, and sometimes beyond. The specific issue that it has been required to address in these decisions has been the nature of commercial competition that should be allowed. It has approached this issue through its development and application of a policy which has undoubtedly had some bearing on urban form and functions within the province.

There is an important distinction between these and decisions involving other types of land use. In the latter, parties usually opposed development proposals because they considered them to be not good planning, or were concerned about the direct impact of the proposals on their properties. In these decisions the opposition has been based primarily on economic grounds. Other commercial property owners or merchants have been concerned about the impact of the proposed projects on their sales. Municipal councils have been concerned about their impact on the economic health of existing or currently planned commercial development within their boundaries.

The policy in respect of commercial competition developed by the Board consisted of two elements, one general in nature and one specific to commercial development applications. Both of these elements appear to have been well established prior to 1971, as they were regularly addressed during the 1971-78 review period, but the latter showed evidence of evolution between the earlier and later periods. The general element has been that the Board does not regulate commercial competition per se. As it stated in approving a shopping centre to which other merchants had objected on the grounds of undue suffering (to them) and of an existing excess of commercial space to serve the current population of the municipality:

This Board has held in the Sherway shopping centre application that it is not the duty or the function of this Board under The Planning Act to regulate or control commercial competition. I am in respectful agreement with that principle there laid down. This is not

were not required. There were 62 decisions during the 1971-78 review period in which commercial land uses were in issue, and 67 such decisions during the 1987-94 review period. As Table 6-6 shows, commercial competition was addressed in less than one-third of the commercial land use applications in each period.
to say that there would never be need for such a control but that it is so particularly an economic and fiscal subject that it would be dangerous for this Board to attempt it under the guise of planning land use.²²⁰

This is an expression of its general position that it must decide on planning rather than economic grounds. Its policy, based on its perception of its role in the land use planning process, has remained consistent in this regard. As it recently and pungently stated:

The role of the board is restricted to planning matters and not to the competitive factors in the market-place. ... It is not the board’s function to participate in the predatory market policies of the food store industry. Its role is to review the project and to make a finding that the project represents good planning and to make a judgement that this is in the public interest.²²¹

This policy was of particular relevance in the consideration of commercial land use applications because, unlike applications involving other types of land use, the major ground of objection was that of competition with existing or planned commercial facilities.

The specific element of the Board’s commercial competition policy was rather more complex. What it developed and applied was a specialized and increasingly sophisticated variant of its impact test. It recognized that there would be an impact on existing commercial operations, but that such an impact must be accepted because it was economic rather than physical, and was inherent in the operation of the free market system. As the Board stated in approving a downtown shopping mall and associated parking:

There is no question that there will be some effect on the existing businesses. It generally is more appropriate that the market place should determine the amount of commercial land uses within the overall concept of planning for the City. The Board never set itself up as an economic arbiter to say when there is enough competition.²²²


²²¹ Georgina. supra note 613 at 256.

²²² Re City of Thunder Bay Parking Structure (1974), 2 O.M.B.R. 162 at 168. For a more recent expression of this position, see Brampton. supra note 414 at 9.
1. **1971-78: A Focus on Economic Impact**

The Board's policy during the 1971-78 review period exhibited a partial abdication of its planning role when considering more substantial commercial development proposals. Broader aspects of planning policy were reduced to a consideration of the economic impact of commercial development proposals on existing commercial operators and property owners. It was only with the emerging focus on impacts on central business districts (hereinafter CBD) that these wider policy implications of approving shopping centres began to emerge in its decisions. During this period, its approach was one of technical orientation to commercial competition based on market studies. Such studies were "objective" in that they made use of data pertaining to such matters as the demand for different categories of retail products, sales per square metre for different types of stores and population growth projections within defined catchment areas to determine whether a commercial proposal (generally a shopping centre) could in theory be supported within a given market area.\(^{823}\) "Support" in these studies, meant that there would, again in theory, be enough retail business potential within the market area to support both existing and proposed commercial centres.\(^{824}\) The Board applied these studies in different ways. It determined whether there would be a sufficient market demand to support the proposed facility, and gave approval if satisfied that there was. As the reporter summarized *Kincardine*:

The Board considered existing commercial facilities and present and future retail demands as disclosed by detailed market studies and forecasts. Two principle factors proved decisive as a result of these considerations: (1) the present "outflow" of retail business from Kincardine to outside points caused largely by more attractive shopping prices outside, and (2) the anticipated permanent population growth resulting from construction of an operation of the Bruce Nuclear Power Development.\(^{825}\)

In dealing with competing shopping centre applications, it first determined that market studies

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\(^{823}\) The market or, technically, the catchment area was generally all or part of the municipality, except for regional shopping centre proposals whose catchment area could encompass two or more municipalities.

\(^{824}\) It should be noted that, despite their apparent objectivity, the "data" relied upon were frequently the competing assumptions of the experts, not truly objective, agreed-upon information. The Board's developing awareness of this problem is illustrated in later decisions.

\(^{825}\) *Re Town of Kincardine Restricted Area By-law 3022* (1975), 4 O.M.B.R. 15 (headnote); See also *Niagara Falls*, supra note 557 at 435.
supported one new centre, but not two, then considered such matters as traffic and servicing in deciding which centre to approve. 826 This approach was, initially, largely aspatial. Later during this period, however, the Board began to focus on the impact of proposed commercial development, as revealed by market studies, on the CBDs of affected municipalities rather than on market demand generally within them. 827 It approved shopping centres in each instance where it had concluded that their impact on the CBD, as determined by market studies, would be limited, 828 and it refused approval in each instance where it concluded that such an impact would be adverse. 829

2. 1987-94: A Focus on Planned Commercial Structure

By the 1987-94 review period the Board had abandoned its reliance on market studies and had focussed on the impact of proposed commercial developments on the planned commercial structure of municipalities. There appear to have been two reasons for this: a disillusionment with market studies and an increasing awareness that the nature and location of commercial land uses should be treated as an important aspect of public policy rather than primarily a marketing exercise.

By the later review period the Board was showing evidence of disillusionment with the market studies it had earlier relied on so heavily. It had concluded that such studies, which were developed as a tool by retailers to assist them in locating and expanding their operations, were too narrowly focussed to be treated as the prime determinant of what should be a public policy decision taking

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826 Re City of Timmins Official Plan Amendment 27 and Restricted Area By-law 1974-284 (1975), 4 O.M.B.R. 322 at 327; Sudbury, supra note 524.

827 In doing this, the Board was reflecting an increasing concern throughout this period that substantial commercial development on suburban and rural sites was undermining the function and viability and leading to the deterioration of the traditional CBD in many cities and towns. The evolution of the Board’s policy in this area is revealed in the analysis of 1987-94 decisions.

828 Re City of Belleville Restricted Area By-law 10000 (1977), 6 O.M.B.R. 217; Morsyd Investments Limited v. Town of St. Mary’s (1979), 9 O.M.B.R. 80. In the latter decision the Board concluded that there would be an impact on the CBD, but that the development proposal provided space for auto-oriented, space-using commercial uses which did not belong in the compact, pedestrian-oriented core.

829 Southwick Investments Limited v. Town of Orangeville (1979), 8 O.M.B.R. 341; Re Township of Sarnia Restricted Area By-law 73 of 1976 (1979), 9 O.M.B.R. 219. In the latter decision the Board concluded that the adjacent city should have a chance to attract a full-line department store to bolster its deteriorating CBD, but that approval of the proposed shopping centre would deny the city that chance.
a much wider range of matters into account. These studies were to continue to play a role, but a subordinate one. As the Board stated in Orangeville:

The market evidence should be considered only as a small part of the planning consideration and no more. Its importance is its over-all effect on existing facilities that might be detrimental to the economic life of the community. ... It has become accepted to present the board with extensive evidence of market analysis in considering the impact of a shopping centre project upon existing commercial facilities and the need for such additional facilities in the municipality. There is a danger that basic planning principles could become buried in a morass of figures based on the analyst's assumptions, suppositions and past experience.830

Similarly, it stated in Oxford that:

The role of market evidence in a planning case before the board is always a difficult one as the board has no jurisdiction or intent to unduly restrict trade or interfere with competition. ... the only role of market evidence is to assist in reaching a sound planning decision to guide orderly development in the best interests of the community, consistent with the broad policies of the official plan.831

It gave stronger voice to its frustration with market evidence In Heritage Glen:

The board heard market evidence from no fewer than six experts and the board will say at the outset that their evidence ranged from the sublime to the ridiculous. ... Even though most of the hearing revolved around market evidence, it cannot be given nearly the same weight as the planning evidence as there are simply too many variables. It is not as exact science and it therefore comes down to a matter of judgement. That judgement can be coloured or twisted depending on the terms of reference given to the market analyst and the analyst’s opinion of what his or her client might like to hear.832

It concluded its lengthy decision with the recommendation that “the city rethink the wording and context of [the retail provisions] in its official plan as soon as possible so that hearings of this kind in future are primarily based on planning issues and only secondarily on market impacts.”833

The planning-oriented policy which the Board had developed by this time was clearly articulated in several decisions. In Severdon it refused to approve a major retail and wholesale food

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831 Supra note 604 at 429.
833 Ibid. at 371.
distribution centre on the ground, *inter alia*, that it would be too disruptive to the existing fabric of commercial development. It stated that:

Knob Hill Farms wishes to locate in the area to provide a competitive alternative in the area outlined as its trade area. ... In this regard the board will use the market evidence before it not for the purpose of regulating competition but for the purpose of assessing whether the impact of the new store will have the effect of destroying or undermining the *planned function* of existing land uses.\(^{634}\)

In *Ajax*, a decision approving a commercial mall in a central area, it stated that "[t]he central issue in all these cases [involving commercial developments] is, will the proposed development undermine the planning function of the existing centres."\(^{635}\) It subsequently developed this position further in two important decisions. In *Etobicoke* it stated that:

The board has previously held that the economic impact on established businesses is a proper planning consideration, and that harmful impact would damage the ability of existing businesses to fulfil their community function and would be grounds for rejecting a proposal causing such harmful impact.\(^{636}\)

In *Brampton* it articulated the manner in which it was prepared to apply its general "adverse impact" test to the impact, not on particular properties, but on a municipal policy as expressed in an official plan:

When considering impact, the board accepts that any change in the commercial structure, however large or small, will cause impact. By itself this is not justification for intervention. The board intervenes only when the impact is "deleterious or harmful" to existing facilities to the extent that the development would "jeopardize" or, as this board has said elsewhere, "undermine or destroy" the proper planned function of existing land uses and the planned commercial structure of the community.\(^{637}\)

These decisions illustrate the Board’s development of a more sophisticated version of its impact test, which may be paraphrased as follows: "A municipality, through its official plan, codifies the commercial land use policies it wishes to pursue. This involves the assignment of different functions

\(^{634}\) *Supra* note 613 at 8. This reasoning was followed in *Maywelle Properties Limited v. City of Mississauga* (1987), 21 O.M.B.R. 32.

\(^{635}\) *Re Town of Ajax Official Plan Amendment 1* (1987), 20 O.M.B.R. 418 at 431. The Board concluded that the proposed development would not have this effect, and approved it.

\(^{636}\) *Supra* note 297 at 234.

\(^{637}\) *Supra* note 414 at 9.
in the commercial hierarchy to different areas within the municipality. Implicit in these policies is the understanding that they will be implemented only if the development they envisage is commercially viable. Any development that threatens this viability and, with it, the functions planned for a given commercial area in an official plan, will threaten these elements of the official plan and should not be approved.” In following this policy, it has placed emphasis, not on the economic impact on competing commercial property owners and store operators, but on the public interest inherent in ensuring that official plan policies can be successfully implemented without being put at risk by subsequent approvals. This concern is, of course, applicable to other types of land use also, but the Board has concluded that the nature of commercial land uses and of the retail hierarchy within a municipality makes such uses particularly susceptible to harm. It has not attempted to roll back the tides of change that have overtaken retailing, the shifts from store-lined streets to shopping centres and, more recently, the emergence of large retail warehouse outlets, known as “big boxes”. It consistently followed this policy, variously expressed, throughout the remainder of the review period, with the decision to approve or refuse a proposed commercial development turning to a great degree in each case on its conclusion on this matter. In decisions involving two or more competing shopping centre applications, it has approved the centre it believed would have the least impact on the planned commercial structure of the affected municipality.

838 Brampton, ibid. is an example of a hearing in respect of a major “big box” application. In a contemporaneous hearing, IPCF Properties, supra note 237, involving a similar application, the Board refused to adjourn this and a similar hearing in Etobicoke until the Brampton application was decided. It did not accept the argument that the latter would establish general principles which could then be applied in deciding the former applications. The Board accepted that it often articulates “principles”, but it did not wish to be seen as establishing a precedent that parties could then argue was binding on subsequent applications involving the same subject matter.

839 The Board approved commercial developments in Re City of Barrie Official Plan Amendment 23 (1993), 27 O.M.B.R. 303; Orlando Corporation v. City of London (1993), 29 O.M.B.R. 66; Kargakos v. City of Ottawa Committee of Adjustment (1993), 27 O.M.B.R. 32. The latter was a decision in which, unlike the majority considered here, the Board’s commercial competition policy was applied in evaluating a small scale, gas bar proposal. The Board refused approvals, on the ground of undue impact on planned commercial functions, in Re Town of Vaughan Official Plan Amendment 249 and Zoning By-law 90-88 (1990), 23 O.M.B.R. 160; Jurian Investments Limited v. City of Mississauga (1990), 23 O.M.B.R. 219.

840 Heritage Glen. supra note 832; Bowmanville. supra note 760; Oxford. supra note 604. In the latter decision the Board gave a narrow interpretation to this policy. It considered a proposed shopping centre in the context of its impact on the township’s official plan commercial policies, but failed to address its impact on the planned function of the CBD in the abutting city.
3. Decision Data

The Board was required to address the issue of commercial competition throughout the review period, in 19 decisions in 1971-78 and 20 in 1987-94. Most of these applications were for substantial commercial facilities, and thus required both official plan and zoning by-law amendments. Table 6-9 shows a pattern of party involvement which differs from that observed overall. The protagonists were almost exclusively municipalities and property owners, particularly the owners of other commercial properties who were opposed to development proposals because of the impact they feared on their own facilities. Municipalities were most frequently supportive during the earlier review period, but were equally likely to be opposed during the later period. The Board was generally supportive of these applications, as it approved 65% of them during the 1971-78 review period and 75% during the 1987-94 period. Commercial competition was an important consideration where it arose. It was the only Board policy addressed in 47% of the 1971-78 and 40% of the 1987-94 decisions in which it was considered at all. The Board considered whether the proposed commercial developments constituted good planning in 26% of the 1971-78 decisions. This figure increased to 40% during the 1987-94 review period, which is reflective of the evolution of the Board’s policy reviewed below. On the other hand, prematurity was considered in 26% of the 1971-78 decisions in which commercial competition was addressed, but in none of the equivalent 1987-94 decisions.

