



December 1971 -- #131

REDEVELOPMENT BY REFERENDUM

The frequent and heated controversy over redevelopment proposals --both public and private -- has focused sharp attention on the process through which such proposals must pass to receive approval. The culmination of the process, a hearing before the Ontario Municipal Board,¹ has become the subject of considerable debate. The Board, a quasi-judicial appointed agency, has taken an increasingly aggressive stance in exerting its influence over municipalities, particularly in development and redevelopment questions that come before it for approval. While many citizen groups see the OMB as performing a useful 'ombudsman' role in resolving disputes between municipal councils and local residents as well as providing an opportunity to present their case to an impartial arbitrator, municipal councils frequently complain that the O.M.B. inappropriately overrules decisions of the elected representatives. Repeated council criticism of the role of the OMB and the increasing pressure by citizen groups to have an effective voice in the redevelopment decision-making process have resulted in renewed interest in the referendum² as a mechanism for decision. On December 5, 1971, at the direction of the OMB, a referendum was held on a major redevelopment proposal. This COMMENT examines that experience and discusses the advantages and pitfalls of redevelopment by referendum.

1. For a detailed discussion on the powers and role of the OMB see: Bureau of Municipal Research, "Urban Development and the Ontario Municipal Board" Civic Affairs, Winter, 1971.
2. In December 1970, a vote of the electorate was held in Hamilton concerning the expansion of Civic Stadium. Early in 1970, the city council passed a by-law authorizing the expansion of the seating capacity at the stadium. They then applied to the OMB for approval of the expansion, the issuance of 20 year debentures to pay for it, and leave to proceed without a vote of the property owners (i.e. a money by-law). The OMB turned down the application. The city council then decided to attain public opinion on the expansion. A question was put (in the December election) to all electors seeking their opinion on the issue. "Are you in favour of the expansion of seating capacity of Civic Stadium by replacement of the north stand at a cost of \$1,500,000?" The vote was 48,233 in favour, 28,736 against. Having received a favourable opinion, the Council proceeded with the project. It decided to take the money from the current budget and consequently did not have to go before the OMB again. Two points require emphasis: (1) the OMB did not request the vote, and (2) the vote held was not a money by-law but a question to seek the opinion of all electors on the issue.

The redevelopment project in question was the subject of an agreement between Oxlea Investments Limited and the City of Kitchener³, concerning the downtown area of the City in the vicinity of and including the present site of the City Hall and the Farmers' Market. The developers proposed to purchase the City property; demolish the City Hall and the Farmers' Market; and build a four storey Eaton's store containing 250,000 square feet, a two storey mall for small shops, a six storey parking garage for 750 cars with facilities on the first floor for the market, and a twelve storey office building. The City would lease a minimum of 30,000 square feet in the office tower for 15 years at \$6.50/square foot to be used for municipal offices, and lease the parking garage for 20 years at which time it would become the property of the City. The features of the Oxlea proposal requiring approval by the OMB included the 15 year leasing by the City of 30,000 square feet in the new office tower for municipal offices, and a 20 year leaseback arrangement between the City and Oxlea for a combined Farmers' Market and parking garage.

In October, after a short hearing to consider the \$15 million redevelopment project and on the request of several citizen groups, the OMB⁴ decided to hold a referendum on the issue at the time of the December municipal election. A single question, attempting to embody the key elements of the agreement between Oxlea and the City received a plurality of 'yes' votes on December 6. The OMB reconvened the hearing on December 9 and heard contrary and supportive arguments for three and one half days. On December 21, the Board released its decision -- the agreement between Kitchener and Oxlea had been approved without change.

