TOPIC

CHANGING THE PLANNING ACT: Risks and Responsibilities

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CHANGING THE PLANNING ACT: Risks and Responsibilities

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THIS TOPIC IN BRIEF

This *Topic* examines and evaluates certain key reforms of Ontario's municipal planning legislation as proposed in the Report of the Planning Act Review Committee (the Comay Report).

The Committee was concerned mainly with the distribution of power in the planning system. It attempted to strike an appropriate balance between provincial and municipal authority in planning and between public and private interests in planning. The main thrust of the Report is to clearly lodge increased decision-making authority and responsibility at the municipal levels of government; provincial supervision and control is thereby lessened.

A second underlying thrust is that the burden for intervention into planning decisions is shifted. Instead of requiring a proponent to justify a proposal, as is the current practice, the suggested change would place the onus on the objector (a citizen or a level of government) to demonstrate why the proposal should be modified or rejected.

The Bureau endorses the approach taken by the Committee, and the main proposals which follow from it.

We point out several aspects of the proposed system that should be emphasized in the revised legislation: (1) the Act should require the Province to monitor local decisions and to define its own interests in local planning by means of policies articulated in circulars, regulations, or orders-in-council; (2) the Act should specify the nature of the provincial veto power, the conditions under which it would be exercised, and its expected effects; (3) the Act should be worded so as to convey to municipalities the necessity of determining their planning objectives and acting to achieve them through their day-to-day development decisions; (4) the Act should set out new opportunities for full participation at the time a council is making a decision, and offer the clear assurance of an appeal process wherein all legitimate objections would be considered by the O.M.B., in a clearly defined way.

We also offer several suggestions for making the transition from the old to the new planning system.

Notwithstanding our overall support, we find the Comay Report weak in two areas: it is unclear as to the role for regional-level planning in a two-tier system; and, it does not explain how a municipality's overall social, economic and financial planning will be accomplished, given its restriction of "municipal planning" to physical and land use concerns.

The Report's value lies in the challenge it poses. This challenge is two-fold: first, that municipal councils, in return for increased authority, will act responsibly, consistently, and in a policy-oriented manner; and second, that the Province, in return for being relieved of its detailed supervisory duties, will develop policies that are useful guides for municipal planning.

Finally, even if the Comay Report proposals are accepted by the Province, we caution against assuming that planning decisions will be "better". Improvements to structure will not necessarily have impact on the substance of planning policy.

CHANGING THE PLANNING ACT: RISKS AND RESPONSIBILITIES

Introduction

In June 1977, Ontario's Minister of Housing released the Report of the Planning Act Review Committee, known as the Comay Report, after Committee Chairman Eli Comay. This was the first major review of the Planning Act since its creation in 1946. Because planning is one of the major powers a municipality may exercise, one might have expected interest to be high. Quite the contrary, there has been scant media attention and no widespread public discussion. Some explanation for this might be found in the fact that the Robarts Report on Metro Toronto was published at approximately the same time, diverting much attention in Metro and surrounding municipalities. But reaction to the Comay Report has been slow across the province, and in fact has led to the Ministry's postponing the deadline date for response from October 15 to December 31.

Certainly the Comay Report is complex, covering a broad range of items from the "nuts and bolts" of municipal planning legislation to the fundamental philosophical principles on which that legislation is based. The provincial government's own response to it will be in the form of a White Paper late next Spring. This is why public discussion of it is important now, so that issues can be clarified. *The purpose of this Bureau Topic is to examine and evaluate key features of the planning system presented in the Report. We have been selective in our approach.* We note that the Report's proposals are actually on three levels: major reforms, improvements that fall just short of reforms, and housekeeping items. Because the Comay review is unique in its attempt to establish clearly the set of principles upon which the proposed system is based, we have focussed on the philosophy expressed in the Report and the key reforms which flow from it.

At the outset we note that The Planning Act deals with planning at the *municipal* level only; that is, the plan-making and development control functions. When (or if) the Province plans, it does so under *other* legislation, for instance, The Planning and Development Act. Provincial planning was outside the Committee's terms of reference except as it affected municipal planning.

Likewise, the Committee's task was not to review the practice of municipal planning, but, rather to examine the legislation. Thus the practice was of interest only insofar as it reflected the adequacies of the legislation.[1]

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1. Chapter 1 of the Report indicates that over the previous ten years a series of reports had dealt with various aspects of Ontario's planning: the studies of the Ontario Law Reform Commission (1967-1971); the report of the Select Committee on the Ontario Municipal Board (1972); (in part) the studies of the Advisory Task Force on Housing Policy (1973); and the Subject to Approval report of the Ontario Economic Council (1973). This last examined the operation of municipal planning. In contrast, the Planning Act Review is the first overall look at the 30-year old municipal planning legislation. Several of the participants in this review had also been involved in earlier studies. Professor Comay himself had chaired the Housing Task Force and participated in the OEC report.

To fully understand the Report and its significance, one must appreciate the context. In 1975, when the Review was commissioned, there was one predominant influence: cries of planning delays caused by bureaucratic red tape. These complaints came mainly, but not only, from the development industry and were echoed daily in the media. The argument was that planning red tape was one of the major factors in the rising costs of land and housing.

Several other influences were, and are still, apparent:

- A mood of restraint and pragmatism had settled over the public sector generally. At the provincial level, the goals-oriented regional development planning initiated with the "Design for Development" documents eleven years earlier had been laid aside in favour of a more hard-nosed economic approach: planning that was realistic and could deliver.[1] At the municipal level prudent spending and the paring of budgets became the by-words for all council activities, including planning.

- Local autonomy where possible was a parallel theme of the provincial government. In the early 1970's a number of regional areas were restructured into two-tier governments, one of the avowed intents being to assign some statutory planning authority to the new regional municipalities. Recent ministerial statements have further endorsed the trend towards increased municipal autonomy.[2] And the dominant focus of the Robarts Report on Metro Toronto is on strengthening the policy-making capability of local government.

In the following sections we examine the main thrust of the Comay Report and several significant features of the proposed planning system. It will be clear that we are strongly supportive of the Committee's direction, and we indicate certain proposals we feel should be emphasized in the revised _Planning Act_. We find the Report weak in two respects: its discussion of planning powers in a two-tier system, and its treatment of the scope of municipal planning.

Our overall conclusion is that the Report is useful for framing legislation; if adopted, the proposals would improve the planning process by adding clarity, flexibility, and accountability. We take issue, though, with those who would automatically assume that planning decisions will be "better". Even the Committee did not make this assumption. Improvements to structure will not necessarily have impact on the substance of planning policy.

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1. See BMR _Comment_ #166, "Design for Development: Where Are You?", March 1977.

2. See, for instance, Housing Minister John Rhodes' address to the CPAC Nation Conference in Toronto, September 12, 1977.

The Thrust of the Proposed Reforms

The Comay Report is concerned mainly with the distribution of power in the planning system. The Review Committee sought to create a legislative framework for municipal planning that would do three things:

- let municipalities engage effectively in planning at the local level;

- allow the provincial government to secure its own interests in municipal planning;

- ensure that the needs and interests of other participants in the process were given their due regard.

Thus the Committee attempted to strike an appropriate structural balance between provincial and municipal authority in planning and between public and private interests in planning.

Although the Committee travelled across the province to hear a variety of persons intimately involved in the operation of the planning system[1], it could find no common agreement on what the system was for, how it operated, or what changes were required. It needed a framework to reconcile the disparate views. Accordingly, the Committee developed a closely-reasoned set of assumptions and principles concerning the nature and purpose of municipal planning, the role and responsibility of government in planning, and the nature and function of planning legislation. Briefly, these stated that:

- the way planning is used should be realistic; its scope must be limited by its available instruments, which have mainly to do with land use and the control of physical development (Sec. 2.34);

- planning decisions are political because they deal with values and priority-setting; therefore, policy decisions, which have the force of law, should be made only by elected officials (Sec. 2.20, 2.22);

- planning decisions must be made openly and clearly, so that persons or bodies making those decisions can be held fully accountable (Sec. 2.24);

- planning legislation and the system it defines should be rational, clear and intelligible, equitable, reliable and predictable, economic in time and cost (Sec. 2.27);

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1. The Committee's public consultation program consisted of two main parts: (1) briefs were taken from municipal councils and other municipal bodies, organized community groups, rural land interests, the land development and real estate industry, and other professional groups (law, planning, architecture, engineering, etc.); and (2) a series of meetings was held province-wide with municipal officials and a variety of interest groups. The Committee also assisted the Community Planning Association of Canada in sponsoring fifteen "citizen workshops" across the Province. See Background Paper No. 1 (by Karen Bricker, Committee Research Associate).