While it is not shown in other data tables, the great majority of identified neighbour opponents were residential property owners. Commercial or industrial owners played an infrequent opposition role.
TABLE 6-9

Commercial Competition - Decision Data

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</tbody>
</table>

(1) Excluding two decisions which involved approval of one application and refusal of another.
(2) Based on 17 decisions equalling 100%.

G. THE PROVISION OF SOCIAL HOUSING: An example of a specific public interest subordinated to the OMB’s own policies

1. Balancing Need and Impact

There is clearly a public interest in the provision of social housing. The term encompasses group homes for specified classes of persons, such as troubled youth, ex-mental patients or battered women, and housing to be made available at lower than market rents, variously referred to as assisted, low cost or non-profit housing. During the 1971-78 review period the Board, in its few
decisions dealing with social housing, treated it no differently than it did other types of application. During the 1987-94 period it exhibited a mixed response to this type of application. It recognized the public interest in providing such housing, but continued to base its decisions on the application of its adverse impact test. Yet at the same time it gave procedural recognition to the provincial interest in the provision of affordable housing, as set out in a policy statement, by working with the Ministry of Municipal Affairs and Housing to “fast-track” applications involving such housing.

During the 1971-78 review period the Board received little policy direction in respect of social housing and was, in any event, rarely called upon to consider the matter. Various government housing funding programs were in operation, but the province had taken no formal policy position. The Board did, however, show some recognition of the public policy aspect of providing social housing. It noted, in approving a non-profit town house project over strong local opposition, that there was a public interest in increasing the stock of low-cost housing. It overrode objections to senior citizens housing based on excessive density on the ground that the proposal was for non-profit housing. It noted that there was evidence of need for group housing for mentally handicapped adults and for low-rent housing. For the most part, however, there was little to distinguish its treatment of social housing during this period from its treatment of development applications generally. While the fact of a development proposal being for social housing was clearly addressed, its decisions were based on the matters it considered in all applications: the lack of adverse impact and its satisfaction that the proposals were in accordance with the principles of good planning.

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842 Toronto, supra note 632.
843 Re City of Toronto Restricted Area By-law 23-75 (1976), 5 O.M.B.R. 301.
844 Sarnia, supra note 522.
845 Walkerton, supra note 619.
846 It should be noted that even in Toronto, supra note 843, the Board’s decision to approve was based on its conclusion that the impact on neighbours was not adverse.
847 The single refusal was based on the applicant’s failure to give particulars of the proposed development, so the Board was unable to assess impact: Limestone Homes Inc. v. City of Kingston (1974), 3 O.M.B.R. 371.
In contrast to the above, social housing programs were a feature of government housing and social policy throughout the 1987-94 review period, and the Board responded to this. The most significant new element was the provincial government's approval in 1989, under section 3 of the Planning Act, 1983, of the housing policy statement Land Use Planning for Housing. The Board's response to the policy statement, discussed in Chapter four, was largely to subordinate it to the application of its adverse impact test. This response did not deal with all types of social housing, however, as the statement referred to affordable housing only. The Board continued to deal with applications for other forms of social housing and, in addition, with affordable housing applications in which the policy statement was not addressed. These two categories of decisions did, in fact, outnumber those in which the policy statement was directly addressed by 31 to 23.848

As in the earlier review period, the provision of social housing was subordinated to the Board's primary concern of ensuring that the proposed developments did not adversely impact on their neighbours. In many of these decisions the social housing proposal, be it for a group home, low-rental apartment building or conversion of an existing residence to provide additional affordable units, was subject to the same criteria as were other residential applications. This is not to say that the Board did not address the matter of social housing at all. It recognized that there was a public interest in the provision of various forms of such housing and, subject to the application of its overriding impact policy, it sought to further this interest.849 It referred in many of its decisions to the need for the type of social housing for which approval was being sought, thus recognizing that even if there was no formal policy statement in place, there was a general public interest in the provision of such housing.850 It noted that applications were in conformity with official plan policies pertaining to social housing851 or were supportive of more general municipal social housing

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848 There was some overlap, as the housing policy statement was referred to in 3 of the 31 decisions. Even in these, however, it was not central to the decision.

849 The fact that the Board approved 65% of the applications involving social housing during the 1987-94 review period, as contrasted with its overall approval rate of only 47% during the same period, is indicative of this.

850 See, for example, Nettie, supra note 792; Tisdale, supra note 681; York, supra note 640.

851 Vanier, supra note 416.
policies. It noted the need for additional density in order to make social housing projects economically viable, a statement in contrast to its usual refusal to address the economic viability of other types of proposal. It responded to the element of opposition, particularly common in opposition to group homes, based on fear of the occupants of these facilities rather than on the impact of the proposed structures themselves, by noting their concerns but applying its policy of deciding on the basis of impact and good planning.

The Board has also, in a number of decisions dealing with affordable housing applications, addressed the balance between the public interest in providing such housing and the need to ensure that these proposals do not cause adverse impact or that they represent "good planning". Its attempts to achieve this balance are identical to its attempts to achieve such a balance in the application of the provincial housing policy statement. They must be considered as the expression, in a slightly different context, of the policy that was identified and analysed in Chapter four. The Board addressed this matter in 8 of its 1987-94 decisions, and in only one of these was there reference to the housing policy statement. It clearly stated its position in the first of these decisions:

Rental housing of all forms and especially affordable rental accommodation is in critical short supply. There is no question about the need for this project. Intensification in urban areas will occur. However, the issue of need does not take away the responsibility from the planners and the decision-makers to assess and address land use impacts. These projects must be properly planned and the assessed impacts on adjoining property owners properly treated. The planning tools are there and they must be properly used.

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852 Hamilton, supra note 613 (city policy to encourage provision of low-income housing); Toronto. supra note 650 (city’s private social housing legislation).


854 Wilson v. City of Toronto Committee of Adjustment (1992), 26 O.M.B.R. 438; York. supra note 640. In the latter the Board referred to "the volatile nature of this hearing" (p. 287). It is difficult to prove that opposition is based on fear, as the latter is generally expressed in planning terms. There can be little doubt of its underlying importance, however, particularly where homes for such groups as drug addicts or ex-convicts are proposed.

855 Oshawa, supra note 327. Even here it was only a passing reference, as the Board did not rely on the policy statement in making its decision.

856 Wendland, supra note 450 at 368.
This point was reiterated in other decisions\textsuperscript{857} even though the provincial housing policy was specifically referred to in only one of them.

While most applications involved the provision of social housing, the Board showed concern with preserving existing affordable housing. In \textit{DeMarsico} it refused to approve a minor variance to permit the replacement of a small bungalow with a "monster home"\textsuperscript{858}, stating that:

This application begs the question of whether or not North York is ever going to retain what affordable housing it now has, let alone providing for any new affordable housing should they continue to allow small bungalows to be redeveloped into much larger more expensive houses. ... it is certainly [a question] that North York Council, in the opinion of the board, should be considering.\textsuperscript{859}

As other decisions show, however, while it furthered the provision of social housing where possible, it never allowed this to override the application of its own policy.

There was, as noted above, another indication of support for the province's housing policy statement which is not evident in the decisions themselves. In the early 1990s the Board, working in conjunction with the Ministry of Municipal Affairs and Housing, adopted "fast-track" procedures to further the achievement of the goals of the housing policy statement. Applications involving the provision of at least some affordable housing\textsuperscript{860} were brought forward for hearing more quickly than were other applications, including other residential applications. This was a significant innovation which the Board had not, to my knowledge, previously adopted for other categories of application. It is indicative of the ongoing relationship between it and the province in operational matters; a


\textsuperscript{858} Monster homes are large houses, replacing small houses on large suburban lots, which take full advantage of the density available on those lots under existing zoning but not utilized by the existing houses. They generally change the character of the neighbourhood, and are included in the discussion in Section D.

\textsuperscript{859} \textit{DeMarsico}, supra, note 753 at 325. In any event, the Board refused to approve the proposed dwelling because of its negative impact on the character of the neighbourhood.

\textsuperscript{860} "Affordable" as determined in accordance with the Ministry's criteria for affordability, based on the percentile distribution of family incomes in different regions of the province.
relationship which has not prevented it from giving priority to its own policies.

2. **Decision data**

Table 6-10 summarizes the data in respect of those decisions in which the Board considered the provision of social housing. It shows that there was very little activity during the 1971-78 review period, and that the few decisions there were fell into a pattern of zoning by-laws or amendment applications which were supported by the property owners, opposed by neighbouring residents, frequently supported by municipalities and received an 87% approval rate, far in excess of the overall rate of 44%. Moreover, other of the Board’s policies played a substantial role in its deliberations. The more frequent consideration of social housing during the 1987-94 review period fell into two categories: zoning amendments, some of which were for substantial developments, and minor variances to permit the provision of social housing on individual properties. Municipal involvement was considerably less frequent, as municipalities were rarely parties to minor variance appeals. As in the earlier period, other Board policies were frequently addressed.
### TABLE 6-10
Social Housing - Decision Data

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(1) Includes one comprehensive official plan.

### H. THE MEANING OF “MINOR”: An example of using Board policy to provide consistency in interpreting and applying a statutory provision

The OMB has been required by the courts to determine whether a proposed variance from the provisions of a zoning by-law is a minor variance. Within this judicial context, it has applied its interest evaluation policy, particularly its adverse impact test, to provide consistency in determining whether a variance is "minor".
The preceding sections dealt with areas in which, with one exception, the Planning Act gave no direction, and where there were no provincial policy statements or ministerial guidelines: in other words, where the Board was required to make decisions within a public policy vacuum. The situation differs with respect to its determination of "minor", as its role here has been to interpret and apply a specific statutory provision. It has received limited guidance in this task from the courts. More importantly, however, the analysis of decisions in which it has interpreted and applied the "minor" in minor variance provides an excellent example of how, when provided with statutory provisions, it interprets and applies them in the context of its own policies.

1. The Application of a Judicial Test

In dealing with minor variances the Board has, unusually, been required to make its decisions in accordance with a judicially determined test. The Planning Act permits a committee of adjustment and, on appeal, the Board to grant minor variances from the provisions of a zoning by-law. These include approval of lot frontages, lot areas or parking requirements less than the minimum required by the by-law, or limited changes in the use of land from those uses permitted under it. The statutory provisions pertaining to minor variances have remained essentially unchanged throughout the entire 1971-94 period. Subsection 45(3) of the current Planning Act states that:

The committee of adjustment, upon the application of the owner of any land, building or structure ... may ... authorize such minor variance from the provisions of the by-law, in respect of the land, building or structure or the use thereof, as in its opinion is desirable for the appropriate development or use of the land, building or structure, if in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained.

The Divisional Court held in McNamara that the Board exercises the same jurisdiction in hearing appeals from committee of adjustment decisions.  

Another difference between this and other areas of policy development is that the Board has here

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861 The only exception was policy in respect of interim control by-laws, although this was of a different nature, being the application of statutory procedural requirements.

862 Re McNamara Corporation Ltd and Colekin Investments Ltd. (1977), 15 O.R. (2d) 718 at 721 (Div. Ct.).
been working, for much of the review period, within the context of a court-determined jurisdiction. In Perry the High Court, on a motion to quash the decision of a committee of adjustment permitting a building lot with a frontage of 41 feet rather than the required 60 feet, refused to quash the decision, holding that “the phrase ‘minor variations’ [the term used by counsel for the applicants] is a relative expression and must be interpreted with regard to the particular circumstance involved.”

In Morrison the Divisional Court established a four-part test which a committee of adjustment and, by extension on appeal, the Board must apply in deciding whether to grant a minor variance. It must be satisfied, as one part of the test, that “[t]he variance must be a minor variance from the provisions of the by-law,” but the court gave no guidance as to what “minor” might mean. The only guidance, and that not very helpful, was provided in McNamara, in which the court repeated the position taken in Perry that:

The Legislature by s. 42(1) confided to committees of adjustment and ultimately to the Municipal Board the authority to allow “minor variances”. The statute does not define these words and their exact scope is likely incapable of being prescribed. The term is a relative one and should be flexibly applied ... No hard and fast criteria can be laid down, the question whether a variance is minor must in each case be determined in the light of the particular facts and circumstances of the case. ... It is for the committee and, in the event of an appeal, the Board to determine the extent to which a by-law provision may be relaxed and a variance still classed as “minor”.

This served only to give a judicial imprimatur to what had been and continued to be the Board’s expressed policy of deciding each case on its own merits. In 1974, for example, the Board quoted with approval the dictum noted above in Perry that “the phrase ‘minor variance’ is a relative expression and must be interpreted with regard to the particular circumstances involved ... it is necessary to look at the whole picture in any given case in order to determine the meaning of the term.” This decision has been echoed in other decisions, in both review periods.

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863 Re Perry and Taggart, [1971] 3 O.R. 666 at 668 (HC.).
864 251555 Projects Ltd., supra note 386 at 766.
865 Supra note 862 at 721.
867 Examples in which this position is clearly stated include Hoppe v. Borough of North York (1978), 7 O.M.B.R. 102 at 102; Macaulay v. Prime Equities Inc. (1979), 8 O.M.B.R. 358 at 362; Chung
stated in *Waisberg* what might be considered its policy on the matter:

The board notes that the legislation does not provide any definition of minor, nor does it impose any restriction on the interpretation of what is minor. The board is of the view that its discretion is not restricted in any way and that the determination of what is minor is dependent solely on the facts.868

2. Applying the Impact Test to Statutory Interpretation

The Board’s determination of what “minor” means, while not a policy in itself, provides a clear illustration of how its interest evaluation policies have been central to its interpretation and application of s. 45(3) of the Planning Act. Because of their local nature and the generally small scale of the development proposals under consideration, minor variance hearings are, for the most part, disputes between competing private interests.869 As discussed in Section B, the heart of the Board’s interest evaluation policy is the determination of impact: If the impact of a proposed development on neighbouring properties is sufficiently adverse, the right of an owner to develop will be overridden by the right of neighbouring owners to be protected from such impact. Throughout both review periods it has been this test which has most often provided the thread of consistency running through what would otherwise have been, in its face, an inconsistent pattern of decision-making. In 61% of its 26 1971-78 decisions dealing with the meaning of minor, and 68% of such 42 1987-94 decisions, the Board stated that its decision was based solely or primarily on impact, while a review of the remaining decisions suggests that impact was often a significant, if implicit, consideration in them. Moreover, the application of this test lay behind its often expressed view that it was not to interpret “minor” in a mathematical sense; i.e., that a variation of 10% from a by-law standard was minor, but one of 11% was not. It stated in *Grant*, for example, that “[w]hile it is true that minor variances must not be construed as a mathematical consideration, the Board must determine any adverse effects which might flow from the granting of the

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868 *Waisberg, supra* note 694 at 186.