The referendum on the redevelopment was a single 'yes' or 'no' vote of all eligible voters on the following four part question:

Are you in favour of the City of Kitchener entering into an agreement with Oxlea Investments Limited which will provide as follows:

1. that the existing farmers' market will be moved from its present location into a new building to accommodate the market and public parking;
2. to convey the city hall site and the present farmers' market site to this developer who intends to demolish the existing buildings and erect new buildings thereon;

3. Kitchener, located approximately 65 miles west of Toronto, is a rapidly expanding (average annual growth rate 1951-66, 5.0%) city with a 1970 assessed population of 107,198. Urban renewal was initiated in Kitchener in January, 1963 and several studies were undertaken and a renewal plan prepared. However, in November, 1968, CMHC announced a freeze on funds for financing urban renewal and the plan could not be implemented. Since then, Kitchener has received some funds for a limited program of renewal which primarily involves upgrading hard services in the core area (i.e. renewal of underground services and roads), and a small amount of land assembly.

4. Mr. J. A. Kennedy, Chairman of the Board, sat alone during the hearings, but as required, the decisions were concurred in by two other members of the Board.

3. a lease to the city for 15 years at an annual rental of \$195,000 of 30,000 square feet of floor space for municipal offices;
4. a leaseback arrangement for a public parking and market building at an annual rental to reimburse the developer in 20 years for the full cost including financing cost and at a profit of one and one half per cent? ^{5.}

Two citizen groups, one opposing and the other supporting the redevelopment, took the issue to the voters. The Citizens Committee for a Better County Core was formed during the summer in opposition to the redevelopment scheme which had been approved by City Council at a special meeting in June 1971. The Committee criticized several aspects of the agreement and was in favour of a renegotiation. As the official opposition, they strongly advocated a referendum on the agreement.

The other citizen group, the 'Vote Yes' Committee, was formed after the announcement of the referendum. In their campaign flyer, they identified themselves as "ordinary citizens representing all walks of community life: labour, business, industry, housewives, service clubs, churches, ethnic groups and individual citizens who have volunteered to help....." They summed up the issue as follows:

The choice facing voters on December 6 is a simple one: Do we want a downtown that is dingy, run-down and getting less attractive each year? Or do we want a downtown for people? : : : : : In our opinion, the Market Square redevelopment proposal will be of great benefit for the City of Kitchener. It will attract further private development, further investment downtown. It will result in more jobs for our citizens, a brighter and better downtown and a healthy contribution of taxes from downtown property and business which will ease the load on the homeowner. ^{6.}

In the December 6 referendum, 40% of the electorate⁷ voted on the referendum. The results were 15,689 in favour of the redevelopment

^{5.} Decision of the Ontario Municipal Board, File no. H3671,R6460; December 21, 1971; pp.4-5.

^{6.} Citizens 'Vote Yes' Committee, Your Choice: Rot or Renewal, p.2.

^{7.} This appears to be the average turnout for municipal elections in Ontario cities of this size. For more information on voter turnout see Canadian Federation of Mayors and Municipalities, Survey of Municipal Voting in Fourteen Canadian Urban Centres of 100,000 or More Population, May, 1967.

scheme and 11,513 opposed. The heaviest turnout was in the suburbs where the voting went solidly in favour of the redevelopment. Even though several central city polls went against the redevelopment, it was not enough to counteract the suburban vote.

This experiment in placing a redevelopment proposal to a popular vote raises several questions.

Why did the OMB choose to submit this redevelopment project to a referendum?

In the Board decision of October 29, 1971, the basis for committing the OMB to the referendum decision-making process was outlined. The major reason appeared to be that no other urban renewal plan approval by the Board to date contained the features of Kitchener's redevelopment proposal -- features the Board felt the public should have an opportunity to express an opinion on. The opposition to the proposal focused on many of these unique features:

- (1) Conveyance of the City Hall to the developer leading to its demolition;
- (2) Conveyance of the Farmers' Market leading to the demolition of the present structure and moving the Market to space in the parking garage;
- (3) Entry by the City into a 15-year lease at an annual rental of \$195,000 for 30,000 square feet of floor space in an office tower to be constructed by the developer, the space to be used for municipal offices; and
- (4) Entry by the City into a lease with the developer for occupancy and operation by the City of a combined market building and parking garage at a rental sufficient to retire the capital cost, interest, and a 1½% profit to the developer over a period of twenty years.