-planning authority and responsibility should be allocated so that all matters which have not been defined as lying explicitly within the interests of a higher level of government should rest with the lower level; municipal governments should be seen as possessing residual planning powers, that is, those planning powers which the provincial government does not require in order to secure its own interests (Sec. 2.43).

These assumptions will be elaborated and discussed later as we review the main recommendations; acceptance or non-acceptance of the premises is basic to one's reaction to the Report. Here the main point is that this framework allowed the Committee to pinpoint the structural troubles in the system: divided powers, fragmented authority, diffused responsibility. The attendant problems identified were a lack of full accountability, uncertainty and inconsistency, and lip service to formal planning requirements. The Committee found further that unrealistic public expectations about the kinds of results the planning system could deliver only made structural problems worse: municipal planning was being held responsible for too much.[1] The framework led the Committee to propose some fundamental reforms to the municipal planning system.

The main thrust of the Comay Report is to clearly lodge increased decision-making authority and responsibility in planning at the municipal levels of government. Provincial supervision and control is thereby lessened.

A second thrust underlying all the recommendations is that the burden for intervention into development decisions is shifted. While the current system requires the proponent to justify his proposal, the suggested change would place the onus on the objector to demonstrate why the proposal should be modified or rejected.[2] In practical terms, this means that an individual could do as he liked with his property *as long as* the municipality (or the region, or the province, or another citizen) could not show that its interests were adversely affected.

The key reform which moves the system in this general direction is restricting the provincial role in municipal planning to formally defining its areas of interest and intervening only to protect those interests. Ultimate protection is afforded by the new provincial power of veto over municipal planning actions which adversely affect the stated provincial interests.

1. For instance, expecting local planning policies to be the chief instruments for creating certain desirable social and economic conditions (such as a divers employment base) when for the most part these policies could only regulate the controlling forces.

2. The Report notes that the onus is similarly placed in the U.K. system of planning control.

Hence in the reformed system:

-Municipal councils would be assigned final authority over all their planning instruments (plans, zoning by-laws, development reviews, subdivision agreements, consents, redevelopment or neighbourhood improvement plans), subject to appeal procedures or the Province's veto. The normal operating relationship between the provincial government and municipalities would be one where the senior level monitored, guided and assisted lower level in its planning activities, rather than, as is the current practice, supervised and approved.

-Municipal councils could also choose whether or not to appoint planning boards or committees. As a general principle, a council could delegate any appropriate planning powers provided planning policies were already established and the scope for the exercise of delegated powers was already laid out.

-Official plans, the central policy element in the planning process, would become "municipal plans" or "municipal planning statements", adopted by a council but with no provincial approval requirement. Subsequent by-laws would be required to "have regard for" rather than be in legal conformity with these adopted policies.

-The Ontario Municipal Board would remain as an appeal body to hear objections to a council's action or failure to act, but its responsibility to make a final decision would be changed to making recommendations to the Minister of Housing or the municipal council for their decision.

Removing the heavy hand of provincial supervision does not produce a system without control but, rather, one where the locus of control is shifted. Early in its investigation, the Review Committee concluded that, while most planning rules and procedures had been introduced in the past for sound reasons, a variety of different circumstances today warranted their alteration. It found that the structural requirements of the system had become ends in themselves so that, for instance, approval was being sought for approval's sake, diverting attention from the substantive issues of planning. *Thus the Committee attempted to replace direct provincial control over municipal planning with a system of checks and balances on municipal planning autonomy.* The emphasis throughout the Report is on formally adopted policies, stated clearly and reasoned specifically, with provisions for proper notice, hearing and appeal.

Our response to the thrust of the Comay Report is generally positive. We have no major quarrels with the basic premises of the report, and the method of defining appropriate levels of government interest and responsibility in planning seems to us to be a useful way of sorting out the problems to be addressed. In particular, we accept that planning is *not* value-free and that municipal councils should have the authority to choose the priorities that are reflected in planning decisions. The main features of the proposed system are consistent with the overall direction.

At the same time, we recognize that there are certain risks inherent in changing the system. As is true of all structural reform, the question is whether the anticipated benefits outweigh the possible costs created by change. The Comay Report is no exception. From our conversations with planners, politicians, lawyers, provincial officials, and other interested observers, we have identified six areas of particular concern:

1. the vesting of local municipalities with final planning authority
2. the identification of the provincial interest and the exercise of the veto
3. "de-officializing" the official plan
4. the role of the O.M.B.
5. planning in two-tier municipalities
6. the scope of municipal planning[1]

In the following sections we assess the risks posed by the proposals of the Planning Act Review Committee on each of these aspects.

1. Granting Municipalities Final Authority Over Their Own Planning Tools

This set of recommendations follows directly from the Committee's premises regarding the appropriateness of decentralized decision-making and local autonomy in municipal planning. As outlined above, among the proposals which seek to strengthen the policy-making capability of the municipality are:

-the elected council may prepare and adopt all its own plans, zoning by-laws and other statutory planning tools without the need for Ministerial approval. All municipal planning actions would be subject both to appeal procedures and to provincial veto on matters of direct provincial (or regional) concern (Sec. 5.1);

-the council may choose to delegate certain of its assigned approval powers to committees of council or appointed officials, provided the delegated decisions remain within the scope of established council policies (Sec. 5.2);

-the council may choose whether to appoint a planning board, or to dissolve an existing one (Sec. 5.4).

1. As noted earlier, our listing is selective; it excludes reference to the proposals regarding development control, subdivision approval, land separation consents, or development standards and requirements, where the changes suggested are significant; other individuals and organizations are better equipped to comment on these aspects than ourselves.

The Report argues that these new rules would constrain municipal councils to act in a clear, formal and considered manner. But some observers point to the risk that municipalities would do just the opposite--that is, behave irresponsibly. The first proposal--municipalities controlling their own planning--has given rise to much concern.

There is, we found, widespread suspicion of municipal decision-making capabilities. Municipal officials themselves are just as likely to express doubt about local capabilities as are lawyers, planners, developers, ratepayers and provincial officials. Some critics maintain that, as a general rule, municipalities have never been able to function as a fully accountable, responsible level of government because they have no parliamentary base with the corresponding discipline of party politics. Others see little hope in the future of improving the scope for local government simply because the Province (and indeed the federal government) remains content to have municipalities serving as administrative handmaidens. The truly cynical believe that repeated provincial avowals to enhance local autonomy, in these times of financial restraint[1] are really a guise to shift some of the provincial spending burden onto municipalities. All three groups of commentators on the municipal scene are suspicious of *any* proposals purporting to "strengthen" local government and would probably agree that the above proposals would *not* significantly enhance the performance of municipal councils.

Other observers are more hopeful about the prospects for local government, although their optimism is tempered by reality. The municipal planning facts of life in many communities across Ontario, particularly smaller ones, are these: part-time politicians; staff with limited technical competence or no skills at all related to planning; a tendency to pass on tough decisions for resolution by the Province or the O.M.B.; financial pressures, leading to planning by assessment. The fear is a dual one: that planning decisions will be made without full consideration of all the issues involved, or that decision-making will be even less accountable than now, with the increased power accruing to civic staffs rather than elected officials.

This fear is difficult to allay because in part it is based on realistic observations. However it seems odd that some carry the argument further, by maintaing that local politicians, by nature, are incapable of making reasonable decisions--i.e., governing. The inference is that provincial officials can do the job better. In our view, there is no reason for assuming that local politicians, and their staff advisors, are *inherently* any less capable of making decisions within their area of jurisdiction (municipal planning) than are provincial politicians and their advisors within their own jurisdiction (provincial planning). Moreover, the planning capabilities of Ontario municipalities have presumably been strengthened over the past several years by the creation of new regional and county governments; one of the main rationales for restructuring, which now affects about 60% of the province's population, was to permit more effective planning.

1. See, for instance, the remarks of the Hon. Darcy McKeough to the Association of Municipalities of Ontario, Toronto, August 23, 1977.

In any case, we find ourselves agreeing with the Committee: that much municipal irresponsibility today can be attributed to the planning system itself; the system not only allows but encourages less than responsible behaviour.[1] Hence the notion that if those aspects that breed irresponsibility (identified by the Committee as excessive and misdirected provincial control) are removed, municipal councils will be more predisposed to govern effectively in planning matters.