869 Such hearings occasionally involve broader, public interest considerations, as discussed below.
application. A statement in McLean was even more explicit on this point:

The question of whether it is minor is something that the courts have said cannot be calculated mathematically. What is minor in one instance is not minor in another. ... It seems to me that in all these variance applications, in order for the variance requested to be considered not minor, there has to be an element of unacceptable adverse impact on some of the neighbours.

A similar position was taken in many of the other decisions, leading to a series of results having strong policy but little mathematical consistency. Thus, for example, variances from by-law standards ranging from 7% to 55% have been refused where, in the circumstances, the Board concluded that such variances would have an adverse impact on adjacent properties. Variances ranging from 16% to 100% have been approved where it concluded that their impacts would not be adverse.

One difference, of emphasis more than of substance, between the two review periods was the more explicit articulation of policy often found in the 1987-94 decisions. In Glinert, for example, the Board stated, after considering a suggestion that minor variances were to be granted only to correct non-conformities arising from the broad brush approach of a general zoning by-law, that:

Given, however, that this board and committees of adjustment have, for the past 25 years or more, been essentially using the criteria of impact on surrounding land users as the measure of whether or not a proposed variance is minor, it seems inappropriate to now attempt to go against that developed body of "jurisprudence".

It was unusual for the Board to be so explicit about its policy-making role.

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671 McLean v. City of Toronto Committee of Adjustment (1990), 23 O.M.B.R. 27 at 30-31. See also Rebelo, supra note 681 at 489.

672 Numerous examples could be given. To take the extremes cited above, a 7% reduction in lot frontage, from 150 to 140 ft. was refused; Richmond Hill, supra note 569. A total reduction in a side yard, from 3 to 0 ft. to permit joined decks, was permitted; McLean, ibid. With respect to the latter, it should be noted that a variance amounting to a complete elimination of a by-law requirement may be minor: McNamara, supra note 862.

A variant of this test, which reflects the importance to the Board of overall impact rather than the magnitude of any individual variance requested, is the cumulative impact test. Applications were frequently made for multiple variances to enable a development project to proceed, and the Board held on a number of occasions that, while any one variance might not cause a problem, "the cumulative effect of this series of variances must be considered when assessing impact."  

Despite this consistent focus on balancing the private interests of applicants and neighbours in minor variance applications the Board has occasionally given consideration to a broader aspect of interest evaluation, its perception of a public interest in the integrity of the planning process. In its treatment of this matter, however, the public interest was seen to be little more than an extension of the interest of property owners. It occasionally concluded that a proposed variance was not minor because it would, inter alia, impinge on the integrity of the zoning by-law as the protector of property rights. This approach, and the philosophy behind it, were clearly noted in *Cassidy*, in which it stated that the intent and purpose of a zoning by-law:

... is to preserve and protect established neighbourhoods and the rights and privileges of property owners therein, and that such purpose is frustrated by significant variances from the by-laws's provisions ... that is not compatible with the neighbourhood and adversely affects the adjoining residence.  

The Board has more recently, without directly addressing impact, concluded that a variance was not minor because it contravened broader planning issues. This, in *Margolis*, it refused to approve a minor variance to recognize the existence of a triplex within an area in which only single-family residences and duplexes were permitted, stating that: "[a]fter consideration of the matter, it does seem that the lynchpin of London’s policy is the distinction between triplex and duplex, and to cross over from one to another is not minor."  

In an unusual application of the term “minor” outside the context of a minor variance appeal, it has concluded that a severance permitting a new lot 300 feet away from an existing residence was not minor where the official plan infill policies prohibited new

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875 *Supra* note 783 at 152.

residences more than 200 feet from an existing dwelling.\textsuperscript{877}

3. \textbf{Decision Data}

The decisions pertaining to the manner in which the OMB has interpreted and applied the term "minor" in minor variance applications, summarized in Table 6-11, exhibit in many respects a consistent pattern throughout both review periods.\textsuperscript{878} These decisions were prime examples of local, micro-planning. Each one involved, of course, a minor variance application, which was occasionally accompanied by a severance application. Except for the latter, the applications pertained to individual lots only. In every instance the owner of the property supported the variance, and was generally the sole supporter.\textsuperscript{879} With one exception in the 1971-87 period, and three in the 1987-94 period, the variances sought were in respect of by-law standards, not use changes. Neighbours were the most frequent opponents, but there was considerable municipal opposition also. The only significant differences are found in the approval patterns. In 1971-78 the Board showed a much greater disposition to refuse approval to minor variance applications than it did in 1987-94. In the earlier period it gave approvals in 27% of the decisions, while refusing approval in 73%. In the later period its approval rate was 52% and its refusal rate only 48%. Since the analysis below shows that the Board applied much the same policy considerations in both periods, it is likely that the remaining difference in approval patterns turns largely on the individual fact situations being considered by it.


\textsuperscript{878} This analysis includes only those decisions in which the board considered the meaning of "minor". It does not include other decisions, involving minor variance applications, in which the meaning of "minor" was not addressed.

\textsuperscript{879} The term "supporter" means that the party is supporting the approval of the minor variance, whether that party is the appellant before the board or the respondent.
TABLE 6-11

Minor - Decision Data

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I. DISCUSSION

Conclusions arising from the analyses of the substantive planning matters addressed by the OMB fall into two categories. Some apply generally to its development and application of its substantive planning policies, while others pertain to specific substantive areas analysed herein.

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These general conclusions apply to some degree to both the procedural and substantive areas within which the Board has engaged in policy development or application. The focus here, however, is on the substantive policy areas considered in this chapter.
I. The OMB has developed substantive land use planning policies to fill the void left by a lack of government policy.

As has been frequently noted, Ontario’s land use planning system, as embodied in successive versions of the Planning Act, is primarily procedural in nature. This is a reflection of the predominantly private law ideology upon which planning in the province is based. A primary goal of land use planning, seen most directly in controls such as zoning by-laws, minor variances and site plan control, but also more generally through the adoption of policies in official plans, is the protection of the owners of private property, particularly residential property, from negative externalities and, more generally, from uncertainty regarding change. This is to be achieved through a process of formal consideration of changes to land use controls, a process involving public notification and provision for public participation and appeal. The Board has developed its own policies for the application of these statutory procedural directives and has developed policies of its own for matters regarding which the province has provided little or no policy direction. Because the Planning Act provides almost no policy guidance with respect to substantive planning matters, the Board has been left to decide how it is to respond to the substantive aspects of the wide range of matters brought before it. It has responded to this lack of policy direction by developing and applying its own substantive land use planning policies to enable it to deal in a consistent fashion with these matters.

I noted in the final section of Chapter five how the conclusion of the MacBeth Committee with respect to the Board’s policy-making activities had fallen far short of the reality as revealed in the analyses in that chapter. That comment is equally applicable to the matters reviewed in this Part. To repeat the quotation in full:

The Committee is satisfied that the OMB tries to follow government policy in making its decisions. However, in at least two types of cases the OMB obviously makes policy. One type occurs when there is no clear statement of government policy. A second occurs when

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With respect to the examination of official plans and amendments thereto, the OMB's practices differ from those of the Board. Proposed official plans and amendments thereto are reviewed and commented upon by affected ministries, which can thereby seek to ensure that their concerns are dealt with in the approval process. Official plans and amendments do not come into force until approved by the approving authority. This was originally the Minister of Municipal Affairs, who gave further assurance that government policy concerns would be addressed, but the recent and increasing delegation of approval authority to regional municipalities, districts and cities has meant a lessening of direct provincial influence.
the Board has only generalized government policy to guide it and feels obliged to make
detailed policy applicable to the issues before it. 882

This language might lead one to believe that the exceptions, the occasions when the Board did not
follow government policy, were infrequent. An analysis of the Board’s treatment of several
substantive planning matters suggests that the Committee’s conclusions were correct as far as they
went, but also that they woefully understated the actual content and significance of the Board’s
policy-making activities. The two exceptions given in the statement, far from representing
aberrations, described the norm. They reflected almost the entire universe of the Board’s decision-
making, as it was infrequently called upon to apply or even consider provincial policy. There was
no provincial policy at all with respect to most of the substantive planning matters reviewed herein.
Even where such policy was expressed, it was of necessity of general application and thus subject
to detailed interpretation and application by the Board in each instance. Moreover, the Macbeth
Committee failed to notice the third exception which is examined particularly in this chapter: the
Board’s development of its own policies which have provided it with the justification for overriding
provincial policy even in those limited instances where the latter was clearly applicable.

2. *Successive provincial governments have acquiesced in the OMB’s assumption of
responsibility for the development and application of substantive planning policies.*

Analysis shows that successive provincial governments have played only a limited role in those
decisions involving areas within which the Board has developed and applied its own substantive
planning policies. While the province has always had an underlying policy impact through its review
of official plans and amendments and its formal or informal adoption of provincial policy
statements, it has left the interpretation and application of these expressions of provincial policy
almost entirely to the Board. This is clearly reflected in the infrequency, as shown in the tables in
this chapter, with which the province has appeared as a party at hearings in which the Board dealt
with these policies. It is reflected also in the fact, whose exploration is beyond the scope of this
thesis, that successive provincial governments have seen fit to not interfere with the basic structure,
jurisdiction or mode of operation of the Board, even though the planning process, and its role

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882 Macbeth Report, *supra* note 6 at 3.
therein, has been addressed in a number of important studies. While its role as a policy-maker was often commented on, no recommendations were made regarding this role or its role in applying provincial policy, and no significant changes were made in this regard.

The reasons for the province's continuing "hands-off" approach are, in my opinion, both extrinsic and intrinsic to the Board. This approach reflects the fact that, apart from ministry comments on proposed official plans and plans of subdivision, the province has treated land use planning as primarily a matter of process. Moreover, most Board hearings have dealt with applications for specific development proposals, and the province has been content to let substantive issues be worked out at the local level. It has thus not interfered when the Board has been dealing with referrals or appeals involving these issues, except in those few instances where it has considered provincial interests to be at stake.

I believe also that the province has considered it unnecessary to interfere in the Board's decision-making because the two share the same planning philosophy. The land use planning and control system adopted in Ontario has focused largely on protecting the rights and interests of property owners, particularly the owners of residential property. The review of the elements of substantive planning policy developed by the Board shows that it too has developed and applied policies which reflect the same legal ideology. This shared belief system, along with the infrequency with which it has dealt with applications in which there is a clear and stated provincial interest, means that there has been little occasion for the provincial government to challenge either the Board's decisions or the manner in which it has, through the application of its own policies, arrived at those decisions.

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683 The Board's role and jurisdiction were considered by the Macbeth Committee in 1972, the Ontario Economic Council in 1973, the Planning Act Review Committee in 1977, the White Paper on the Planning Act in 1979 and, more recently, by the Sewell Commission in 1993.

684 This is a large statement which, to be fully justified, would require a study of the development of the province's planning system and of the rationale behind this development. There are several indicators, however: the procedure-bound and property protection-oriented nature of zoning and other direct land use controls, the limited nature of provincial policy development, partially chronicled here and, negatively, the failure of the province to intervene to change the Board's direction.
3. The OMB’s treatment of the public interest has revealed a tension in its decision-making between public and private law concepts, and has been at variance with its status as a provincial tribunal.

A major rationale for establishing a tribunal such as the OMB is to ensure that the public interest, and public policy concerns, are adequately addressed in the making of land use planning decisions; the implication being that local decision-makers may not address such matters. The Board has regularly endorsed this view, stating that it bases its decisions on whether or not applications are in the public interest. The actual situation is not that straightforward, and the analyses in this chapter show that it has developed and applied policies under which the importance of the public interest falls short of what its stated position has suggested.

(a) The OMB has adopted a limited, group-oriented concept of the public interest.

While the Board is a provincial tribunal, and might therefore be expected to seek the broadest expression of the public interest as a basis for deciding on matters before it, it has clearly opted for the concept of the “group public interest” described in Chapter one. This is a belief that the public interest is embodied in the policy decisions of the dominant local “publics”. For the Board, the single most important of these has been the residents of a municipality, as represented by its locally elected council. In specific terms, this has meant that it has generally accepted official plans, as adopted by councils, and council decisions with respect to enactment of zoning by-laws and the approval of plans of subdivision, as the truest expressions of the public interest.885 It has also tended to equate the public interest with good planning. While its view of the relationship between the two has not always been clear it has regularly, as noted below, accepted decisions of local councils as representing good planning.

Implicit in the above has been a belief that the public consists of all residents of a municipality, who of course speak through their elected councillors. Yet it has been obvious in many situations that the group interest approach reveals other “publics”, and the Board has often had to identify the public interest on a sub-municipal scale. The only consistency shown by it in this regard appears to

885 The approval of plans of subdivision and of consents are the only matters for which the approval authority, including the Board, is required by the Planning Act to have regard for the public interest.
have been geographical. It has tended to identify the larger community in a given situation as the public, even if this community is only an individual neighbourhood, and to identify the private interest with a smaller group within that community. The difficulty inherent in this approach, however, is that the normative distinction between “public” and “private” has tended to disappear, particularly as the Board has identified ever smaller groups as the public. Yet it has regularly followed this empirical, uncritical approach, most noticeably in developing its policy, as summarized below, for the protection of neighbourhood character.

\[(b) \text{ Despite being a provincial tribunal, the OMB has rarely addressed the public interest as expressed in expressions of provincial policy.}\]

In contrast with the above, a contrast made even more striking by the Board’s ostensible provincial role, has been the limited priority it has accorded to provincial policy interests. This has been to a great degree a matter of circumstance. With limited exceptions, the province has not adopted policies, which would by definition represent a provincial public interest, with respect to substantive planning matters. The Board has therefore received no direction as to what the broader public interest in these matters might be. This situation is, in my opinion, partly responsible for its own development of substantive planning policy, although as the analyses here and in Chapter five have shown it has adopted policies anyway and applied them to override statements of provincial policy. Yet even in those relatively few instances where the Board has addressed provincial policies it has failed to accord them priority over other interests, particularly the interests of private property owners. It has noted the importance of the public interest as expressed through statements of provincial policy, but this has not prevented it from refusing in specific instances to approve applications supportive of such policy, most frequently the province’s affordable housing policy, where such approval would conflict with the private interest of neighbouring property owners in the avoidance of undue impact arising from such applications. This was noted in Chapter four. The manner in which this came about, however, was seen in the development of the Board’s own interest evaluation policy.
Where the public interest and private interests are in conflict, the OMB has consistently favoured the latter.