Clearly, the redevelopment would result in a major change and have far reaching implications for the character of the City Hall and the Farmers' Market, two key components of the City Centre. Under the redevelopment proposal the City would lose these elements of its civic focus for at least the 15 years that it rented office space; a decision taken in spite of the fact that the Council had already spent more than \$1,600,000 to acquire land for a civic complex that would include a City Hall. The Farmers' Market, a traditional Saturday market (held twice weekly in the summer) with a unique historic character, would occupy the first floor in the parking garage with some provision for outdoor vendors in the summer. Supporters of the proposal, presumably suggesting that they should be dismissed, contended that the objections were purely emotional. The Board, however, apparently disagreed.

Finally, the Citizens Committee for a Better County Core, official opponents of the redevelopment, as well as other interested groups had strongly advocated a referendum. In this case, the machinery for the vote, cumbersome and costly when mobilized to decide a single question, was already in place for the upcoming municipal election.

What weight did the referendum have in the final decision on the redevelopment?

The redevelopment approval provided by the referendum played a substantial role in the final decision of the Ontario Municipal Board. It outweighed many rather serious objections to the redevelopment scheme. Opponents to the scheme presented 5 basic objections at the second hearing of the OMB, contending:

- (1) The urban renewal plan within which this proposal came had been approved by the Board on July 9, 1970. The approval, however, did not contain a text properly setting forth the scheme of redevelopment; what was approved was therefore not a redevelopment plan as defined in the statute.
- (2) The urban renewal scheme as laid out in the studies and in the official plan amendment had been breached in a number of basic respects by the Oxlea proposal, specifically: (a) a new City Hall in the civic centre would be postponed for 15 years because of the lease to the City by Oxlea of municipal office space for that period; (b) the retention of the park in front of the City Hall was abandoned; (c) the Farmers' Market would no longer have direct access to the King Street mall -- being separated by a four storey commercial building and located on the ground floor of the parking garage, also there was no provision for a fully outdoor market as planned earlier; and (d) the only area of civic quality would be removed without any indication of how and when a new civic focus would be established in the downtown area.
- (3) There would be a serious danger of air pollution to the Farmers' Market as a result of its being so close to the entrance, exits and ramps of the parking garage.
- (4) The economic features of the Oxlea proposal would be improvident for the taxpayers of the City.
- (5) Several features of the Oxlea proposal are not in conformity with the official plan and so the by-law authorizing the Oxlea agreement would be invalid under the provision of the statute.⁸

The decision of the Board discussed the influence of the referendum over the three areas of objection that clearly related to the redevelopment project and fell within the jurisdiction of the Board -- objections two, four and five listed above.⁹ In weighing the result of the referendum against objection two outlined above, the Chairman in delivering the decision of the Board, concluded:¹⁰

⁸As noted in the Decision of the Ontario Municipal Board, December 21, 1971, p.6.

⁹The first area of objection was before the Board for a technical amendment; the third area of objection lies outside the jurisdiction of the Board. It is the responsibility of the Air Management Branch of the Department of the Environment.

¹⁰Decision of the Ontario Municipal Board, December 21, 1971, p.7.

In my opinion these would be material and rather forceful objections were the matter before the Board without a referendum to the electors having been held. It was my view that the purpose of seeking the opinion of the electorate was precisely to get their decision on questions of this nature. As suggested in the decision directing the vote, these are matters especially appropriate for decision by the electors.

I am of the opinion that this proposal does detract some important planning features proposed in the urban renewal studies and in the official plan. However, the electors have voted in favour of these changes and in my opinion this Board should not presume to intervene.

On the fourth objection, the arguments on the economic features of the scheme centred around a cost-benefit analysis and the market-parking garage structure. In reference to the cost-benefit analysis, the Chairman stated:¹¹.