Admittedly, this is a gamble. The corollary of assuming that the provincial government will encourage responsible behaviour by assigning authority is that when residents in a community perceive that "bad" decisions are being made, and that the blame is with the local council, then they will call the council directly to task through the participation process and--ultimately--the ballot box.[2]

In the end, there is a leap of faith to be taken: that the municipal councils will govern and that any adverse effects of their decisions can be contained.[3] One cannot know for sure how municipalities would use their planning powers, with less provincial supervision, just as one cannot know whether the Province is genuinely supportive of the trend toward decentralized decision-making.

We recognize, however, as did the Committee, that no structural reform of the system can ever solve all the problems in planning, including the lack of resources, nor will it eliminate "essentially irresponsible" political behaviour. *The real question, therefore, is whether the Report's proposals for increased municipal authority in planning provide sufficient checks against abuse of power and the avoidance of full accountability.* In other words, are the checks sufficient to replace the system of supervision established in 1946?

In our view, the answer is yes. Local autonomy would be bounded by a number of provisions:

i) Although planning authority would be assigned to all municipalities as a general rule, the Minister could exclude those municipalities where this would be inappropriate because of a stated provincial interest (Sec. 4.14); similarly the Minister could recall powers if he could show that this was necessary (Sec. 4.15);

ii) No municipal planning authority could be exercised without a basis of clear and reasoned policy statements (Sec. 6.2); the revised Act would contain more formal provisions for participation *prior* to a decision (Sec. 9.10 to 9.14);

1. Comay Report, Sec. 3.23.

2. This is a significant difference from the current system where affected interests hopefully gear up to do battle at the Ontario Municipal Board.

3. A leap that the Robarts Commission was able to take for Metro Toronto and which the Bureau supported. See BMR Topic No. 2, "In Response to the Robarts Report", October 1977.

iii) Municipal planning would be guided by provincially and regionally established development standards, including special provisions to bar exclusionary zoning practices and to protect rural agriculture lands (Sec. 14.14, 4.16);

iv) A municipal planning decision would stand *unless* an appeal was granted or unless the Province could demonstrate that the decision was contrary to province-wide interests; the ultimate constraint would be the exercise of the provincial veto.

We will deal with just the first proposal here; the remainder are discussed in subsequent parts of this Topic. We note that our understanding of the suggested checks and balances can be in theory only at this time, because, of course, this system has not been tried previously in Ontario.

The proposal to initially exclude some municipalities from the general assignment of planning powers offers a basic check on autonomy. One wonders, though, how this proposal could be implemented. The Report itself does not specify how different municipalities should be treated differently; however it is adamant that, in contrast with the current system, all municipalities should be entitled to the increased powers unless the Minister could show that a provincial interest would be adversely affected by a particular assignment.[1] Carrying the intent of the Report further, the Bureau can suggest several conditions under which the Minister should withhold planning authority:

- if a municipality were unwilling or unable to accept the responsibility because it was not ready (i.e., no organization for planning or no policies or statement of intent regarding planning in the community);

- if a Ministerial zoning order were in effect in a municipality[2];

- if the Province had identified its interest in an area (for example, Haldimand-Norfolk), but its policies were only just emerging. In this case, to ensure that the policy would be readily forthcoming, a time limit for expiry of this condition would have to be set. (The ability of the Province to bring forward policy is crucial to the operation of municipal planning autonomy in the system envisioned by the Committee, and we discuss this in the next section.)

1. Under Section 44 of The Planning Act, the onus is on municipalities to request additional powers; the Minister may or may not choose to delegate them.

2. Section 32 of The Planning Act authorizes the Minister of Housing to improve zoning orders in a variety of situations, such as: where a municipality has not implemented its official plan (e.g., Tay Township in Simcoe County); where a municipality has no controls at all (e.g., Essa Township--this was a commercial order covering shopping centre development); in northern communities where there is no municipal organization (e.g., Sault North). Zoning orders are also authorized under other legislation dealing with specific provincial concerns, such as the Niagara Escarpment or the Parkway Belt West. Such orders do not freeze development, but all planning applications, including requests to amend or revoke an order, are dealt with by the Ministry itself.

We would not wish to see planning autonomy assigned as a blanket rule only to the regional or restructured county level, as some observers have suggested. This would exclude other municipalities where autonomy might be appropriate, for instance, London, Sarnia and Windsor.

Likewise, we would reject using simply a city-size criterion for exclusion, on the grounds that size does not necessarily imply ability or inability.

2. The Defined Provincial Interest and the Veto

The Committee states that the provincial role in municipal planning received most of its attention because this was the area consistently criticized by participants in the system:

> "In our view, the question of how to organize municipal planning begins with the definition of the Province's interest in the matter". (Sec. 4.1)

and;

> "There is, in the end, widespread bewilderment with the essential paradox of the provincial role in municipal planning: indeterminate substantive policies within a framework of rigorous processes and procedures." (Sec. 3.21)

The Committee calls for a fundamental change in the nature of provincial involvement in municipal planning. Briefly, the main proposals are that:

- the Act should specify the limits for provincial interests in municipal planning; these interests stem from the interests of people of the province taken as a whole and cover the following: the achievement of policies or programs in economic, social and physical development; environmental protection and resource management; maintenance of the Province's financial well-being; ensuring that municipal planning does not infringe on civil rights or natural justice; co-ordination of planning activities and resolution of conflicts between jurisdictions (Sec. 2.44, 4.2, 4.4);

- the Province should intervene in municipal planning only to protect those interests (Sec. 4.5);

- the Minister concerned, or the Cabinet, should be able to exercise the ultimate power of veto to prevent municipal actions which conflict with stated provincial interests (Sec. 4.6, 4.7);

- where Ministerial discretion is to be exercised, it should be done formally, through regulation or other statutory orders (Sec. 4.23).

Many observers have reacted with cynicism to these proposals; they feel that the Province would be neither willing nor able to define its interests, let alone exercise a proper veto. *The risk seen, then, is that this crucial check on municipal autonomy might not work.*

Some cite the dismal track record of the provincial government in its "Design for Development" saga. The Bureau itself, in a previous study, emphasized the gap between the original objectives of Design for Development and the present land use and economic growth trends in Ontario. And we expressed doubts about the Province's recent "strategy" approach to regional planning.[1]

Others are softer on the provincial politicians, but suggest instead that the provincial bureaucracy could be responsible for the breakdown of the proposed system. These critics recognize that changing the structure of a system does not necessarily change the attitudes of the people who run the system. They argue that, unwittingly or not, the present civil service could undermine the intent of reforms because they are too much oriented to a system which requires detailed checking and approving; the idea of limiting their interests, of disciplining their intervention, would become generally accepted only gradually, if at all. Thus the fear is that provincial staffs would pay attention only to the major issues (e.g., development of the Niagara fruitlands) and miss the cumulative significance of lesser decisions, or that, in the words of one person we interviewed, they would continue to "muck around" in local affairs as usual.

Again, we cannot *know* whether these proposals would create effective checks on the municipal planning process. We are not as skeptical as some about the capacity of the provincial civil service to respond because we understand from those both inside and outside the bureaucracy that a change in attitude has already begun. Further, we see no benefits in assuming that a lack of political commitment at the provincial level will stymie the operation of the system, if it is adopted. Structural changes can only set the broad conditions for decision-making.

And, in this case the structural change represents a definite shift: the Comay Report clearly rejects the notion of an overall provincial "plan" as a guide for municipal planning.[2]

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1. See BMR Comment #166, op. cit.

2. This represents a major change in thinking from the Subject to Approval report two years earlier. The Bureau also abondoned its attachment to the idea of a comprehensive province-wide plan in its study of the farmland issue. See BMR Civic Affairs, "Food for the Cities: Disappearing Farmland and Provincial Land Policy", June 1977.

In the Committee's view, the elaborate regional planning and development objectives of Design for Development are not realistic.[1] Instead of an overall plan, the Committee favours an approach whereby the Province states its interests in local planning, if not in advance of specific municipal planning decisions, at least formally and categorically at the time they are made (Sec. 4.9). Thus in theory, while the Province might well continue its reactive approach to planning, the heightened accountability would let "instant policy" be seen for what it was, and so function as a check. Over time the Province would learn to demonstrate why it was concerned about particular decisions, and therefore to anticipate real provincial interests and focus its energies on them.