There can be no clearer example of the Board’s private property-oriented legal ideology than was shown in those situations where, faced with conflicting public and private interests, it has consistently favoured the latter. This has been so whether it has been addressing the provincial interest or, far more frequently, local public interests. Moreover, it has consistently defined conflict in terms of impact. It has chosen to override public interests, generally by refusing approval of applications, where approval would cause what it has considered to be an unduly adverse impact on private property interests. One likely reason for this has been that the public interest is often of a very general nature, and is one for which there is no identifiable benefitting group, whereas opponents have been clearly identifiable property owners. This has been seen most frequently in the Board’s treatment of applications involving affordable housing. Given the adversarial nature of the Board’s proceedings, with decisions being based on evidence submitted by the parties at the hearing, and given the fact that the province has rarely played an active role in protecting public interests, it is understandable that Board decisions would tend to favour the “squeaky wheel”. Yet should it not have been an inherent part of its role that it address these broader issues? What is clear is that it has rarely done so.

The only instance in which the Board has regularly favoured public over private interests has been its approval of interim control by-laws. Yet even here approvals have been given because of the temporary nature of the restrictions such by-laws place on development, and such approvals have been subject to certain other Board criteria being met.

4. Despite the OMB’s ostensible public policy orientation, the underlying rationale for much of its decision-making has been the application of the law of nuisance to planning applications.

It would be unfair to refer to the Board as a “wannabe” court. Nevertheless, it has certainly emulated the courts in many aspects of its operation: a focus on procedure, the use of the

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866 For example: the provision of affordable housing, the protection of wetlands, the reduction of air or water pollution, and general policy statements contained in official plans.
adversarial process, the protection of individual (property owners’) rights and, most particularly in this context, the underlying rationale it has developed for the protection of these rights. I have referred to this rationale as “nuisance in a new guise”. The driving force behind much of the Board’s decision-making has been the protection of the right, which lies at the heart of the tort of private nuisance, to enjoy the use of one’s property without suffering adverse impacts. The development of this rationale is not surprising if one considers the generally property rights-protective thrust of the planning process in Ontario. Because the Board is a policy tribunal, however, it has not been bound by the common law-determined actionable causes of nuisance relating to physical impact, such as pollution impacts. It has developed socio-economic rationales which have created a tension between discouraging and encouraging development. Retaining a stable land use pattern and preserving the character of generally low-density residential areas have been protectionist in nature, serving to make it more difficult to obtain development approvals. Yet on the other hand the Board has followed a rationale of protecting the rights of owners to develop their properties. Again, it is its adverse impact test which has served as the nexus, providing it with the tool to determine which interests should be favoured in any given set of circumstances.

For a brief period the Board appeared to be developing a public law-oriented rationale through the evaluation and balancing of majority and minority rights. Even here, however, its focus was on its role as “ombudsman for the property owner”, the protection of the right of private property owners against the encroachment of planning proposals approved by those elected councils which, in other circumstances, it recognized as the repository of the public interest.

5. The “meta-policy” underlying much of the OMB’s decision-making has been its development and application of the test of adverse impact.

This test has lain at the heart of the Board’s decision-making throughout both review periods, and has been applied equally to its balancing of public and private interests, and of competing private interests. The nature of the test has varied depending on whether or not the public interest was involved, but in both situations the determination of impact has been predominant. Where both public and private interests have been at issue the Board has acknowledged the public interest in the approval of applications, but has refused to approve them if satisfied that the impact of the
proposed developments on neighbouring property owners would outweigh the public interest. Where only private interests have been at issue, the test has been implicitly stated as follows: If the impact of a proposed development on neighbouring properties is sufficiently adverse, the right of an owner to develop will be overridden by the right of neighbouring owners to be protected from such impact. The Board’s rationale has been consistent with its private property and law of nuisance orientation reviewed elsewhere.

The test, as developed by the Board, has really been a double onus test. The neighbours of a proposed development must first establish a credible perception of harm. The owner must then show that the development will not have an adverse impact, failing which the development will most likely be refused. In applying this test the Board has distinguished itself from the courts by functioning as a tribunal carrying out policy, but has also revealed certain self-imposed limitations. A major difference between the role of the courts in hearing nuisance cases, and the role of the Board, is that the former are acting retrospectively. A plaintiff must prove that harm has been done to its property interest. The Board, however, is acting prospectively, and must arrive at a conclusion as to whether harm is likely to occur. This is inherently more difficult to achieve, as the possibility and the magnitude of harm are a matter of opinion, professional and otherwise, rather than of proof. Unlike the courts, the Board has taken the position that harms, or adverse impacts, need not be of a tangible, objective physical nature. It has been prepared to respond to subjective perceptual impacts, such as concerns about overshadowing from large buildings, and even psychological impacts, such as the effect of new development on the expectations of property owners regarding the continuance of amenities they currently enjoy. To this extent it has considered, as a matter of policy, impacts which could not be addressed by the courts when hearing nuisance claims. Yet the Board’s adoption of this test has limited its ability to address broader, more diffuse impacts which may impinge on public policy concerns. It has focussed on impacts on the parties before it, has generally considered each application on its own merits, and has rarely

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A Board hearing dealing, as do the majority, with objections based on possible adverse impacts, is analogous to an application for a *quia timet* injunction to prevent an action which the plaintiff believes will have an adverse effect on his enjoyment of his property. It is, however, extremely difficult to obtain such an injunction.
addressed the question of the cumulative impact of similar applications. Also, by focussing on the concerns of parties, it has failed to address the interests of non-represented persons or groups, or to address aspects of the public interest which are not raised by parties. The Board’s approach has, for example, made it difficult for it to even acknowledge, much less evaluate, the impact of refusing to approve affordable housing developments on those persons who are not represented before it but who would benefit from such housing. This has not mattered where impacts have fallen only on directly affected private property owners, but it is an approach that has severely limited the Board’s ability to consider the impacts on broader public policy of approving or refusing to approve the applications before it.

It is beyond the scope of this thesis to disentangle these various strands to determine the extent to which the Board developed its adverse impact test because of the nature of its court-like mode of operation. Nevertheless, it is clear that the application of this test has been fundamental to its operation throughout the review period, and before then. The decisions show that the nature and application of the test were well developed by 1971, and that there was little variation in its use over the entire review period. This serves to reinforce the view, which would warrant further study, that the adverse impact test is likely the product of both the Board’s mode of operation and its deliberations on planning matters from the time it assumed jurisdiction in this area.

None of the above should be taken as a conclusion that the Board should not address impacts. As discussed in Chapter two, a major reason for using public land use regulation has been to avoid the costs and inadequacies of private legal action to forestall the creation of adverse impacts on property rights by land development activity. My purpose, rather, is to show that the Board has developed and consistently applied a policy that is fundamental to its decision-making and to explore the manner in which it has balanced this protection of private property orientation with broader public policy concerns. This analysis enables us to note the tensions between its role as a tribunal responsible for the interpretation and application of public policy and as one responsible for protecting individual property interests from land use initiatives, whether public or private.

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888 The Board’s treatment of shoreline development along recreational lakes and residential severances in agricultural areas are common examples of this.
which may be objectively or subjectively harmful to them.

6. While the OMB has not been "captured" by any single economic or political interest group, it has shown an increasingly strong tendency to approve development industry applications having municipal support.

The capture theory put forward by students of regulatory activity has limited applicability to the Board. The development industry has demonstrated a greater rate of success in obtaining approvals than have development "producers" as a whole. Industry members have generally had the resources to make full use of lawyers and planning experts in responding to the policy matters raised or implicit in the Board's decision-making. Yet land development is such a diffuse process that no single developer or group of developers has been able to exert a substantial influence on the Board's overall activities. Moreover, as the analyses of its interest evaluation policies has shown, it has been protective of private property interests generally, including the interests of owners opposed to development proposals. Municipalities have clearly had a significant influence on the Board's decision-making. This has been reflective of its policy with respect to interest evaluation and to its acceptance of council decisions as being most truly representative of the public interest. But the Board has always subjected matters having a public interest component to its ultimate adverse impact test and, on the basis of this, it has often refused to uphold municipal positions. The combination of developer and municipal support has clearly had the greatest likelihood of success, with the probability of success increasing significantly from the earlier to the later review period. Municipalities have played a special gatekeeper role in the planning system, and the Board has looked to council decisions as expressions of the public interest. These factors, plus the financial strength of municipalities and developers, which has enabled them to make strong, expert-supported cases, has given this combination a strength before the Board which it has been increasingly difficult to successfully oppose.

7. The OMB's treatment of "good planning" reveals the tension between its public policy and private law orientations.

The Board has rightly treated good planning, or the lack thereof, as an important consideration in deciding whether to approve planning applications. The analysis herein shows that it has consistently identified two sometimes conflicting elements as constituting good planning. The
significance it has attached to the first of these, conformity with official plans, has been in keeping with its views as to what constitutes the public interest. Its decisions reveal that it has accepted an equivalence between good planning and the public interest, with the nexus being the approval of the policies contained in an official plan adopted by an elected local council. In requiring conformity with an official plan as an element of good planning it has been engaged, in its role as a provincial planning review tribunal, in the interpretation and application of publicly determined planning policies to the matters before it, and an approved official plan may be considered a form of localized provincial policy. Thus, as the Board is required to have regard for provincial policy, it is equally required to have regard for public policy as expressed in official plans. If the Board had identified good planning as only conformity with official plans, the logical conclusion of this would have been its acceptance of compliance with official plan policies as determinative in any hearing, yet it has clearly not done this. It has retained the discretion to consider official plan policies, but also to address other matters it considers to be elements of good planning. More specifically, it has regularly identified the absence of adverse impacts as the second element of good planning and, when conflict has arisen between the two elements, it has not hesitated to give priority to impact over conformity. Thus, where applications have failed the impact element of the good planning test, findings of conformity with official plans has not been sufficient to warrant their approval.

8. The OMB’s policy with respect to the preservation of neighbourhood character, a sub-set of its interest evaluation policy, provides a pure example of its adoption of a private law ideology unhampered by consideration of the public interest.

The Board’s treatment of neighbourhood character has been a sub-set of its interest evaluation policies applied in a specific physical and socio-economic context in which it has received no formal statutory or policy direction. This treatment provides a prime example of its adoption of a private law ideology, as public policy concerns have simply been absent from consideration.

669 It must be kept in mind that conformity with official plans is central to all types of planning application. No by-law, including zoning by-laws, may be passed that do not conform to an official plan (Planning Act, subsection 24(1)). In considering a draft plan of subdivision or severance, regard must be had to, inter alia, whether the plan or severance generally conform to the official plan (subsections 51(4)(c), 53(2)). A minor variance cannot be granted unless the approving authority is satisfied that the general intent and purpose of the official plan are maintained (subsection 45(1)).
I have said that the Board received no formal policy direction, but the matter is not that simple. The analysis of this matter reveals how a tribunal, while not receiving specific direction with respect to policy, has been attuned to and followed the policy underlying the statutory provisions. The genesis of this policy can be traced to the introduction of zoning powers, whose purpose was largely to protect good residential areas from the unwanted impacts of other types of development ranging from multi-family residences to heavy industry. The Board was given jurisdiction over zoning matters in 1921, and received responsibility for hearing referrals and appeals with respect to other types of planning applications through subsequent legislation. Yet, whatever the type of application, it appears that it has applied the initial zoning rationale to them as well, as its policy for the protection of neighbourhood character appears to have been well established by the beginning of the review period in 1971. Its decisions throughout the entire review period have revealed this acceptance. Moreover, the policy appears to have "matured" by 1971, as the decisions from then to 1994 show no significant evidence of changes.

(a) The OMB has demonstrated a strong socio-economic bias toward the interests of single-family home owners.

The Board has exhibited, in dealing with these applications, its belief that there is a clear hierarchy of land uses, and that interests of owners of property within a higher category are to receive priority over interests of owners of lower category properties. The highest category has been the single-family residence in a low-density residential neighbourhood. The Board has given these properties protection, not only from commercial or other uses which might have a tangible physical impact, but also from residential uses having slightly higher densities and slightly different character, such as semi-detached dwellings and townhouses, whose adverse impact is much harder to gauge.

There is, however, a significant refinement to this policy. The Board has accorded protection to single-family owners in predominantly single-family neighbourhoods. It is the interest of this collectivity in the protection of their amenities that has been paramount. The obverse of this has been clearly shown in the Board's treatment of mixed use neighbourhoods. Even though these areas generally contain single-family dwellings, its position has been that their amenity levels have already been lowered by the existence of a range of uses, and that permitting additional uses would not
therefore have the same impact as would be the case in a predominantly single-family area.

(b) *The rationale for this policy is to a great extent perceived rather than real impact.*

The Board’s policy in respect of neighbourhood character is a sub-set of its general interest evaluation policies. It has refused approvals where it has considered proposed developments would have adverse impacts and has approved them where satisfied that such impacts would not result. Yet the impacts which it has addressed in considering neighbourhood character have frequently been subtle: matters of perception and of socio-economic concern rather than of tangible impact. Neighbourhoods have been characterized by their large lots, substantial houses, and generally open appearance, and development proposals which would not fit this character have been refused, even though they would have no measurable impact on the enjoyment of existing properties. The Board has allowed these perceptions to overrule established planning policy by refusing to approve smaller than average lots even where they were in conformity with existing zoning. It has, with even more dubious justification, acknowledged the social perceptions of single-family home owners by refusing to approve less expensive types of housing, such as semi-detached or townhouses, in their immediate vicinity.

(c) *In dealing with neighbourhood character, the OMB has given priority to the expectations of property owners.*

Giving priority to the expectations of owners with respect to their right to develop or to be protected from the adverse impacts of development is inherent in a private law-oriented approach to planning, and the Board’s treatment of neighbourhood character has provided a clear example of this. In characterising the protection of desirable residential neighbourhoods as a public interest, it has shown how public and private interests can merge. More frequently, however, the Board has based its refusal to approve applications on the expectations of neighbouring owners, which existed when they purchased their properties, that land uses and amenities would remain unchanged. While it has been prepared to accept changes in other areas and neighbourhoods, it has only rarely acknowledged that change can be expected over time in low-density single-family neighbourhoods also.
9. The OMB’s treatment of interim control by-laws demonstrates the rapid development of a policy by a tribunal, based on its existing policies, for its evaluation of these by-laws.

The Board’s consideration of interim control by-laws provides a particularly instructive demonstration of its policy development, and of the manner in which a tribunal has seen fit to interpret and apply new law. Unlike other areas reviewed herein, the power to enact interim control by-laws was not introduced until 1983, and the Board considered the first appeals involving them only in 1986. It was therefore required to start from scratch in determining how it was to deal with appeals of these by-laws. It did so, partly by developing policy specific to them, and partly by applying its interest evaluation policy in a novel way to fit the statutory circumstances of their enactment.