In my opinion those who prepared this analysis as to some items at least erred to some extent in underestimating debits and being perhaps generous on the credits. I do not believe, however, that these variances add up to advocacy although the strong submission of the objectors is that they do.

The decision of the voters weighed more heavily in the comments on the leaseback arrangement for the market-parking garage structure.

It has long been my view that these [leaseback arrangements] are less to be desired in municipal administration than in the private business sector...the fact remains that no private corporation will enter such a deal unless to make a profit. In this case this profit is one and one half per cent estimated at some \$35,000 a year for twenty years. But this profit was mentioned specifically in the question put to the electors and, as noted, the majority voted in favour.¹².

A further objection to the market-parking garage structure was that the land on which it was to be constructed would be used by Oxlea for the 20-year life of the leaseback arrangement without any remuneration to the City during that time.

While the objectors contend in effect that this end of the package is gift wrapped, nevertheless the rate-payers have given approval. The Board should not interfere even though it might be otherwise if the vote had not been taken.¹³.

11. Ibid., 8.

12. Ibid.

13. Ibid., 8-9.

The final and most serious area of objection raised by the Citizens Committee for a Better County Core at the December hearing was that the Oxlea redevelopment proposal did not conform to the official plan and consequently the by-law approving it would be invalid. Counsel for the Committee identified three points at which the redevelopment scheme did not conform. In his decision, Mr. Kennedy agreed with counsel that in his opinion, two of the three points were valid and the by-law adopting this proposal appeared to be for a purpose that would not conform to the plan. The decision of the Board, however, reflected concern that the various powers of the OMB did not include the power to declare a by-law invalid.

.....the Board should never purport to exercise a power if there is any real doubt that it possesses that power
.....(and) there is real doubt, at least in this case.
To refuse to grant this application may mean the agreement will be lost to Kitchener because there is a deadline of December 31st instant. On the other hand, if the Board follows the clear language of the Court of Appeal quoted above¹⁴. and grants these applications, the deal which the electors approved by a majority vote can be protected while the objectors, ¹⁵. if they are so advised, can still resort to the courts.

The result of the referendum had a profound effect on the decision of the Board. Because the electorate, due to the wording of the question in the referendum, had not been able to 'comment' on the components of the development scheme but was instead limited to accepting or rejecting the total package, the referendum could only direct the OMB in accepting or rejecting the total package. The Board did not choose to exercise any latitude in changing specific components of the scheme, as it might have, had the referendum not taken place.

What are the foibles in decision making by referendum?

Aside from the overriding advantage of giving each voter an opportunity to express his opinion, a referendum has some inherent shortcomings. These fall into three general areas: (1) presentation of the issue, (2) adequacy of the voting mechanism, and (3) statement of the question.

Presentation of the issue is extremely important, particularly in the case of a complex redevelopment proposal. Is it the municipality's responsibility to mount a widespread information program just prior to the referendum? Or does municipal responsibility take the form of extensive public hearings and open committee and council meetings followed by an "information available on request" posture during the campaign?

¹⁴. Ibid., 11. The decision quoted is from the judgment of the Court of Appeal in Re. North York Township 1960 OR 374.

¹⁵. Ibid., 11.

Should the primary responsibility for presenting the issue to the public rest with the various groups formed to support or oppose the redevelopment? What role should the media play? Newspaper coverage is particularly important in this regard. How can adequate press coverage of the issue be ensured? Failure to properly present the issue to the public leaves the electorate in the position of being asked to vote on something they are unclear about and/or the implications of which they do not understand.