The Bureau believes that the challenge posed by the Committee for the provincial role is both realistic and useful. With regard to the Province's own planning, the approach might work. Although provincial planning per se was not within the purview of the Planning Act Review, the Committee's suggestions go further than any previous proposals to promote an understanding and acceptance of why the appropriate provincial government activity should be to develop policies in areas of obvious province-wide interest--environment, natural resources, economic and social development--rather than to approve the details of local land use decisions.

Moreover, we view the proposed provincial role as imperative to balance the increased local autonomy in municipal planning. If the planning system were reformed as the Comay Report suggests, then the consequences of the Province's not acting in its proper role could be more serious than currently is the case. As shown in the previous section, the first task for the Province in its new role would be to exclude from the general assignment of planning approval powers those municipalities where autonomy would be inadvisable from a provincial viewpoint.

Within the spirit of the Committee's proposals, if they are accepted, *we urge that the revised Act provide certain strong incentives to the early formulation of provincial policy*, for instance:

i) a *requirement* that the Ministry of Housing (as well as other appropriate Ministries) monitor local plans and decisions, where approval powers have been assigned, to determine whether they conflict with stated or developing policies. While some would object that this would only result in more bureaucracy, the fact is that the provincial staff is already there, checking in order to approve rather than reviewing in order to object.

1. Design for Development has been a decade-long effort by provincial officials to draw up a grand design for the economic, social and physical development of Ontario. It has failed for several reasons, two of which the Committee applies in the context of the Planning Act Review: Ontario is a large and varied province with many conflicts of policy objectives for which there can never be a satisfactory resolution; and the nature of public policy is such that it must and does continually change, so that grand, goals-oriented plans soon become unworkable.

ii) a *requirement* that the provincial interests, and hence standards for municipal planning, be stated in documents that are public and receive wide circulation--departmental circulars or regulations, or orders-in-council. The current system of letters, "guidelines", and ministerial speeches would be neither adequate nor acceptable.[1]

We agree with the Committee's identification of another early task for the Province: reconciling the procedural conflicts that would arise between The Planning Act (revised) and other pieces of legislation affecting planning, most notably The Environmental Assessment Act and, to a lesser extent, The Planning and Development Act.

We find the Report in need of some clarification as to provisions for the use of the veto power. Presumably the veto would be regarded as the ultimate sanction in a situation where a municipality ignored clear provincial policy and would be solely under the control of the Minister of Housing (in planning matters under his jurisdiction) or the Cabinet (where other Ministries were involved). Presumably also if a question arose as to the applicability of a provincial policy (or emerging policy) to a particular local decision--i.e., whether the veto should be used in a particular instance--the Minister could ask the O.M.B. to review the situation and report its findings. While we endorse the idea of the veto, it requires fuller explanation--what it is, how it would be exercised, what effects it would have--before being incorporated in legislation.

3. De-officializing the Plan

The official plan is the central element in Ontario's planning system and has been widely criticised. It is actually a remarkable instrument in that it has been all things to all critics. In general, the official plan is accused either of being an unrealistic document of false hypotheses and pious goal statements or of sacrificing much needed content in order to satisfy the excessively legalistic requirements of the provincial approval process.[2]

The Planning Act Review Committee recommends a substantially different instrument. Among its proposals are the following:

-that, although municipal planning should continue to be a voluntary activity as it is now under the Act, a municipal council could not pass zoning by-laws or undertake any other planning control activities without having first established a suitable policy framework (Sec. 6.2);

1. In a recent report, the Bureau examined the Province's foodland "guidelines" approach and found it inadequate. See BMR Civic Affairs, "Food for the Cities", op. cit.

2. In Chapter 6, the Committee summarizes the difficulties of the official plan. See also D.M. Nowlan, "Towards Home Rule for Urban Policy", Centre for Urban and Community Studies, University of Toronto, Research Paper #83, November 1976.

-that this framework could consist of either a comprehensive plan or individual policy statements pertaining to specific planning activities; these would be renamed in the Act "municipal plans" or "municipal planning statements" (Sec. 6.5, 6.8);

-that, in contrast to the current system, there be no requirement for provincial government supervision and approval of these plans; hence, they would no longer be "official" (Sec. 6.7);

-that the legal requirement for subsequent planning actions (such as zoning by-laws) be changed from being "in conformity with" formally adopted policies to "having regard for" them (Sec. 6.34).

These proposals mean that the municipal plan would work within a different set of checks and balances from those of the current system. Interestingly the Robarts Report, while similar in many respects to Comay, opts for the retention of the official plan and conformity concepts, although for Metro in relation to the area municipalities.[1]

Most criticism of this concept of the municipal plan is prompted by the same doubts about municipal responsibility discussed earlier. Skepticism as to the capability of municipal politicians (or of the people who advise them) to act in a consistent, equitable, comprehensive and policy-oriented manner leads some observers to advocate maintaining the status quo as far as the official plan is concerned, despite the frustrations and delays caused by a rigid approval process. Underlying the opinion of even those who fully appreciate and respect the planning capability of municipalities is the suspicion that, somehow, individual or community interests will be adversely affected without an "official" plan.

There are really two things at issue: first, whether the municipal plan should be "official"--i.e., supervised and approved by the Province--and second, the legal status of the municipal plan vis-à-vis statutory tools, particularly zoning by-laws.

Our understanding of the proposal to "de-officialize" the plan is that, far from being what some critics consider an abandonment of plan-making, it is actually a call for *much more* planning. The main safeguard of the proposal is that no council could engage in any planning activity without first establishing a clear policy base. This basis for planning would be either a comprehensive policy plan or an individual policy statement. It would be adopted by a council in a formal and public way, guided by procedural rules for notice, hearing and objection (Sec. 9.10 to 9.18).

1. See Robarts Report, Recommendations 11.1, 11.11, 11.12. Our recent BMR Topic No. 2, op. cit., discusses the Robarts official plan idea for Metro, and decides in favour of the Comay approach.

Further, it would have to specify what the council was aiming for with this policy and how it hoped to use its variety of planning tools to achieve these ends (Sec. 6.17).[1]

Of course it would be naive to assume that appropriate policies, well-reasoned and clearly stated, could as a practical matter be formulated, publicly discussed and adopted in all circumstances and in all jurisdictions. The development imperative in fast-growth areas to the west of Metro, for instance, is very strong and the burden of keeping a watchful eye on all municipal planning activities would continue to be very heavy indeed on the provincial planners. Nevertheless, in comparison with what happens now, we believe these proposals offer significant improvement. Under the present Act, a municipal council can pass zoning by-laws or subdivision agreements or, through its committee of adjustment, grant rural consents all without having any type of official policies plan in place. *Thus, in the Bureau's view, the proposal for municipal plans/planning statements gives an emphatic boost to planning; the proposal that the Province not approve these plans--i.e., that they are not "official"--is consistent with the principle that a senior level of government should intervene in planning only to object.*

An alternative to the direction taken by the Committee--making the passage of (official) plans mandatory for all local councils--has the fatal shortcoming that it would be extremely difficult to enforce. Realistic penalties such as the withholding of provincial transfer payments could result in undue hardship to the community represented by the recalcitrant municipality, or, alternatively, to the adoption of inconsequential plans for the sake of expediency.

The second issue is the changed legal status of the municipal plan. Many observers believe that, if zoning by-laws must only "have regard for" formally adopted policies (rather than be "in conformity with" them), then local councils, unwittingly or not, could run roughshod over their own policies.

The existing conformity provision[2], of course, is not neat in actual practice; Section 35 (28) of the Act, for instance, exempts by-laws from strict conformity by allowing the Ontario Municipal Board to *deem* conformity. Nor is the "have regard for" provision new. It already exists in Section 33 (4) of The Planning Act where, in considering subdivision plans (a major part of all planning activity), the Minister must have regard to a number of items.

More important in our consideration of the proposal is the Committee's finding that the legal status afforded by the conformity provision is misleading (Sec. 6.31); further, it can adversely affect both the shape and content of a council's policies, with plan substance being sacrificed to legalistic considerations (Sec. 6.32).

1. The proposal for no action without a pre-established policy is doubly important if, as we suggested in Section 1 of this Topic, the Province chooses to withhold planning authority from municipalities which have not formulated policies.