The Planning Act provision states only that a municipality that intends to undertake a study of planning policies for a given area may pass a by-law limiting development within that area to defined uses for one to three years. The Board quickly took that sketchy direction and elaborated a four-part test that a municipality had to meet if its by-law was to be upheld. It is likely that this test followed the spirit of the legislation, but there was certainly no policy directive for it. The Board did not stop there, but developed refinements of its interest evaluation policies to enable it to decide whether an interim control by-law should be upheld even where the four-part test was met. In doing this it demonstrated an unusual shift of emphasis during the review period from private interests to the public interest, with increasing emphasis being attached over time to achieving a balance between the public interest in undertaking planning studies and the private interest in not having one’s development rights fettered. The Board came to accept in dealing with these by-laws that the public interest was paramount and that the temporary limitation of development rights was justified as long as the rights of all owners within the area subject to the by-law were equally affected. Under this unique variant of its interest evaluation policy it did not consider the effect of the by-law on the interests of the objectors per se, but whether the by-law affected their interests more adversely than those of other property owners within the by-law area. If it did not, their objections were overridden in the name of the larger public interest in limiting development until the studies had been undertaken and more appropriate planning policies put in place.
10. *The OMB's treatment of commercial competition provides a clear example of the evolution of policy in a specific area of planning.*

The Board's treatment of commercial competition shows the evolution of a policy by an administrative tribunal enabling it to deal, with some degree of consistency, with a particularly contentious type of land use application. It reflects, moreover, the tension between its espousal of a strong private law ideology and its need to give credence to public policy considerations. It is an example also of the evolution of a clearly articulated policy by a tribunal in the absence of any guidance by way of statutory provisions or government directives.

There was little tension evident during the 1971-78 period, however, as the Board functioned as a mediator of retail interests in respect of commercial applications and their opponents. Its decisions were based primarily on its acceptance of the market study tools used by the retail industry to assist in making locational decisions, and consideration of other planning matters was infrequent. The tension had increased by the 1987-94 period. The Board's competition policy by now contained a much more apparent public policy aspect through its focus on commercial functions as provided for in official plans. Nevertheless, it was prepared to and often did override the planned commercial functions in official plans by approving new or additional commercial development. In so doing it was engaging in its "traditional" activity of allowing property owners to develop their land as they saw fit, subject to refusal only where the impact on other owners and business operators, i.e., those in existing and planned commercially-designated areas, was considered to be adverse.

Why did the Board develop this policy? Firstly, it saw its jurisdiction under the *Planning Act* as one requiring it to apply land use planning criteria and standards to development proposals, but not to consider the economic reasoning underlying these proposals. Its development of this policy has thus provided it with a rationale for not addressing the economic conflicts which are particularly evident in commercial land use applications and opposition thereto. Secondly, the policy it developed...
provided the analytical tools enabling it to both transcend the issue of competition and take a consistent approach to dealing with these applications. Moreover, its approach has been consistent with its underlying policy of evaluating the interests of the parties before it, and of the public, in accordance with the degree of impact imposed upon them by development proposals. This policy evolved from the relatively simplistic approach seen during the 1971-78 review period, which was really only one step removed from deciding on the basis of private economic impact, to one focussed on the public policy aspect of commercial development.

While an analysis of the effect of this policy on the pattern of commercial land use development in the province is beyond the scope of this paper, I believe that its application has had some bearing on the commercial structure of municipalities by providing a steadying influence on this volatile area of planning. Commercial development is favoured by municipalities because of the economic and assessment benefits it brings, often with little countervailing public expense, and the temptation is therefore strong to approve such proposals. It is true that, in both review periods, the Board gave approvals in the majority of the applications in which it addressed commercial competition. Nevertheless, by imposing its impact test, particularly in the form to which it had evolved by the 1987-94 review period, the Board has required municipalities, proponents and opponents to address the public policy implications of such proposals.

11. *The provision of social housing provides a clear example, in a specific policy context, of the OMB's subordination of a recognized public interest to the interests of property owners.*

The provision of various categories of social housing has, during both review periods, been clearly recognized by the Board as being in the public interest. For the later period, the provision of affordable housing has been a matter of formally stated government policy also. One might therefore have expected it, as a tribunal responsible for the furtherance of the public interest generally and provincial policy specifically, to have made this a fundamental element of its decision-making. The decisions show that it has not done this. It has in recent years shown its recognition of the need for affordable housing by fast-tracking applications involving such housing. Once these and applications involving other types of social housing were before it, however, it recognized this public interest but at the same time followed its customary policy. Moreover, the Board rarely even
referred to the provincial housing policy statement. It subordinated the provision of social housing to the interests of adjacent property owners by refusing to approve applications which would have adverse impacts on those owners.

12. The OMB has consistently applied its interest evaluation policy to determine whether a variance is "minor".

The Board’s interpretation of minor, as applied to minor variances, provides an interesting example of how a tribunal has applied its own policy to assist in its interpretation and application of a statutory provision. The Planning Act speaks only of minor variances, without providing further direction. The courts have held that the term is relative and must be flexibly applied to the circumstances of each case. The Board has avoided this invitation to ad-hocery, and attempted to achieve a consistent approach, by applying its interest evaluation policy to determine whether each variance application is minor. It has simply applied its adverse impact test. Where it has concluded that the impact of a proposed variance on neighbouring properties would be adverse, regardless of the percentage variance proposed from the zoning requirement, it has held the variance not to be minor. Where it has concluded that the impact would not be adverse, it has found the variance to be minor. It is of interest that, while the Board has rarely considered the cumulative impact of a series of development approvals, it has applied a cumulative impact test here. The test has still been one of adverse impact, however. It has refused multiple variances in a single application, holding that while each individual variance would not have an adverse impact, cumulatively they would do so.
In the discussion in Chapters four to six, I presented conclusions arising from the consideration of the OMB’s policy development in those three areas. I seek here to “complete the circle”: to relate the analysis of the Board’s policy-making activities back to the general themes raised in Chapters one and two, to show what bearing my findings in respect of specific areas of policy development have to the general tenets of regulatory theory, and to determine how these findings affect the general rationale for making use of a regulatory tribunal of this nature in the land use planning process.

1. Theory v. Practice: Developing policy rather than relying on policy derived from other sources.

The OMB has not behaved as the literature of regulatory theory might have led us to expect. I noted in Chapter one how writers on regulation, particularly Canadian writers, had focussed on the use of regulation of various economic activities, and the creation of regulatory agencies for this purpose, to achieve broad public policy goals. The theoretical or, more correctly, the ideal model is one in which the federal or provincial governments create tribunals to further the achievement of important public policies which are clearly spelled out in legislation, regulations or other forms of policy statements, and the role of the tribunals is to apply these policies to the matters brought before them. The reality of regulatory activity, as the commentators fully recognize, can be far more complex and ambiguous, and the analysis of the Board’s decision-making certainly reveals a pattern far removed from the theoretical norm. While it has addressed public policy considerations to some degree, these have clearly been subordinated to its application of its own internally-developed policies. We are thus confronted with a “freestanding” tribunal, one which pays lip service to public policy, but which makes its decisions in a manner largely independent of such considerations by applying its own policies.

It is implicitly assumed in regulatory writing and in the general understanding of regulatory activity that tribunals are created to achieve public policy goals, the public policy to be applied will be clearly stated, and the tribunal will then proceed to apply it. What happens, however, if a tribunal is created and given little or no policy direction? This analysis of the Board provides us with a “real
world” situation in which a tribunal is created, given a general mandate, then left largely on its own to determine what policy, if any, it is to apply. It is certainly the case that expressions of public policy have been minimal or non-existent in respect of land use planning in Ontario. The theoretical writings do not appear to respond to this possibility, but the evidence of the Board’s decision-making shows that regulatory tribunals, like nature, abhor a vacuum. The options which are available to a tribunal finding itself in this situation are to make its decisions on a totally ad hoc basis, or to develop its own policy as it goes along so as to provide at least some element of continuity in its decision-making. While these two options are theoretically available I believe that in practice, as the evidence illustrates, a tribunal which receives little or no policy guidance will be drawn immutably to filling that vacuum by developing policies to give direction to its members and, of equal importance, to provide stability and continuity to the process it is regulating.

The Board has denied that it engages in policy development. It has occasionally referred to “principles” it follows, and has certainly in its internal deliberations considered what approach it should take in dealing with various issues. Yet at the same time it has regularly stated that it decides each matter on its own merits. This is true on the surface. There is no question that the Board has proceeded by considering the facts of each application before it. Yet it has not analysed these facts in an ad hoc, isolated manner, but has filtered them in each hearing through the medium of its own policies.

2. The OMB and the Province: Why the Board has retained its “independent” policy development role.

The decision-making activities of the Board confound the regulatory theory cited above by revealing a tribunal which not only relies largely on its own rather than on received public policy, but which gives precedence to its own policy even where relevant public policy exists. It has been able to do this without provincial government interference because it has played a role in the more fundamental policy espoused by successive governments of Ontario of overseeing municipal activities without the need for direct provincial involvement, and successive provincial governments have shown a benign neglect with respect to both the Board’s policy development activities and its treatment of provincial policies. It is understandable within the context of regulatory theorizing that
tribunals would engage in policy development to enable them to function effectively and consistently where they receive no external policy guidance. What is striking, and not accounted for in the theory, is the example provided by the OMB of a tribunal which openly subordinates expressions of public policy to its own internally-developed policies.

One variant of the political theories of regulation noted in Chapter one was the analysis of regulatory tribunals as agents of government. The theory is that governments create regulatory agencies to act as their agents when they are required to act as arbitrators in disputes between parties with strongly opposing interests. The relevance of this theory may not be apparent when examining the operations of the Board in isolation, but it becomes immediately so when considering its role in respect of land use control in the context of provincial/municipal relations in Ontario. Provincial governments have always exercised a clear supervisory role over the activities of municipalities. The Ontario Railway and Municipal Board was originally created for the purpose of providing a forum for the regulation of municipal financial activities and of municipal street railways by the province without the need for the direct involvement of the provincial government or politicians in dealing with each specific issue or application. There were sound reasons for this. Provincial politicians and staff would be swamped by the need to make a myriad of local decisions and would be unable to devote adequate attention to matters of provincial concern. Provincial politicians would run severe political risks if they were directly involved in making decisions with respect to what were often contentious local matters. Both of these problems were avoided, while retaining provincial oversight of municipal decision-making, by delegating the review function to a provincially-appointed tribunal.

The province has treated municipal land use regulation in the same manner. It has never considered that municipalities should be free to make planning decisions without the opportunity for "sober second thought" by an agency staffed with its appointees. When municipalities were initially given zoning powers, for example, the coming into force of their zoning by-laws was made conditional on Board approval. Its approval was similarly required for municipal plans. This theme of control by means of a provincial tribunal has run unaltered through the numerous changes to the province's planning legislation that have occurred to the present day. It can thus be argued that the Board has
been left free to develop and apply its own policies to the specific matters before it, even when those policies have overridden specific provincial policy statements, because it has throughout its history been carrying out the more fundamental provincial policy of overseeing municipal decision-making. It is apparent also, because successive provincial governments of differing political persuasions have not intervened to change or reduce its mandate, that the Board has conducted its policy development and decision-making activities in a manner which provincial governments have not seen as a threat to their vital political interests. Thus, while it has often chosen not to apply provincial planning policies in specific instances, it has met the province's underlying public policy goal of exerting indirect control over planning and other types of municipal decision-making.

Much of the discussion of regulatory theory has focussed on the independence of tribunals from the governments which created them. There has been a considerable difference in outlook between American and Canadian commentators arising from the differing constitutional structures of each nation. The position expressed in Canadian writings is that the sovereignty of parliament or the legislatures in Canada precludes the emergence of tribunals which are truly independent of their creators. Their existence can be terminated at any time by the repeal of their establishing legislation and the government of the day can establish the policies which they are to apply. This is undeniably true in law, yet the analysis developed in this thesis points to a very different relationship. It reveals the existence of a tribunal which has over a long period of time openly developed and applied its own policies and openly subordinated provincial policy to its own policies, all without any apparent retribution.

Successful provincial governments have played only a limited role in those decisions involving areas within which the Board has developed and applied its own substantive planning policies. While the province has always had an underlying policy influence through its review of official plans and amendments and its formal or informal adoption of provincial policy statements, it has left the interpretation and application of these expressions of provincial policy almost entirely to the Board. This is clearly reflected in the infrequency with which the province has appeared as a party in hearings at which the Board has dealt with these policies. It is reflected also in the fact, whose exploration is beyond the scope of this thesis, that successive provincial governments have seen fit
not to interfere with the basic structure, jurisdiction or mode of operation of the Board, even though the planning process, and its role therein, has been addressed in a number of important studies. While its role as a policy-maker was often commented on, no recommendations were made regarding this role or its role in applying provincial policy, and no significant changes were made in this regard. The reasons for the province’s continuing “hands-off” approach are, in my opinion, both extrinsic and intrinsic to the Board.

The province’s position reflects the fact that, apart from ministry comments on proposed official plans and plans of subdivision, it has treated land use planning as primarily a matter of process. Moreover, most Board hearings have dealt with applications for specific development proposals, and the province has been content to let substantive issues be worked out at the local level. It has thus not interfered when the Board has been dealing with referrals or appeals involving these issues, except in those the few instances where it has considered provincial interests to be at stake.

I believe also that the province has considered it unnecessary to interfere in the Board’s decision-making because they share the same planning philosophy. The land use planning and control system adopted in Ontario has focussed largely on protecting the rights and interests of property owners, particularly the owners of residential property. The review of the elements of substantive planning policy developed by the Board shows that it too has developed and applied policies which reflect the same legal ideology. This shared belief system, along with the infrequency with which the Board has dealt with applications in which there is a clear and stated provincial interest, means that there has been little occasion for the provincial government to challenge either its decisions or the manner in which it has, through the application of its own policies, arrived at those decisions.

It is of particular interest that this relationship appears to have held firm regardless of the political and doctrinal leanings of the party in power at Queens’ Park. During the 1971-78 review period,

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891 This is a large statement which, to be fully justified, would require a study of the development of the province’s planning system and of the rationale behind this development. There are several indicators, however: the procedure-bound and property protection-oriented nature of zoning and other direct land use controls, the limited nature of provincial policy development, partially chronicled here and, negatively, the failure of the province to intervene to change the Board’s direction.
and for many years previously, the Progressive Conservative party was in power. Yet the relationships between the Board and the government of the day appeared to be no different during the 1987-94 review period, when the province had a Liberal and then a New Democratic Party government. Documentary evidence of meetings and correspondence suggests that there was a close working relationship between provincial governments and the Board. While an analysis of this relationship is beyond the scope of this thesis, it is likely that direct provincial intervention was not required for several reasons. A lack of provincial policy for the Board to be applying is one obvious reason. Another is that the local nature of most matters considered by it, and the consequently limited political impacts of its decisions, meant that it was rarely dealing with matters of sufficient provincial interest that the government felt a need to intervene. It is probable also that during the earlier review period the members of the Board, because they had been appointed by Progressive Conservative governments over a long period of time, shared with members of the government many beliefs with respect to the role of planning, the importance of protecting private property interests, and the need for an increasing degree of public participation in the planning process. The Liberal and New Democratic governments in office during the later review period did not have the advantage of longevity in office, but because new Board members were now appointed for a three year term it was possible for them to appoint members in sympathy with their policies. Finally there is the possibility, which would certainly warrant further study, that provincial governments have at no time considered their own planning policies to be of sufficient political importance to require the Board to hew closely to them.