Adequacy of the voting mechanism is another area of concern. As noted above, 40% of the electorate voted on the issue; approximately 22% of the electorate was in favour and approximately 18% opposed. Is the turnout large enough to provide an adequate guide to public opinion? Is it sufficient to decide an issue? Should a minimum voter turnout be required? What effect does the timing of the referendum have (i.e., during an election or at an off-election period)? Who should be eligible to vote -- all those who are eligible to vote in a municipal election or only those eligible to vote on a money by-law (i.e., property owners). How should the voters' list be compiled -- from assessment rolls, through enumeration, by requiring eligible voters to register at a central voters registry office? When should the polls be open and what effect do the day and hours have on voter turnout? In short, referenda--because they are popular votes--are subject to many of the problems that present themselves at the regular election time and which deserve close analysis in assessing the worth of the referendum technique.

The last area that is especially important when using the referendum as an input into the decision-making process concerning a redevelopment issue is the statement of the question.

To reduce a complicated redevelopment issue to a simple positive or negative answer is a Herculean task. The referendum in Kitchener posed a single four-part question to all eligible voters (not just property owners). The electorate was then forced to vote on the redevelopment agreement as a whole, or not vote on the question at all. It became a simple matter to vote if one agreed with the redevelopment proposal, or if one disagreed with it, entirely. For those voters who favoured certain aspects of the scheme and opposed others, however, the form of the question presented a dilemma. The Citizens Committee for a Better County Core advocated a negative vote if one disagreed with any part of the scheme. A negative vote, they contended, would be a mandate for renegotiation of the Oxlea scheme.¹⁶ The 'Vote Yes' Committee suggested that Oxlea would not renegotiate if the vote was negative, and the voters should therefore weigh the merits of the entire scheme and vote 'yes'.¹⁷

16. "No: City sells the citizens short; who benefits from Oxlea deal?"
Kitchener-Waterloo Record, November 8, 1971.

17. "Yes: King St. renewal plan will not cost taxpayers one cent",
Kitchener-Waterloo Record, November 18, 1971.

Here, as in so many redevelopment fights across Canada, the issue was not whether central city redevelopment was a good thing; the issue was whether this was the best redevelopment scheme. The form of the question, given the many diverse elements of the scheme, made impossible an expression of public opinion on the merits of the various components of the redevelopment scheme to assist the Board in reaching its decision. Answers given can only be for questions asked.

Should referenda be used to decide redevelopment issues?
Use of the referendum technique presents many problems that should be examined and overcome before it is put into widespread use. Care must be taken to ensure that the redevelopment proposal and its implications -- social, financial, environmental, and so on -- are presented to the public in an understandable fashion in time for discussion and debate before the vote. A referendum is not a substitute for a full program of open committee discussions and public hearings, it is an additional mechanism to provide the public with a direct voice in the decision process.

Omnibus questions can only result in vague, general answers. Few redevelopment proposals are simple enough for the public opinion to be gleaned in a single vote. A simple yes or no on the entire of a proposal defeats the purpose of the referendum. A series of questions embodying the main features of the proposal would be far more effective.

The Kitchener referendum took place during a municipal election. Ontario municipal elections have achieved a measure of notoriety for the small numbers of eligible voters who exercise the franchise. In the United States, where referenda are a commonly used decision technique, voter turnouts are highest for federal (presidential) elections then drop off steadily for state, local, and referenda issues. A similar trend is evidenced in Ontario.^{18.} Should referenda then be used only at the time of an election? What are the costs involved in holding referenda at other than election time?

The decision to hold a referendum in Kitchener stressed the unique nature of the redevelopment proposal. What criteria would be required to separate the "unique" proposal from the "commonplace" proposal? Should all redevelopment proposals be put to a referendum?

The purpose of the Kitchener referendum appears to have been to guide the Board in its decision. Should referenda decide the issue, or merely provide advice to the Board? What effect would an increased use of referenda have on the role of the OMB in urban development?

Referendum decision-making appears to be an attractive technique to express popular opinion on redevelopment issues. The experience in Kitchener, however, raises several questions that need further study before the technique is widely adopted.

^{18.} Canadian Federation of Mayors and Municipalities, Table 9.