2. Section 19 of The Planning Act.

In our view, there is much merit in arguing that a *different* legal status for the municipal plan would have a positive effect on a council's behaviour. Of course, the Province will have to take legal opinion on whether the "have regard for" provision in this context would provide a similar degree of certainty and predictability that the conformity provision offers. We suspect, though, that much of the certainty an official plan has provided has come not from the conformity provision, but rather from the fact that a plan has been fairly difficult (or at least slow) to amend. *And under the Committee's proposals, a municipal plan could not be abandoned or amended willy-nilly.* If a specific development proposal favoured by the council were at variance with an adopted plan or planning statement, the council could change the plan or depart from it for that one case. But in either instance the council would have to notify interested parties and hold an open hearing prior to making the decision. That decision would become final only if there were no objections; aggrieved parties could appeal the decision to the O.M.B. or the Province could veto it. Thus we do not believe the proposed reform would obscure a council's responsibility to act on specific decisions in accordance with its own policies.

A separate but related charge against the proposal to give the municipal plan a different legal status is that it could open the door to increased attacks on the validity of municipal by-laws in the courts. This risk could perhaps be overcome by establishing in the revised legislation a limitations period, say 60 or 90 days, for challenging a by-law on the sole grounds that the council failed to have regard for certain of its policies.[1] This would prevent either a developer or a citizen's group from attempting to prove long after the passage of a by-law that a council did not adequately consider its own policies at the time.

With this modification, we believe that, in most cases, there would be effective procedural checks on the "de-officialized" plan: no planning activities without formal policies, all decisions to have regard for these policies, provisions for notice, hearing and appeal on the policies or subsequent decisions, and finally, the overall guidelines or outer limits set by the provincially (or regionally) defined interests. Therefore the municipal plan would still retain its binding quality.

Apart from the benefits to the planning process already mentioned, we see several other advantages in adopting the Committee's proposal. First, we found some agreement among people we interviewed that this de-emphasis of formal plan approval requirements might actually cause more attention to be paid to plan-making. The feeling was that municipalities would be less apprehensive of creating their own straight-jacket and therefore more willing to state their long-term as well as their short-term priorities.

1. Metro's Planning Committee has recommended using the phrase "be consistent with" (instead of "have regard for") to reduce the likelihood of increased litigation. See Executive Committee Report No. 12 of the Planning Committee, 19 October 1977. While it might indeed accomplish this, the phrase might also undermine the main intent of the proposal to change the conformity provision to a "have regard for" provision, that is: to encourage positive action by municipal councils to achieve their objectives. This is because the dictionary definitions of "consistency" and "conformity" are very similar.

Similarly, the legislative encouragement for area- or problem- specific planning statements might well cause smaller communities to become more interested in planning, because their needs could be better and more quickly met than with a "comprehensive" approach. One of the Committee's own background papers set out the criteria for the planning process and its instruments in small communities: they must be attuned to the scale, nature, and pace of development in the area, and they must be able to be comprehended and managed by the local people.[1] A single planning statement identifying the main planning problem in the area--for instance, the long- and short-term costs of scattered rural development (extra servicing costs, loss of high quality farmland), or the decline of main street stores and businesses--and setting out appropriate objectives and policies could be much more useful to a local council and the community it represented than a document with chapters based on categories of land use. Those communities (larger cities or regional municipalities, for instance) which wished to produce a conventional plan--i.e., an interrelated set of policy statements--would still have legislative sanction for this activity. We are assuming that provincial planners would be able to advise municipalities as to when a plan rather than a statement would be appropriate (or when a series of statements should be consolidated into a plan, or, possibly when a plan should be supplemented by a special policy statement).

Second, under the Committee's proposals, one might also anticipate a new and practical plan review process. The emphasis now is on a five- or ten-year statistical update (although even this does not always take place). While this type of review is certainly necessary, so too is the shorter-term performance review: what policies have been implemented? how effective have they been? have objectives changed, or should they?[2] In practice, this would be a form of monitoring; we think this type of activity as a widespread municipal practice (and not only in planning) is long overdue.

4. The Role of the Ontario Municipal Board

The Committee's proposals with regard to the O.M.B. are likely to be the most contentious of all its suggestions. Yet they are clearly related to recent concerns over the nature and extent of the Board's influence in municipal planning matters.[3] And they are supported by the Robarts recommendations; both the Comay and Robarts reports propose that the Board function as an advisory-cum-appellate body with respect to municipal planning decisions.

1. Planning Act Review Committee, Background Paper No. 5, "Planning For Small Communities" (by Gerald Hodge, School of Urban and Regional Planning, Queen's University).

2. For instance, the City of Toronto Housing Department publishes an annual performance review which is available to the public and then discussed by Council.

3. See the Province of Ontario, Report of the Select Committee on the Ontario Municipal Board, 1972, and the Ontario Economic Council, Subject to Approval: A Review of Municipal Planning in Ontario, 1973. The Bureau's own Civic Affairs, "Urban Development and the Ontario Municipal Board", Winter 1971, was a critical review of the O.M.B.'s structure, procedure and jurisdiction.

There is widespread consensus that the O.M.B. provides a valuable recourse other than the courts for citizens affected by planning decisions. But much debate regarding the O.M.B. has centred on the issue of whether the Board, which was originally intended to act as a quasi-judicial *administrative* tribunal in municipal planning matters, exercises more influence in the municipal planning system than it should. Consistent with its own principles of clarity and accountability in the system, the Committee takes a definite stance:

> "We think it is wrong that in approving municipal planning decisions, the Board is frequently called on to substitute its own judgement for the judgement of elected municipal councils or the Minister. Moreover, where explicit provincial policies are lacking, the Board can be required to determine such policies, and is thus in some instances called on to make rather than simply apply provincial policy." (Sec. 10.4)

Specifically, the Committee suggests two major reforms which would define and limit the Board's role:

- the Board should serve only as an appeal body, to hear objections to the way in which municipal decisions were made; that is, to hear objections on the grounds that the council's behaviour was unreasonable or unfair or that the council acted on incorrect or inadequate information or advice (Sec. 10.9);

- the Board should not make final decisions but rather recommendations to the appropriate elected officials, the Minister (if the council's behaviour were deemed unfair or unreasonable) or the municipal council (if the Board determined that the council had acted on incorrect or inadequate information). (Sec. 10.7, 10.14, 10.15)

Thus the Board would lose its existing powers to approval all zoning by-law decisions regardless of whether an objection had been raised. It would retain its central role in the grievance process, though, handling appeals on a variety of municipal planning actions. The grounds for appeal would be clearly defined. And, instead of being a final decision-making body, the Board would serve as a reporting agency. In this respect it would fill a function similar to the Hearing Officer now authorized for provincial planning matters under The Planning and Development Act.

While many observers can readily agree that it is not necessary to have the O.M.B. approving by-laws where no objection has been made, some find the Committee's proposals for limiting grounds for appeal and removing final decision-making authority unacceptable. They cite a number of reasons, ranging from extra delays or increased power of the civil service to the concern that natural justice would not be done. In our view, this last criticism is the most serious, and we deal with it below.

By "natural justice" we understand a number of procedural principles having to do with an individual's rights to notice of a decision, to information concerning a decision, to a hearing before an impartial body, to be represented by counsel, to present evidence, and to cross-examine.[1] The rules of natural justice have been designed to ensure that any parties who may be affected by a decision will have "a fair opportunity to influence the decision". They flow from the broader principle that an individual's basic rights should be protected from arbitrary actions by government.

The Committee was very much concerned with natural justice; one has only to recall the fundamental shift in onus which underlies all the proposals. And with regard to the appeals process, the O.M.B. still would remain the central element as an independent body which hears evidence and makes findings. Yet it is legitimate to ask whether limiting the grounds on which an appeal may be heard, as the Committee has suggested, would deny any interest their rightful say at the O.M.B.

We cannot express a legal opinion as to the validity of the suggested grounds. On the other hand, the Report itself is not a statute; rather, its purpose is to set out proposals which could frame legislation. *In principle, the Bureau can support the idea of limiting the range of O.M.B. consideration.* This seems to be a constructive way of dealing with the major criticism of the Board: making policy rather than applying it.[2] We also understand that the generalized grounds for appeal ("unreasonable/unfair behaviour" or "inadequate/incorrect information") could be applied by the O.M.B. in specific cases. To safeguard against too broad or too narrow exercise of O.M.B. discretion, the Committee proposes that objectors file written reasons for their request for appeal (Sec. 10.29) and, where necessary, a preliminary hearing be held (Sec. 10.28). In considering an appeal then, the Board would still examine the merits of the case, but in a controlled way. It would not conduct a trial de novo because it would have before it the full written record of the information and advice received by the council when the decision was made (Sec. 9.15, 10.12) and could therefore judge whether the information was inadequate or the behaviour unreasonable.[3]

In general, we would expect the effects of making the Board an appellate body and setting outer limits to the exercise of its discretion to be positive. First, the O.M.B.'s energies would be focussed where they were really required--where a municipality was alleged to have misused its authority. The courts, and not the O.M.B., would continue to deal with flagrant violation of rights.