The role of the New Democratic government is of particular interest. It showed a much stronger bias than its predecessors in favour of a more direct provincial role in planning. It developed more stringent provincial land use policies and required that the Board, municipal and public agency decision-making be consistent with these policies. Despite these changes, there is no evidence that the government sought to alter the relationship between itself and the Board, or to transfer any of the latter's decision-making authority to itself. Moreover, there is no evidence that the latter behaved any differently vis-a-vis the government in developing and applying its own policies or that

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892 The Liberal government was in power from 1985 to 1990, and the New Democratic Party government from 1990 to 1994.
it attached greater importance to provincial policy statements during this period. The logical conclusion is that the Board has continued, regardless of the political positions of different provincial governments, to function largely independently of any government and to apply its own policies without any degree of interference from any government.

3. **A question of Legitimacy: Is the OMB entitled to do what it does?**

It is clear that the Board has been heavily engaged in developing and applying planning policy and in subjecting provincial planning policies to its own policy. I noted in the discussion of legitimacy in Chapter one that while the thesis is an examination of the Board’s policy-making activities, the question of its legitimacy in this area is troubling. It remains so after the tribunal’s activities in these areas have been subject to empirical analysis.

A rationale for the justification of regulatory tribunals such as the OMB may be found in Jones’ Efficiency and Expertise model; i.e., assuming that some form of review of municipal decisions will occur, the tribunal can develop a level of skill and expertise in dealing with planning matters beyond that which could be expected of the courts, and can deal with matters more expeditiously. This is true to the extent that its members, because they are continually involved in dealing with both procedural and substantive planning matters, are bound to become more knowledgeable than judges about these matters and, hopefully, be able to deal with them more expeditiously. The model has little relevance, however, to the Board’s role in developing and applying planning policies, as there is nothing in its statutory grant of jurisdiction, or in other sources of provincial policy guidance, specifically empowering it to engage in these activities. Its role, presumably, has been to apply policy derived from other sources to the facts before it, just as it is the role of the courts to apply the law to each fact situation. One must therefore look to other possible sources of legitimacy for its policy development activities.

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Note the assumption here that if a tribunal does not undertake this review function the courts will. This recognizes the fact that any council decision is potentially subject to judicial review. However, it ignores the equally important fact that most planning disputes matters of substance, administrative process and policy which fall outside of the jurisdiction of the courts in any event. The courts can deal with these issues only to the extent that they can be forced into the Procrustean limitations of a judicial review.
Determining legitimacy on a positivist basis is certainly justified. To some extent, the subject matter of the Board’s decision-making is “necessary or incidental to the exercise of the powers conferred”.\footnote{OMB Act, clause 37(a).} It has certainly been within its jurisdiction as a review agency under the Planning Act to decide whether there is enough professional support, in the form of planning studies, for development applications before it. It has equally been justified in deciding whether there are planning grounds for approving official plans referred or other planning applications appealed to it, as the Legislature has conferred on it this authority and responsibility. To this degree, the Board may be considered as meeting the Legislative model of administrative legitimacy, as it has been carrying forward legislative prescriptions, which must be general in nature, and applying them in the many and varied fact situations before it. It is doubtful, however, that this is sufficient to encompass all of its policy-making activities in these areas. It is not at all clear that the terms “necessary” or “incidental” clothe the Board with the power to impose its own notice or hearing requirements beyond those required under the Planning Act, to refuse an application because it was of the wrong type to permit sufficient review of a development proposal, to decide that adverse impact is in many instances the ultimate test for determining whether to approve an application, to decide that statements of provincial policy should be accorded the same status as policies in official plans, or to decide that new commercial facilities should not be approved if they would have an adverse impact on the planned commercial structure of a municipality. These and similar matters are ones in respect of which the legislation is silent, yet they have been developed by the Board as important elements of its procedural and substantive policies.

The Board’s legitimacy in respect of its policy-making activities in the procedural areas reviewed in Chapter five, to the extent that they carry beyond the scope of the legislation or of judicial pronouncements, must be found in the Due Process model, in its role of ensuring that the decision-making procedures in the planning process are fair in allowing the full participation of all affected interests. The most extreme expression of this was doubtless Kennedy’s concept of the “Board as ombudsman”, but it has represented throughout both review periods the Board’s expression in its policy development of its legal ideology. It has provided the legitimation for the Board’s exercise of its independent discretion, beyond the limits imposed by the legislation and the courts, in
developing its procedural planning policies.

Legitimizing the Board's substantive planning policy development and application presents further difficulties. In some areas, such as its dealings with interim control by-laws or interpreting the "minor" in minor variances, its policy development has had direct links with its responsibility to interpret and apply specific statutory provisions. But such direct links do not exist in respect of the other areas reviewed, as the Board is given no statutory and only limited policy direction regarding these. Given these circumstances, much of its legitimacy must be derived from its mandate. It is required to hear referrals of official plans and appeals from a range of municipal planning decisions. Both its creating and enabling legislation, the Ontario Municipal Board Act and the Planning Act, must be given a "fair, large and liberal" interpretation to enable it to meet its statutory responsibilities. It can be argued to this extent that it is "necessary" that the Board have authority to engage in policy development. It must over time deal with thousands of applications, and it is in the interests of both itself and the parties appearing before it that there be a comprehensibility and a consistency in its decision-making. Thus, to the extent that it receives no policy direction from external sources, it is legitimate for the Board to develop and apply policies to structure its decision-making activities.

The caveat is crucial. The Board does receive policy direction in certain areas, most notably through provincial policy statements and other expressions of provincial policy. It is not unrealistic to expect it to bring its own policies to bear in interpreting these received policies and applying them in the specific fact situations of the matters before it. But the Board has gone beyond that on occasion in applying its own policies in preference to those of the province, and the legitimacy of its actions in this regard is dubious at best. As we have seen, it has interpreted the Planning Act requirement that it have regard to formally adopted statements of provincial policy as permitting it to override such policy, and has applied other expressions of policy not subject to this requirement in the same manner. Its actions in this regard are a far cry from those anticipated by regulatory theory, namely those of a tribunal which seeks to apply the policies of its senior level of government. How has it been able to do this?
Two possible reasons come to mind, both rooted in the subtle ongoing relationship between the Board and the province. The first lies in the astuteness and sensitivity of the Board to the nature of that relationship. It has identified with the general commitment of successive conservative-minded provincial governments, whatever their formal politics, to the institution of private property and its protection from adverse impact. It has consistently supported this fundamental, ongoing policy of the province, and has consistently developed and applied its own policies to this end. While it has freely and openly subordinated the imposition of specific provincial policies to its own policies, it has not "crossed the invisible line" by adopting and applying policies which threaten the province’s ongoing commitment to private property or the functioning of a planning system intended largely to protect property rights.

The second reason the Board has retained this degree of freedom is largely negative. Under the Accountability and Control model, a tribunal’s activities are legitimate to the extent that the process in which it is engaged is subject to legal and political accountability and control. The Board was created by the province, and is technically subject to such constraints, but in practice it has not been subjected to them. It has been able to exercise a considerable degree of independence in developing and applying the policies analysed in this thesis because successive provincial governments have been content to let it do so. Despite its apparent independence, the Board’s authority has rested ultimately on its accountability to the governments of the day. The latter have chosen, probably because the Board has recognized its limits and has not therefore been perceived as a threat to their interests, to allow it the flexibility it deems necessary in dealing with appeals and referrals. The Board has responded to this ongoing opportunity by developing and applying the wide range of policies reviewed in the thesis, but never in a fashion which would cause the government to compromise its relationship.

The Board’s decision-making has been subject to remarkably little judicial challenge. One important reason is that it has rarely presented a target. While evidence of policy development can be discerned through the analysis of a large number of its decisions, it has regularly professed that it does not develop or apply policy, but decides each application on its own merits. This is true in a formal sense, as it has not set down policies and stated its intention to be bound by them.
Consequently, there is very little basis, in the context of an individual application, for arguing that it has exceeded its jurisdiction. Another reason lies in the nature of the interests represented before the Board, which are largely economic or policy-oriented. Fundamental legal rights are not in issue. Municipalities want to support their planning policies and are generally interested in encouraging development in accordance with them. Developers want to build. Neighbours want protection from adverse impact. The first two categories, which generally have the most resources, are frequently before the Board and prefer to have a harmonious relationship with it. They generally understand the planning process and factor the possibility of Board hearings into their calculations. Neither group is normally interested in the lengthy, costly and uncertain process of challenging the Board’s decisions on legal grounds. Neighbours have diffuse interests, often fewer resources, and are equally likely to be deterred by the costs and uncertainty of judicial challenges.895 Parties are aware, moreover, or can easily become aware, that the courts are loath to overturn decisions of administrative tribunals on any but clearly legal grounds, and challenges based on the Board’s application and interpretation of policy, whatever its source, are unlikely to be successful.

4. The Implications of applying a Private Law Ideology: Why retain the Board when we have the courts?

The Board’s policy development has reflected a strongly held private law ideology. Its application of an adverse impact test has been determinative of not only disputes between private parties, but of those in which public interests have been in opposition to private ones. This has clearly been the case with its treatment of substantive planning policy issues. This test has been applied also in its dealings with procedural policy issues, in which the adequacy of the assessment of adverse impact has often been the determining factor in deciding whether an application had been dealt with in a procedurally adequate manner. The Board has thus functioned in a court-like manner in both its operational procedures - treating applications as *lis inter partes* to be resolved in an adversarial setting, basing its decisions on the evidence placed before it by the parties - and in its policy development focussed on the law of nuisance. In doing so, it has called into question its reason for being as a tribunal which, in theory, applies public policy to regulatory decision-making. The uncertainty of its role is magnified by the policy approach it has espoused.

895 See Chapter two, Subsecton B.2 for a discussion of problems in relying on the courts.
The Board’s pattern of decision-making has turned on its head the theoretical view of tribunals as being public policy-oriented entities whose existence is justified by that orientation. Property owners have appeared as parties before it at almost every hearing, and municipalities have frequently appeared also. Because the Board limits itself to the evidence placed before it, those parties who cannot afford lawyers and expert witnesses to shape the issues and submit evidence and argument to support their positions are at a distinct disadvantage to those who can afford such support. Because of the private property bias inherent in the Board’s policies, there is a hidden onus built into its entire process. It is the position of these private property interests that provides the norm, and the onus is by implication placed on those pursuing public policy goals to satisfy the Board that this norm should be overruled. This has been illustrated in several areas of the Board’s decision-making and, of equal interest, lack of decision-making. It has been clearly demonstrated in its treatment of social housing, including the provision of assisted housing as a matter of articulated public policy. The interests of the current owners of private property have regularly been given precedence over the general public interest in the provision of such types of housing and over the interests of those members of the public, not yet specifically identified, who would benefit from the increased availability of such housing. It has been demonstrated also in the differing degrees of protection given to owners in single-family or low-density residential areas and to owners in other types of areas. The Board has treated the amenities enjoyed by the former with great solicitude in protecting their neighbourhoods, yet has expected the latter to put up with land use changes. Moreover, because it has tended to deal primarily with property owners it has shown little evidence of addressing concerns of less favoured socio-economic categories, such as residential tenants.\footnote{The Board does so partly because the planning process is biased in that direction. Notice is generally required to be given to property owners only, so that tenants are less likely to be aware of applications which might affect them. It is obvious that in virtually all applications the owners of properties subject to them appear as parties. It is often, although not always, clear from decisions that neighbouring objectors are property owners rather than tenants. In any event, whether parties are owners or tenants it is their local and immediate interests and concerns that are the focus of the Board’s consideration far more frequently than what can be identified as general public concerns or the concerns of those members of the public who are not represented at the hearings.} Its treatment of social and affordable housing, noted above, is a case in point. Similarly, there is little evidence that it has considered the adverse impacts on potential tenants of the common planning practice of placing higher-density residential development along major roads.
or as a buffer between railway lines, or commercial or industrial areas, and low-density residential areas. These buffers are, by definition, the absorbers of such adverse impacts as traffic noise and fumes, industrial noise and dust, or rail noise and occasionally derailments, but their future residents are not parties before the Board and their interests, which should be considered a legitimate public concern, simply do not register on the Board's policy radar unless one of the parties present chooses to raise them.

The retention of the Board as a planning tribunal is therefore open to question. Consider two of the main reasons for using tribunals rather than courts, the ability to apply public policy to matters to be decided and the provision of a quick and inexpensive system of hearings. The Board has to some degree vitiated the former by basing its decisions largely on policies derived from the common law rather than on public policy considerations. Its utility with respect to the latter, while not examined in this thesis, is also doubtful. One of major complaints that has been expressed over the years in reviews of the Board's role and manner of operation is the cost in both time and financial resources of taking part in its hearing process.

Despite these concerns, and assuming for the moment that a forum for reviewing local planning decisions is required at all, I believe that it would be a severely retrograde step to do away with the Board and revert to reliance on the courts to resolve land use disputes. The reasons for this conclusion, discussed in Chapter two, lie in the nature of the planning process, and in the inability of the courts to respond to the needs of this process. The considerations are three-fold: the retrospectivity of harm, the inclusivity of the concerns addressed and the application of policy.

The legal process before the courts is designed to deal with alleged breaches of common or statute law and with allegations of harm. Generally speaking, an act must have occurred, a contravention of the law or an act creating a measurable harm, for an action to be sustainable. Claims of prospective harm should an act occur in the future are extremely difficult to sustain, except occasionally as the basis for a temporary stay. Yet a major purpose of planning, both through the establishment of planning policies in official plans and the application of various land use controls, is to enable disputes regarding the impacts of proposed developments and land use changes to be
resolved before they occur. The Board is able to accomplish this, even if its adverse impact test is closely derived from the common law tort of nuisance.