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1. See, Report of the Royal Commission on Civil Rights (Mr. Justice J.C. McCruer), 1 (1), 1968, Chapter 11.

2. In fairness one should note that the O.M.B. has not necessarily sought out increased power in the planning system; the system has evolved that way, with both municipal and provincial politicians relying on the Board. This is why it is important to view the Report's recommendations for the Board in the context of its proposals for municipal councils and the Province: the intent is to increase accountability *throughout* the system.

3. The Report does not specify how detailed this record would have to be; such technicalities would have to be worked out before legislation was drafted.

Second, all participants might gear themselves more to the original decision than to a possible appeal. Those objectors who would be excluded from having their day at the Board would be those who simply did not like a council's decision, no matter how reasoned it was, and wished to try their chances in another form.

Differences in opinion as to whether converting the O.M.B. to a reporting agency impairs the process of natural justice seem to be based on ideological rather than technical concerns. This makes the case for or against the proposal difficult to argue; one sees different risks depending on one's basic values. Those most opposed to removing the O.M.B.'s decision-making power are those who hold that planning as a governmental activity affects civil rights, particularly property rights, and that where disputes arise, these must be adjudicated. Hence they argue that the O.M.B.'s significance lies in its ability to determine the "proper balance" between private interests and public interests in planning.

It would be foolish to assume this argument is of no consequence; property interests in particular are deeply entrenched in our form of democratic society. And we fully recognize the importance of the stability and certainty that can be achieved through municipal planning to both large-scale and small-scale investors: developers must minimize their investment risks, and residents, both homeowners and tenants, have a right to expect a stable neighbourhood environment, protected from the effects of speculative activity or sudden physical change. *Yet we also agree with one of the Committee's fundamental premises: that planning decisions are by nature political decisions. They deal with competing interests. It follows that, while it is highly useful to have a mechanism for the impartial review of grievances, such as the O.M.B.*[1]*, the final determination of a matter should properly be made by elected officials. Otherwise no one can be held accountable for the decision.*

In practise, we expect that municipal councils or the Minister would accept the O.M.B's recommendations in the majority of cases. The O.M.B. is widely perceived to be fair, so that the public pressure to comply with the Board's findings would be substantial. In its reporting role, then, the O.M.B. could actually foster increasingly responsible political behaviour.

There remains a separate but related issue which causes some observers to prefer the status quo as far as the O.M.B. is concerned: the Committee's suggestion that the Board function as an appellate and advisory body can be interpreted to mean that a municipal council, because it would have final decision-making powers, would have to act "judicially" so as to ensure natural justice. The implication is that this would be both an impractical and unreasonable burden because it would oblige the council to hold a court- or O.M.B.- type hearing prior to the initial decision[2]; otherwise it would lay itself open to increased legal attacks as to the validity of its actions.

1. Most other jurisdictions in Canada, with the exception of British Columbia and Quebec, have a planning grievance mechanism, but the structure and powers of the O.M.B. are unique among such bodies in Canada.

2. This would mean, for instance, maintaining a quorum of the same council members, sitting long hours to hear all evidence, deciding impartially on the basis of the evidence.

Obviously, any Planning Act revision based on the Committee's proposal would have to take this danger into account. For our part, we would interpret the proposal to mean confirming in law such procedures as are now followed as a matter of course by, for instance, the City of Toronto: when a by-law change or official plan amendment is proposed, a public meeting is held where interested parties can come to have their say. In fact, we would prefer a common-sense approach to be taken. Any revised legislation should guarantee what would be "fair" to the man-on-the-street: if an individual's rights were to be affected by a decision, then the individual should receive notice and have an opportunity to present his views *before* the decision is made. As the Act now stands, there are fewer procedural safeguards than the Comay Report proposes:

- regarding zoning by-laws: a council is under no obligation to hold a hearing prior to the passage of a by-law; only the O.M.B. is required to hold a hearing, and this can be dispensed with if no objections have been brought forward;
- regarding official plans or amendments: these may be adopted by by-law with no mandatory hearing, unless an objection is raised, in which case the Minister decides whether or not an O.M.B. hearing will be held.

Only where a site-specific official plan and zoning change have been proposed is the council required to hold a hearing. Yet surely to the ordinary individual the potential adverse effects of any planning decision are the same.

In summary, the Bureau can accept the Committee's major proposals with regard to the O.M.B. There are obvious advantages to be gained as far as accountability is concerned.[1] *And in comparison with current legislative provisions, there would be more opportunity for each interest to be expressed, prior to a decision as well as on appeal.* In our view, this is the only test that, finally, can be applied: whether the legislative changes would better allow each interest to be represented.

The Committee's main reforms apply to a system where municipalities have final authority over their planning tools, subject to appeal or veto. The Committee also suggests that, even if the Province chooses to retain its approval powers over municipal planning, the Board's role should still be that of an appellate body, advising the Minister. We would support this.

5. Planning Authority in Two-Tier Municipalities

The Planning Act makes little distinction between the planning authority of a regional municipality or restructured county and an area municipal council. Both upper and lower tiers exercise statutory powers, the exact allocation being determined not in The Planning Act but in the individual regional Acts.[2] Given this context, the Planning Act Review Committee could only attempt to define the common regional responsibilities in planning and the general

1. For those who worry that having the O.M.B. act as a reporting agency will sacrifice time savings for accountability, the revised legislation could impose time limits for decisions following O.M.B. recommendations.

2. All regions/restructured counties may prepare official plans or redevelopment plans; some have been assigned zoning, subdivision and consent powers; and a few exercise final approval authority over subdivision plans.

authority for intervention into local planning decisions. Its five main recommendations are:

- that the appropriate upper-tier role is to ensure that local planning actions are consistent with defined regional interests (Sec. 8.9); these arise out of the interests of the residents of the area as a whole (as well as from the statutory responsibility to provide roads, pipes, etc.) and relate ultimately to the regional development pattern and development structure (Sec. 8.14). (Note that the scope of planning, regional and local, will be discussed in the next section.)

- that the Province must continue to review local decisions, and veto them if necessary, because protecting the regional interests in local planning will not of necessity secure the provincial interests (Sec. 8.6);

- that the region intervene in local planning not to approve but only to object, with ultimate resolution being a provincial responsibility (Sec. 8.25; 8.26);

- that as a general rule the region be assigned subdivision approval and consent powers, with further delegation to local councils being determined by the regional council and authorized in the regional Act (Sec. 8.37);

- that the region be allowed to set development standards, including guidelines for local zoning (Sec. 8.44).

The caveat that appears mid-way through Chaper 8--specific allocations of authority between the tiers would actually depend on the existing regional legislation (Sec. 8.32)--confuses this section of the Report. Because the Committee made no clear allocation of authority between the two tiers, the proposals mean different things to different people. Some regional planners are satisfied that they can secure the regional interests under this system. Others fear that the planning authority they currently have (and perhaps the credibility of their regional government) might be weakened: instead of reviewing local decisions to approve, as intended under the present system, they would be reviewing only in order to object; and where agreement could not be reached with an area municipality, the provincial government, not the region, would determine the outcome. In contrast, some municipal officials are cheered by the apparent new vistas opening before them. Yet others are sobered by the hints later in the chapter that they might not receive subdivision and consent powers (if, for instance, they are labelled "rural" rather than "urban") and that their zoning powers could be constrained by development standards.

In short, the Report's treatment of planning in two-tier municipalities is unsatisfactory. The Committee should be commended for attempting to clarify the planning role of the county/region in relation to area municipalities and suggesting that this be included in the legislation; this is definitely an improvement over the existing Act. We understand that in some jurisdictions there has been a good deal of conflict between regions and local municipalities. But before the proposals can be used to frame legislation, some clarification is required. *The main question is:* in a reformed planning

system characterized by a dual emphasis on local autonomy and on limited but focussed provincial intervention, *is the region to function as another level of municipal government or as a sub-province?*

With regard to the planning relationships between regional councils, the Comay Report is more useful. It recommends that formal inter-regional planning machinery be established to deal with certain issues in housing, transportation, agricultural land and resource management (Sec. 7.19). This recommendation is intended mainly for the central Ontario urbanized region, but making this provision under The Planning Act now would ensure that other areas could respond as required. The suggested mechanism is a permanent standing committee comprised of regional council (elected) representatives, with municipal council and ministerial participation as appropriate.

Some observers fear more "red tape" and "yet another" level of government. Clearly this would not occur. The Committee has in mind a consultative forum; its members would meet on a continuing basis to discuss common objectives and co-ordinated ways of achieving them, and then report back to their respective councils on both short and long term planning matters.[1]

We cannot argue with the proposition that land use decisions and the provision of services and facilities be planned in a co-ordinated way over a large urbanizing area. *The Comay proposal in this regard seems to be sensible and we support it.* We would caution, however, against expecting great returns to planning from this effort. If the inter-regional standing committee members could reach agreement on an issue, and subsequently persuade their councils of the same, then the process could produce substantial gains (e.g., in the distribution of housing in relation to jobs). Co-operation cannot be guaranteed merely by making structural changes, however; and *the Committee would not really be a co-ordinating agency, because it would have no powers to ensure co-ordination.* A second posible benefit is that regions and their constituent municipalites might acquire increased bargaining power vis-à-vis provincial (and federal) governments.

The real risk taken in establishing such committees is that they could be used by the provincial government as an excuse for not defining the province-wide interests. For instance, could the Province use the committees to avoid making necessary but politically sensitive decisions on such matters as waste disposal sites, distribution of employment and housing, and maintenance of the agricultural base?

6. The Scope of Planning

The Committee's proposal that the primary purpose of planning is "to establish and carry out municipal policies and programs for the rational management of the municipality's physical development" (Sec. 2.34) has elicited approval from many observers but regret, or even alarm, from others. The Committee's desire to refocus the scope of planning is understandable in view of the widespread sense of frustration about municipal planning:

1. The Robarts Report suggests a similar type of forum--The Toronto Region Co-ordinating Agency, provided for by statute, but with no executive responsibilities.

that it has promised too much and delivered too little, that it has been overly goals-oriented rather than problem and solution-oriented, that its instruments have been inappropriately used. The reaction is mixed because, on the one hand, the Committee's proposals seem to fly in the face of all that has been learned about the adverse consequences of planning just for physical development, and on the other hand, it appears to reflect a realistic understanding of the inherent limits of municipal planning under The Planning Act.

The long-standing critique of planning practice is two-fold. First, that it has been obsessed with too much detail and paid too little attention to policy. Second and closely related, that it has been too much oriented towards accommodating market forces rather than altering their operation so that a broader range of social and economic needs are met.[1] The implication of this critique is that planning should have accomplished more. Echoing partly this concern, the O.E.C. report, Subject to Approval, took exception to planners who "have spent most of their lives in the application and stale pursuit of development control... They have not, in any discernible sense, emerged as a truly innovative force in the area of public policy formulation".[2]

In contrast, the Review Committee argues that planning has "failed" mainly because people themselves have failed to understand the limits of statutory tools for planning. Zoning and subdivision powers, for instance, relate mainly to physical development and even then can only regulate what happens, not cause it to happen, or control all the outcomes. Although the Committee acknowledges that the use of planning tools can and should be influenced by social and economic objectives, it maintains that the tools should not be regarded as primary means for accomplishing these objectives. Hence the Report's concern that planning tools be used in a realistic way and the suggestion that the "health, safety, welfare, and convenience" provision of the Act be replaced with one where municipal planning:

> "must... have regard for social and economic concerns and needs in establishing the community's physical development goals, and must take account of the social and economic consequences of municipal development policies and programs" (Sec. 2.35).

While most observers would agree that planning decisions ultimately do involve land use and buildings, some fear that formalizing the scope in this way would cause the social content of planning to be ignored. Again, this attitude is based partly on the perceived inability of municipal officials to have responsibly. We have argued throughout this Topic that the Report provides a number of checks against the risks of increased local autonomy. Further, the Comay proposals manifest a definite concern for the social pattern of communities in recommending that the revised legislation bar exclusionary zoning and housing practices (Sec. 14.16). As for the protection of other non-property rights--quality of life considerations and community facility or program requirements[3]--the Report places the onus on the Province: to develop policies and standards, to assist municipalities in adapting them to local circumstances and to intervene when the achievement of these policies is threatened by particular municipal decisions.

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1. For practical purposes, we can assume the modern critique of planning began with Jane Jacobs in the early 1960's and has continued through into the 1970's with such varied writers as Bolan, Davidoff, Friedman, Sennett; and in Canada, Gerecke, Gutstein, Clark.

2. Ontario Economic Council, op.cit., pp. 39-40.

3. For instance, neighbourhood safety and stability, access to day care, recreational, library and medical facilities.

Our confidence that municipal plans will have useful social content is conditional: to ensure that the provincial framework will be forthcoming, the Act should specify that the Province "shall" spell out from time-to-time what municipalities should have regard for--in circulars, regulations or orders-in-council (not "guidelines", as we indicated in our discussion of the defined provincial interest). *Similarly, methods for determining the social and economic impacts of certain development decisions should be set out* (for instance, the impact on the diversity of employment and the economic base of a town resulting from a decision to build an office block, or the impact on a farming community of rural estate development). Our underlying premise is that while planning legislation cannot guarantee that all interests will be satisfied by a particular decision, it should at least ensure that they will not be ignored.

The Bureau has a different concern if the scope of planning under The Planning Act is limited as suggested: will the overall social, economic and financial planning of the municipal corporation--frequently referred to as municipal management or municipal "corporate" planning--be done?

The Committee's view on the municipal plan as a record of co-ordinated policy thinking is plainly stated:

> "As practiced under The Planning Act, municipal planning is not the same as municipal management. It is not a substitute for municipal corporate planning, nor the appropriate vehicle for overall financial, economic or social planning. We do not discount the importance of these activities in municipal management, but conclude that it is simply not appropriate to equate them with municipal planning... or to make them the responsibility of the operators of municipal planning." (Sec. 2.32)

We are sympathetic toward this view, but at the same time disappointed. What the Committee is really concerned with is municipal *land use* planning and the *land use* Planning Act. While this focus may appear to be a retreat to the 1950's and 1960's type of municipal planning, it is really a valid attempt to sort out one particular aspect of overall municipal "planning" activities--land use--and to improve the legislation which affects it. The problem is that this leaves municipalities without explicit legal authority to undertake their broader planning responsibilities.

Municipalities are increasingly aware of these broader responsibilities. Most recently, the Robarts Commission affirmed that the Municipality of Metro Toronto should be involved in the planning of human services ("the health, education, social, recreation, cultural and library services provided by governments and a variety of private and independent organizations") *and* that the municipal plan is the appropriate instrument for expression of human services objectives and policies.[1] The logical inference from its argument is that the scope of the plan can be expanded to provide an overall framework which is a fundamental description of what the municipality is, where it is going, and how--whether by subdivision and development control policies under The Planning Act *or* by other means at the council's disposal. In fact, the Robarts Report lists a non-land use definition in its glossary:

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1. See Robarts Report, Chapter 16, "The Human Services System", p. 302. As we noted earlier, whereas the Commission's suggested system of planning in Metro is very similar to the Comay Report, the Robarts Report opts for the retention of an "official" municipal plan.

planning--"any effort on the part of a public body to understand and respond to key factors affecting its present and future operating environment and to prepare future courses of action in relation to those factors".[1] The Robarts municipal plan, then, would be a record of this effort to consider a variety of problems of people living in a particular geographic area.

In the City of Toronto, the Commissioner of Planning has cautioned that "experience in this municipality has demonstrated the profound importance of the plan as the one place where council can tie together its policies and programs affecting a whole range of urban problems, from the housing of its citizens to the regulation of noise or other environmental pollutants".[2]

Outside Metro, some municipalities are already attempting to develop (official) plans that can be used to mesh the whole range of a council's planning activities. And planners in planning departments have played a key role.[3] In fast-growing Peel, there is considerable debate, among the planners at least, as to the scope of the regional plan. Those arguing that the plan should function as an overall management document claim that there is no other statutory instrument currently available by which a developer or the public at large can determine the council's broad concerns for the area. In Halton the planners regard the new draft official plan as the chief document by which the regional corporation will manage both long and short term community affairs, whether this involves capital works programs, or negotiations with senior levels of government for social and health program funding, or guidance regarding area municipality land use controls.