It is the statement that the Board's test is "derived from" nuisance law which provides the key. It is not limited to the judicial tests. Proof of an actual, measurable impact is not required. It has developed what might be termed a "credible perception" test. It has accepted reasoned concerns about the potential impact of proposed developments as grounds for refusal, concerns which are subjective and often immeasurable, such as a desire to preserve a particular environment or set of amenities. It has accepted concerns with respect to prospective economic impact, such as the concerns expressed by industries and farmers that the approval of residential development in their vicinity might lead to future pressure on them to curtail or cease their operations. It has even given weight to the expectations of property owners that they will not be subject to changes that would have an adverse impact on their enjoyment of their properties. The Board has considered these matters primarily in the context of protecting private property, and has often done so at the expense of upholding public policy interests. Nevertheless, these are all legitimate matters to be addressed in making planning decisions, and they extend well beyond the tests of nuisance that can be addressed by the courts.

The courts cannot deal with the public policy concerns which are often at issue in planning decision-making. Even though the OMB has, as a matter of its own policy, frequently subordinated these to private concerns, it does retain and has often exercised the jurisdiction to consider broader policy issues. This is seen clearly in its development of its policy with respect to commercial competition, where it has considered the impact of proposed commercial development on the functioning of a municipality's planned commercial structure. It is seen in the Board's acceptance that the public interest underlying the adoption of interim control by-laws outweighs the adverse impact of a temporary development freeze or limitation. It is seen in its treatment of residential development in agricultural areas, where it has regularly applied the provincial Food Land Guidelines in deciding whether or not to approve severances. It has been able to consider the public policy implications of approving comprehensive official plans and zoning by-laws, which frequently change permitted land uses in such a manner as to lessen the profit potential of development of individual properties.
The courts can consider none of these matters. Even if the Board has not always given these public policy issues due regard, it has been able to address them, and has often done so.

5. A Forum for sober second thought: has the OMB outlived its usefulness as a planning review tribunal?

If we accept that the courts cannot replace the OMB, it is still open to question whether it performs a necessary role in Ontario’s planning system. I believe it does, but much more for legal than for planning reasons.

The Board occupies an anomalous position in regulatory theory. In what might be called the standard model of regulation, a tribunal is overseeing the activity which is subject to regulation. In the area of planning and land development, however, the primary activity of land development is regulated locally, mostly by elected municipal councils but also by municipally-appointed committees of adjustment and land division committees. There are several arguments of a political and administrative nature for providing a provincially-appointed planning review tribunal. These relate to the ability to bring greater expertise to bear on making planning decisions than local municipalities are often able to do, ensuring that adequate consideration is given to provincial planning policy, avoiding local political pressures and addressing inter-municipal concerns. In other words, the “value-added” political and administrative arguments for retention of the Board’s role in planning review is that it provides something in the process which local decision-makers cannot or, at least, are unlikely to provide. Evidence drawn from its actual decision-making casts doubt on these arguments. It has consistently subordinated provincial policy to its own locally-oriented policy. It has accorded considerable weight to municipal council decisions and to local interests represented by councils and property owners. It has shown little evidence of considering broader inter-municipal implications of matters before it.

The OMB is a product of history. It reflects the continuing relationship between the province and its creatures, the municipalities, relationship based on the belief that municipalities cannot be fully trusted to manage their own affairs. The province’s initial concern was with municipal financial
management. Yet while municipal borrowing still requires Board approval, this has become a largely *pro forma* exercise. The reviewing of municipal planning decisions is now by far the most important area of the Board’s discretionary control over local decision-making. Apart from the claim that the Board, not depending on local political support, has been a more impartial decision-maker than municipal councils could be, it is difficult however to see what the Board adds to planning regulation.

Given the nature of the Board’s policy development, it does little that could not be done by local decision-makers. The latter can also determine adverse impact, and in reviewing local decisions the Board is merely substituting its opinion on this matter for theirs. The only rationale for retaining its jurisdiction in this area is the essentially unprovable argument that local councils or committees might not make this assessment with the same degree of impartiality. Yet there have been very few instances in which it has overturned council or committee decisions on the ground that they were made solely for political reasons, to satisfy a particular group, without consideration being given to planning issues. In any event, this might not have mattered if the Board had been injecting a strong public policy component into its decision-making but, as the evidence of its actual decision-making makes clear, it has done so in only a limited manner. This is not entirely its own doing. It has been given little policy direction and has thus been left on its own to develop principles to ensure some consistency in its decision-making. But in doing so it has failed to take the opportunity presented to it, as a regulatory tribunal, to give primacy to public policy considerations and, where they have existed, to expressions of provincial planning policy.

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897 There was justification for this concern, at least with respect to financial matters. Municipalities often found themselves in financial difficulties and, during the 1930s, some became bankrupt.

898 The Board has developed formulae for the maximum debt loads municipalities can carry. As long as proposed borrowing does not exceed those limits, approval is virtually automatic.

899 The term “municipal” here includes decision-making by committees of adjustment and land division committees, both of which have jurisdiction within a municipality and are composed of members appointed by municipal councils.

900 The Board also hears a large number of assessment appeals. These are not municipal matters, however, but are quasi-judicial hearings of appeals of decisions of provincially-appointed assessment review boards. It does not exercise policy-related discretion in this area but, like an appeal court, applies the provisions of the *Assessment Act* to the facts before it.
The approach the Board has taken to determining who constitutes the "public" whose interests are to be protected also militates against the retention of its planning review role. It has adopted the group public interest theory, and has generally held up decisions of municipal councils as the highest expression of the public interest. Following from this, it has often stated that it does not lightly overrule council decisions. Its conclusion that development proposals are in conformity with approved official plans has always been a powerful reason for approving them. Yet the Board has frequently reversed council and committee decisions. If it had done so on the ground that these local decisions had contravened more broadly based public interests or stated provincial policies, it would have justified its role as a provincial review tribunal. It has done so, however, primarily by substituting its opinion as to adverse impact for that of locally-elected or appointed decision-makers.

Regulatory theory speaks of the life cycle of agencies. This is seen as a process in which agencies originally created to regulate the activities of given industries develop close links with those industries, are eventually captured by them and regularly make decisions favourable to their interests. The frequency with which the Board has refused to approve planning applications, both overall and in the face of municipal and owner support, suggests that it has not been captured, in the sense suggested by regulatory theory, by interests regularly appearing before it and whose behaviour it is supposed to be regulating. But capture can be more subtle. If a tribunal is constantly subjected to the "world-view" of particular groups to the exclusion of the views of others, it is likely to accept the arguments and positions expressed by the former as representing the real world. The Board has functioned largely as a forum for property owners, as both developers and opponents of development, and for municipalities which are generally allied with one or the other groups of owners. This fact, plus the paucity of public policy support it has received, help to explain its adoption of its largely private law-oriented policies.

It can certainly be argued that the Board has outlived its usefulness as a planning review agency. It did have a role to play in earlier years. The use of official plans and of land use controls developed gradually throughout Ontario. In a province of mostly small municipalities with few
resources to undertake planning and little understanding of the rationale for or the mechanics of land use controls, the Board could play a stabilizing and educating role, and could subject local decisions to review by an agency which had developed considerable experience in this area. Those conditions have now largely disappeared. Most of the province’s population, and certainly the great bulk of its planning and development activity, are now found in large municipalities whose councils are regularly dealing with planning policies and development proposals and with the conflicts these can generate. These municipalities have considerable planning expertise available to them. Nor is this experience and expertise limited to larger municipalities, as the administration of planning controls has become customary throughout the province. If the Board has not been contributing something beyond this, such as ensuring that provincial policies are being followed, resolving inter-municipal disputes or considering the implications of major planning or development initiatives on inter-municipal or regional development patterns, it is making decisions that many municipalities are equally well equipped to make.

The province’s gradual shift of official plan approval responsibilities from the Minister of Municipal Affairs and Housing to upper-tier municipalities is indicative of the continuing evolution of planning controls and the maturing of the municipal role in planning. As this trend continues, and the province’s direct approval or regulatory role diminishes, the need for its “alter ego”, a provincially-appointed review tribunal, also diminishes.

Ironically, while there is not a strong planning case to be made for retaining the Board’s planning jurisdiction, there is a strong administrative law-based argument for retaining some form of planning supervision. It is probably unrealistic to expect municipal councils, even if granted the authority and the responsibility, to undertake the onerous legal hearing commitments that would be required to ensure that they follow the principles of natural justice in making planning decisions. It is therefore inevitable that some form of review will occur and, in the legal context existing in the province, the only realistic options for achieving this appear to be the courts or a quasi-judicial tribunal exercising authority in this area. Given this choice, I believe the Board is better able than the courts to exercise this function. It is more accessible to the public as a whole than are the courts. It can provide a broader range of remedies. Judicial review would be largely limited to ensuring that procedural
safeguards were met, whereas the Board is able to, and does, address a wide range of planning policy considerations as well. The problem is that the Board, through its policy development and its associated treatment of provincial policy, has only partially fulfilled its promise as a policy-oriented review agency. It has, through its judicialized hearing process, ensured that the requirements of natural justice have been met, but it has failed to add much policy-related value to the planning decisions made by municipal councils.

There is also a political argument for the retention of the Board’s planning review role. It is an agency of the provincial government. Without it, there might be great pressure on provincial politicians to become involved in resolving local planning disputes. It provides security for municipal politicians, who know that making decisions with respect to politically contentious land use disputes will be the ultimate responsibility of someone other than themselves. Looked at more generally, it provides a sounding board for the general public, a tribunal removed from the political arena which will make what they believe will be “fairer” decisions. The primary reason the OMB will probably continue to retain its planning review function is a matter of inertia. It has long been an accepted part of the political landscape, satisfying the needs of the major municipal and private interests participating in the planning process. Unless different socio-economic groups become influential, the Board radically changes its policies or the provincial government concludes that its review function is redundant, none of which appear likely at the present time, I doubt that there will be the political will to either change or abolish its planning review mandate.
APPENDIX

1. METHODOLOGY: The manner of selecting and analysing OMB decisions

This thesis is a study of how an administrative tribunal has applied provincial planning policy and has developed and applied its own planning policy in many areas in which provincial policy is silent. Given the nature of its operation, it has thus been necessary to develop a method for selecting and analysing those of its decisions which are relevant to these themes.

The nature of the tribunal, and of the task, established the context within which a method of obtaining and analysing the relevant information had to be developed. A tribunal speaks through its decisions. Thus, while secondary source data - annual reports, correspondence, studies and reports on its operation, minutes of members' meeting - was available and of value, the prime source of data had to be the decisions themselves. The nature of the Board's decision-making was a further consideration. It hears and issues decisions and orders in respect of a large number of appeals and referrals each year. It is not bound by precedent and does not issue, as do the courts, recognizably leading decisions from which a legal trail can be followed. It has therefore been necessary to select from a huge "anonymous" decision base those decisions dealing with the policy matters under review and to subject them to meaningful analysis.

(a) Selecting policy areas for review

The analysis of the Board's treatment of provincial policy has been governed by what policies have existed at various times. These have changed considerably over time, and these changes have been a main reason for selecting, as noted below, the periods for detailed review of Board decisions. With respect to the selection of areas of Board policy development for review there are certain themes which have appeared frequently in its decisions. It has regularly spoken of, inter alia, adverse impact, good planning, prematurity, matters that are or are not in the public interest, interference with council decisions and opportunities for public participation in making planning decisions. These and similar matters became the basis for case selection. Because they were

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901 In the 1989-90 reporting year alone the Board held 1912 hearings, the majority of which involved planning applications. Similar numbers have applied to other years under review here.

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frequently repeated it was reasonable to assume that, if the Board did engage in policy development, such development would likely be associated with them. It has not been feasible, of course, to analyse all possible areas in which it might have engaged in policy development and, indeed, not all possible areas were included in the initial coding. The selection should be sufficiently broad, however, to provide a clear picture of its activities.

Not all of the potential policy areas included in the coding of decisions, as described below, were subject to detailed analysis and discussion. Those not so included were either ones which were addressed too infrequently to make analysis possible or which, when decisions were being reviewed and selected, proved not to have been as clearly addressed as I had thought they might be. The potential policy areas for which further analysis was considered feasible were therefore those which were frequently and/or clearly addressed by the Board.

(b) The review period
The review period for which decisions have been selected has been determined on the basis of two considerations, the appropriate length of time to be included and the planning environment in which the Board has operated. An eight-year period was chosen as being of sufficient length to allow for recognisable policy development. Two different eight-year periods were chosen to permit an examination of the Board's policy development activities in two different planning contexts. The earlier period selected - 1971 to 1978 - was one in which the Planning Act provided little procedural and less substantive direction, and in which the province was actively engaged in developing and starting to apply broadly-based planning policies. These policies had no formal status, however. The later period selected - 1987 to 1994 - was one in which the major procedural reforms embodied in the 1983 re-enactment of the Planning Act had become established practice and were being considered and applied by the Board. By this time also the province was formally adopting planning policy statements under section 3 of the Planning Act, 1983. Unlike provincial

902 The major policies and their dates were: Design for Development: The Toronto-Centred Region Plan (1970); Parkway Belt West Policy Discussion (1973); Central Ontario Lakeshore Urban Study (1974); Strategies for Ontario Farmland (1977); Parkway Belt West Plan (1978); Food Land Guidelines (1978).

903 The policy statements and their dates were: Mineral Aggregate Resources (1986); Flood Plains Planning (1988); Land Use for Housing (1989); Wetlands (1992).
policy in the earlier period these had formal status and municipalities and public agencies, including the Board, were required to have regard to them. My intention has been to determine what differences, if any, in the Board’s policy development activities occurred under these two different circumstances.

Because of the time required to move through the process of local decision-making, appeal, hearing and rendering of decision, the time periods to which the decisions pertain are slightly in advance of the formal review periods. A decision released early in 1971 might thus have been the result of a 1970 hearing of an appeal of a municipal decision made in 1969.\footnote{A major concern expressed during reviews of the Board has been the length of time required to process appeals.} At the other end of the review period, municipal decisions appealed during the latter part of 1994 would not be included in the analysis as they would have resulted in 1995 decisions.\footnote{The Planning and Municipal Statute Law Amendment Act, 1994 S.O. 1994, c. 23, commonly referred to as Bill 163, illustrates this. It was given First Reading in May 1994 and Royal Assent in December 1994. It changed the rules in respect of municipal and Board decision-making by requiring, \textit{inter alia}, that their decisions “be consistent with” provincial policy statements rather than, as hitherto, “having regard to” them. Because of the transition provisions for applying the new test, and the time required to process any appeals the new language might refer to, Board decisions applying the test did not appear until 1995.} I do not consider this small degree of overlap to be of significance, as the general context within which the Board was operating in each review period existed prior to the formal commencement of each period.

\section*{(c) Selecting the decision data base}

The Board’s heavy involvement in planning and other municipal-related matters has provided a huge data base of decisions.\footnote{As noted above, there were 1912 hearings in 1989-90 alone, which would have resulted in a equal number of decisions. Comparable numbers of decisions have been released in other years during the review periods also.} It would not have been feasible, nor statistically necessary, to review and analyse all of these decisions. The review and coding was therefore limited in all but one of the years during the review periods to decisions released during those periods which were published in the Ontario Municipal Board Reports (hereinafter OMBRs). This reporting series, which commenced publication in 1972, might be termed the report of record for the Board, as it contains
only Board decisions and a few court decisions arising directly from challenges to such decisions. In each year approximately 75 to 80 decisions with respect to planning appeals and referrals are reported, plus decisions arising from assessment appeals and other matters. This is less than the number handed down during each year, but it provides a good indication of the Board's thinking.

Decisions selected for reporting in the OMBRs are those in which the Board has made a specific statement of its views in respect of a matter, is dealing with a new type of planning application or is dealing with planning applications of major public significance because of the scale of the development provided for in them. While the data base utilized is thus smaller than the total number of decisions, it is drawn from those decisions that are most likely to provide a clear indication of the Board's thinking with respect to the matters it must address.

Data for 1971 was selected differently. The OMBRs were first published in 1972, and before then decisions were only occasionally and intermittently published. The staff of the Great Library of the Law Society of Upper Canada had, however, been assembling decisions for a number of years previously, and these provided a data base similar to that found in the OMBRs. It was possible to review, select and code these in the same manner as for the post-1971 published decisions.

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907 The author has been an editor of the Ontario Municipal Board Reports since 1987, and in that position has had to review all decisions released by the Board for four months of each year, and select decisions for reporting.

908 In many of its decisions the Board recites the evidence and gives its decision, but gives either no or cursory reasoning for its decision. These are not reported. They are of importance to the parties involved, but contain nothing that would be of more general interest in illustrating the Board's thoughts about or positions being taken with respect to the matters dealt with in them.

909 Examples of this include provincial policy statements adopted under section 3 of the Planning Act, development review (site plan control), interim control by-laws and development charges by-laws. In dealing with the new types of planning applications the Board has considered, in its initial decisions involving them, how it will handle them. Similarly, it has considered how it will deal with the "have regard to" requirement when dealing with planning policy statements.

910 Examples of such significant development include the City of Toronto's central area official plan, the City of North York's city centre policies and the resolution of competing regional shopping centre proposals in the City of Barrie.

911 As it happened, the number of 1971 decisions selected was similar to the numbers selected for later years. See Table Intro-1.
(d) **Coding and selecting decisions for further analysis**

It has been necessary to select a large number of decisions in order to undertake a meaningful analysis of the thesis regarding the Board’s policy-making activities. It has not been possible to select a few leading, precedent-setting decisions, as the Board simply does not function in that manner. It is only in reviewing a mass of decisions that patterns, both normative and numerical, begin to emerge. The task has therefore been to establish a method for selecting from an otherwise undifferentiated mass those decisions sharing the relevant common characteristics, and to use each such set as the basis for detailed analysis. I have made extensive use of a relational database software program for this purpose. This required initially the creation of categories, and of fields within each, in order to record what appeared to be the relevant information for coding purposes. The categories included identifiers, types of planning application, parties, provincial policies considered, areas of potential Board policy development, and its disposition of matters before it. A complete listing of the categories and of the fields within each is contained in the Technical Appendix. All 1971 decisions in the Great Library’s files and all of the Board’s published decisions issued during the 1972-78 and 1987-94 review periods were reviewed, and all those containing any reference to provincial policy or to the selected areas of potential Board policy development were coded and entered into the computer data base. It was determined as this exercise proceeded that some categories or fields had little relevance to the subject matter of the thesis, or that sufficiently accurate data could not be obtained to make them usable for analytical purposes, and these were not subsequently utilized. This is also indicated in the Technical Appendix.

The review led to the selection of 348 decisions from the 1971-78 review period, and 321 from the 1987-94 period. Table Intro-2 provides an overview of the general data obtained for each review period. The breakdown of this data as it applies to specific provincial and Board policies is shown in the tables in Chapters four to six. The data has served two purposes. It has provided a basis for the numerical analysis of decisions, showing for example the different rates of approval and approvals of different types of applications, or given differing combinations of parties opposed to and supporting applications. It has also provided the basis for selecting decisions exhibiting common characteristics so that they can be individually reviewed to determine what light, if any,

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912 The program I have used is Microsoft Foxpro 2.6 for Windows.
they cast on the Board’s thinking in respect of the matters under study. It is thus possible, for example, to obtain a listing of the decisions during each review period in which it addressed the application of the Food Land Guidelines, or of the decisions during the 1987-94 review period in which it refused to approve development involving social housing. The ability to manipulate data in this manner has thus been an essential precondition for undertaking the analysis of the Board’s policy development in the various areas selected.

2. **Coding of OMB Decisions**

The following data fields were established prior to commencing the assembly of data from OMB decisions. Each published decision was reviewed to determine if it addressed any of the potential provincial or Board policy areas and, if it did, data was entered for it in respect of any of the fields which were relevant.

Data fields are of three types; standard fields in which alpha-numeric information is inserted, logical fields in which true (the Board dealt addressed the policy area in question) or false (it did not address the policy area) were entered, and memo fields, into which a large amount of information could be entered. The first two fields can be sorted and collated in various ways to obtain different clusters of decisions, but the third cannot. Alpha-numeric fields are used in the identifiers section. All other fields, except the memo fields noted with an asterisk, are logical fields.

It must be kept in mind that a very wide set of data fields were determined at the commencement of the decision review process so as to ensure that any information that might be pertinent to the analysis was collected. As data collection proceeded, and again as the data was used for the analyses, it became clear that some types of information would not be significant, or that information contained in the decisions was not certain enough to be used for analytical purposes. Data regarding the use of professional experts is a good example of this. It was clear when lawyers were acting for any of the parties, as counsel are listed in the decision heading. It could not be accurately determined whether or not expert planning or other types of witnesses were called, as some decisions mentioned expert evidence while others were silent on this matter.
Identifiers:
These served to keep track of all decisions and to provide for retrieval, most importantly, by decision date. Most of these fields applied to all decisions.
1. Num  Numerical noting of decisions as reviewed - 1 to 669
2. Decnumber  Numbering of decisions released in each year - e.g. 75-01, 02, etc.
3. Decname  Abbreviated name of decision
4. Fullname*  Complete decision name
5. Ombfilnum  Identification number given to post-1971 decisions by Board
6. Libfilnum  File number given to 1971 decisions in Great Hall Library by staff
7. Citation  Form of citation in Ontario Municipal Board reports
8. Decdate  Date of OMB decision
9. Member  Member(s) hearing application - numerical coding of names

Application types:
These identified decisions by the types of land uses being considered in them. There have been some occasions in the analysis where the type of application being considered is significant. Hearings have often involved more than one type of application, particularly official plan and zoning by-law amendments.
10. Compreop  New official plans or official plans covering a substantial portion of a municipality
11. Comprezbl  As above, with respect to zoning by-laws
12. Opamend  Site-specific official plan amendments
13. Zblamend  Site specific zoning by-law amendments
14. Intcontbl  Interim control by-laws
15. Planofsub  Applications for approval of plans of subdivision or of proposed conditions to draft plan approval of subdivisions
16. Severance  Severance of lots from larger parcels of land. Known also as consents
17. Minorvar  Minor variance applications
18. Pitlicapp  Board recommendation required with respect to an application to open or enlarge a pit from which to extract aggregates.
19. Othapplic  All applications that do not fit into any of the above categories
20. Apppartic*  Details pertaining to particular applications

Land use types
These were of general interest as indicators of the nature of matters brought before the Board. They were also of specific relevance in certain parts of the analysis. Hearings involving the Food Land Guidelines, for example, were usually for approval of residential land uses in rural areas. Hearings occasionally involved more than one type of land use.
21. Resid  Residential land uses
22. Comm Commercial land uses - retail, office
23. Indus Industrial land uses
24. Instit Institutional land uses
25. Agric Agricultural land uses
26. Rec Recreational land uses
27. Pit Sand and gravel pits and other types of aggregate removal
28. Services Water supply, sewage disposal, gas or electrical utilities
29. Transport Roads, railways, airports, harbour facilities
30. Othlu Land uses not included in any of the above
31. Llpartic* Land use particulars in specific instances

Supporters and opponents

Inclusion in this category means that the supporter or opponent was identified in the decision, either through the listing of counsel appearing for them or through references in the decision, as a party at the hearing. Supporters are those parties appearing in support of the approval of an application, while opponents are parties appearing in opposition to such approval. These terms are not coterminous with appellant and respondent, however. An appellant may, for example, be supporting a development proposal by appealing a municipal council’s refusal to approve it. Alternately, an appellant may also be an opponent if appealing a municipal council’s approval of an application.

32. Provopp Provincial ministry appearing in support of application
33. Municsupp Municipality (in which development located or adjacent municipality) in support
34. Ownersupp Owner of property subject to application in support
35. Develsupp Owner identified as a developer in support
36. Neighbsupp Owners or tenants of property adjacent to or in the vicinity of the subject property in support
37. Provopp Provincial ministry appearing in opposition to application
38. Municopp Municipality in opposition
39. Owneropp Owner of subject property in opposition
40. Comneigbop Owner or tenant of adjacent commercial or industrial property in opposition
41. Resneigbop Owner or tenant of adjacent residential property in opposition
42. Partpartic* Particulars of parties in specific instances

The distinction between fields 40 and 41 was occasionally of value for analytical purposes, but on other occasions the two categories were combined.

Professional support or opposition

It was believed initially that data on the incidence of professional support, lawyers and expert witnesses, might prove useful in analyzing Board decisions. However, as the decisions were reviewed and the nature of the policy analysis became more apparent, it became evident that this
data would be of little analytical value. While some decisions referred to the evidence of specific experts, or at least to the fact that certain types of expert evidence were presented, many did not. There was not basis in these decisions for inferring that such evidence was or was not called.

| 43.  | Munprofsup | Lawyer and/or expert witness appearing on behalf of municipality supporting application |
| 44.  | Ownprofsup | Lawyer and/or expert witness appearing on behalf of owner of subject property supporting application |
| 45.  | Plnsup     | Subset of 43. Planner appearing as expert witness in support of application |
| 46.  | Provprofop | Lawyer and/or expert witness appearing on behalf of provincial ministry opposing application |
| 47.  | Munprofop  | Lawyer and/or expert witness appearing on behalf of municipality opposing application |
| 48.  | Ownprofop  | Lawyer and/or expert witness appearing on behalf of owner of subject property opposing application |
| 49.  | Cneiprofop | Lawyer and/or expert witness appearing on behalf of owner or tenant of adjacent commercial or industrial property opposing application |
| 50.  | Rneiprofop | Lawyer and/or expert witness appearing on behalf of owner or tenant of adjacent residential property opposing application |
| 51.  | Plnropp    | Subset of 47. Planner appearing as expert witness opposing application |
| 52.  | Posnpartic | Particulars of professional support or opposition in specific instances |

**Expressions of provincial policy**

The following fields selected were known provincial land use-related policies or as areas in respect of which the provincial government or its ministries might have developed such policies.

| 53.  | Aggpolstat | Aggregate Protection Policy Statement |
| 54.  | Fldpolstat | Flood Plains Policy Statement |
| 55.  | Hsgpolstat | Housing Policy Statement |
| 56.  | Wetpolstat | Wetlands Policy Statement |
| 57.  | Desfordev | Design for Development |
| 58.  | Coluc      | Central Ontario Lakeshore Urban Concept |
| 59.  | Tcr        | The Toronto-Centred Region Plan |
| 60.  | Udira      | Urban Development in Rural Areas |
| 61.  | Flg        | Food Land Guidelines |
| 62.  | Agcode     | Agricultural Code of Practice |
| 63.  | Niagara    | Niagara Escarpment Plan |
| 64.  | Moeguidel  | Ministry of the Environment Guidelines |
| 65.  | Prointstat | Statements of provincial interest |
| 66.  | Envprot    | Environmental protection policies (other than field 63) |
| 67.  | Servsch    | Provincial servicing schemes - e.g. water supply, sewage disposal |
| 68.  | Econodevel | Economic development policies |
| 69.  | Otherpol   | Other expressions of provincial policy |
| 70.  | Propolpart*| Particulars of policy consideration in specific decisions. |
The major policies were generally grouped for analytical purposes:

- provincial policy statements - fields 53-56, 64
- regional planning - fields 57-59
- protection of agricultural land - fields 60-62
- environmental policies - fields 63, 64, 66

Potential areas of Board policy development

71. Bdrole The role of the Board in dealing with planning matters
72. Onus The onus of proof in Board hearings
73. Approvproc The adequacy of the approval procedures followed by a municipality in making a planning decision
74. Adeqdecma The adequacy of the basis upon which council has made a planning decision
75. Coundecint Interfering with the decision made by a council
76. Opapplic The manner in which the Board has made use of an official plan in arriving at its decision
77. Intevaln The evaluation of interests by the Board
78. Goodplg What the Board means by the term good planning
79. Nghbdchar The manner in which the Board has considered neighbourhood character
80. Premature What the Board means by the term premature
81. Commcomp How the Board has dealt with the issue of commercial competition
82. Socialhsg How the Board has dealt with social housing
83. Minor How the Board has applied the term minor in hearing minor variance applications
84. Othbdpol Other areas in which the Board has potentially been engaged in policy development
85. Bdpolpart* Particulars regarding the above in specific applications

Importance of policy to Board’s decision

It was believed initially that this information might prove useful in determining the importance in the Board’s thinking of a particular provincial policy or a matter on which it might have developed a policy. It soon became clear upon reviewing Board decisions, however, that any conclusions in this area would be highly subjective and, given the lack in many decisions of a clear explanation of the reasons for the decision, would be a very speculative exercise. These data fields were therefore not used in the analysis, but are noted here as matters that were included in the coding.

86. Prpolnote Provincial policy was noted in a decision, but was given no apparent weight
87. Prpolreas Provincial policy was a reason, among others, for the decision
88. Prpolmain Provincial policy was the main reason for the decision
89. Bdpolnote An area of potential Board policy development was noted in a decision, but was given no apparent weight
90. Bdpolreas An area of potential Board policy development was a reason, among others,
An area of potential Board policy development was the main reason for the decision.

Particulars regarding the above weightings in specific applications

Board decisions

These data fields indicate the nature of the Board’s decision to approve or otherwise the development or land use designation proposal that is the subject of an application. It is not a reference to the Board’s decision with respect to the application itself. The Board might thus, for example, refuse to approve an appeal against a rezoning to permit a development, but the effect of refusing to approve the appeal is to approve the development. It is the latter which is recorded here.

Three types of decision are coded. It was soon realized that approval with modifications was best treated as an approval, as the nature and extent of modifications from what was originally proposed, and even the existence of modifications, was not always apparent.

Decision to approve the development application

Decision to approve the development application with modifications

Decision to refuse to approve the development application

Particulars of specific decisions
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