The questions these current activities raise, in light of the Comay proposal to limit Planning Act planning to land use, are: *who should be doing the broader type of municipal planning?* Under what legislative authority? Where should this occur in the municipal organization? What about those municipalities (to date, mainly regional municipalities) that are already devoting much staff time and effort to thinking corporately within the context of the official plan?

We tend to agree with the Committee that the broader municipal planning can now be carried out using powers under a variety of Acts, and that therefore the problem is mainly one of municipal administration. As such it is beyond the scope of the Comay Report. Nevertheless it is related, and we regret

1. Robarts Report, p. xix. This interpretation is very similar to the American Institute of Planners' definition of a planner, and hence a plan. For instance, the AIP places only minor emphasis on experience in such fields as subdivision design, large-scale site design, traffic engineering or social work and community organization. It stresses instead the ability to analyze interrelated social, economic, financial and administrative issues, to develop appropriate policies and programs, and to evaluate these in terms of performance and effectiveness.

2. Commissioner of Planning, "Comments on the Report of the Planning Act Review Committee", October 7, 1977 (as amended).

3. No doubt because, being from a wide variety of backgrounds, planning staff are accustomed to bringing a number of perspectives to bear on an issue. As well, the plan has been seen as a ready and useful way to involve the public in long-term overall planning.

that the Committee did not choose to spend more time discussing the organizational issues involved once the land use planning function has been sorted out. The municipal management art in Canada is, after all, only in its infancy.[1] In terms of the Committee's proposals, Toronto's Metroplan may be on the right track, intended to be a land use, population distribution and facilities plan, but one developed out of, or consistent with, "plans" prepared outside the (physical) planning department. But then Metro is a large municipality with a sophisticated administrative system. What should smaller municipalities, with fewer resources and problems different in nature or scale, do? What are the risks that they will focus on land use planning in the short and medium term, not appreciating the need for a broader management approach when it arises, or that they will extend their vision, but fail to understand the methods for achieving it? *We are disappointed that the Committee made no attempt to examine the implications--for municipal responsibilities in general and for upper-tier planning in particular--of restricting the scope of planning under The Planning Act.*

SUMMARY AND CONCLUSIONS

The reforms proposed by the Planning Act Review Committee would result in a system where municipal planning decisions would be "subject to objection" rather than "subject to approval". In this Topic we have examined selected features of the system to assess the adequacy of the checks proposed. On the whole, it is a system which the Bureau supports.

We note that, while most observers are sympathetic toward the intent of the reforms (to reduce provincial supervision over planning matters that are appropriately municipal), many fear that the confidence in local government which underlies the Report is unwarranted, and that the proposed system only increases the danger of arbitrary decision-making. We do not share this fear.

Notwithstanding our overall support of the system, we find the Comay Report weak in two areas: it is unclear as to the role for regional-level planning in a two-tier system; and, it does not explain how a municipality's overall social, economic and financial planning will be accomplished, given its physical and land use definition of municipal planning. Further, in view of all the cries about "red tape", it is regrettable that the Committee did not deal directly with the issue of planning delay. The Committee focussed on accountability in the municipal planning process and merely *assumed* that delay exists as a consequence of the process and that it should be minimized wherever possible. Thus while the Report makes some suggestions which would speed up the process, it does not contribute significantly to our understanding of why delays occur, which can be considered acceptable and which unacceptable[2], and whether it is valid to blame all manner of ills--especially land and housing costs--on it.

1. Although there is considerable professional concern (for instance, in the Institute of Public Administration of Canada and in the Local Government Management Project at Queen's University), as yet there are relatively few practical applications.

2. The Dobry Report in the U.K. ("Review of the Development Control System", HMSO, 1975) presented a useful treatment of planning delay.

We point out aspects of the proposed system that would have to be emphasized in the revised legislation:

- first, the Act should require the Province to monitor local decisions and to define its own interests in local planning by means of provincial policies or standards articulated in circulars, regulations, or orders-in-council;

- second, the Act should specify the nature of the provincial veto power, the conditions under which it would be exercised, and its expected effects;

- third, the Act should be worded so as to convey to municipalities the importance of determining their planning objectives and acting to achieve them through their day-to-day development decisions; procedural safeguards, including a limitations period for challenging a municipal by-law solely on failure-to-have-regard-for grounds, should be provided as back-up;

- fourth, the Act should set out new opportunities for full participation at the time a council is making a decision and offer the clear assurance of an appeal process wherein all legitimate objections would be considered by the O.M.B., in a clearly defined way.

Finally we indicate, for two key proposals, how the transition from the old system to the new could be affected. With regard to determining whether planning autonomy should be withheld from a particular municipality, the Province should consider the following factors: is the municipality organized to carry out planning activities? is it currently subject to a zoning order? is there an emerging provincial policy which makes such an assignment inappropriate? With regard to the O.M.B., the Board should immediately function as an appeal body only, but it could report its findings during this transitional period just to the Minister and not back to local councils, as is the main proposal.

Our general understanding of the proposed system is that it would bring about significant improvement; it strikes a logical balance between local autonomy (this imposes its own obligations) and constraints on autonomy when province-wide interests need to be protected. We acknowledge that our understanding can be in theory only at this point; we cannot *predict* how the existing planning system will respond because the new relationships are as yet untried. Until then, there is no test that can be made, only a calculated risk or leap of faith that can be taken. This calculation involves one's judgement of three key factors:

- how the increased responsibility will affect a council's behaviour;

- how the provincial government will exert its necessary and legitimate interest in municipal planning;

- whether the new system provides sufficient safeguards for the whole range of rights affected by planning decisions.

In our view, the increased authority should encourage municipal councils to first plan and then make sound decisions. We think that under Comay the need for the Province to define its interests in *municipal* planning becomes irrefutable; the provision for these interests to be set out incrementally rather than in an integrated grand design might even increase the likelihood of *provincial* planning action on province-wide issues. And we feel that, at a minimum, the required checks are no less in the proposed system than in the present.

There is a second leap of faith that must be taken: endorsement of the Committee's main proposals is based on a confidence that the provincial government can reorient its approach; that is, that it can decentralize planning authority. While provincial spokesmen have stated that this is the intended direction, the Province will have to devote its energies to ensuring that it is not sidetracked by other important priorities--for example, balancing the budget, or reducing the size of the provincial-municipal government sector in the Ontario economy.

In summary, the Report's value lies in the challenge it poses. This challenge is two-fold: first, that municipal councils, in return for increased authority, will act responsibly, consistently, and in a policy-oriented manner; and second, that the Province, in return for being relieved of its detailed supervisory duties, will develop policies that are useful guides for municipal planning. Considering the original context of the Planning Act Review, *we interpret the Report as posing a further challenge--to the key private actors in the system, chiefly the development industry: that, to the extent that some of the unnecessary steps in the planning process have been eliminated, the industry will in fact find it easier to deliver the reasonably-priced housing which it claims has been held up because of planning procedures.*

We think these challenges are useful, and worth the risks. In publicly accepting or rejecting the Comay proposals, the White Paper on planning will have to deal with several fundamental and politically sensitive questions:

- is the municipal level of government capable of dealing as fairly and effectively (or even more so) as other levels of government with matters that are within its own area of interest?

- are provincial ministries willing to forego detailed supervision of local planning activities? More important, will they formally and clearly define their interests, and accept Cabinet resolution where required?

- what are the rights of individuals and communities in the municipal planning process, and are they adequately secured?

Yet even if the White Paper favours the proposals and these are subsequently incorporated in a new Planning Act, none of us should pretend that the outcomes of the planning process will *necessarily* be different. The Comay Report is a conservative document. It is about the machinery for planning. The suggested changes offer a better chance that the substance of planning decisions will be more satisfactory to a broader range of publics, but the only guarantees in the reformed structure are that decisions will be made in a clearer and more accountable way. Thus those who would see planning

as one instrument to be used directly for broader social purposes are bound to be disappointed by the Comay Report. The Report describes a function for municipal planning but does not treat in detail the purposes of the legislation. And its approach to change is limited:

> ".... we could find no compelling reasons for recommending a totally new kind of planning system. Nor could we find an overriding need to propose changes that would involve radical redefinitions of the nature of local government or the nature of property rights. We do not suggest that a need for radical change might not be warranted under other kinds of assumptions, but only that the nature of our review and the submissions we received did not lead to such conclusions."[1]

The real issues in planning still remain: housing and jobs, natural environment, resource management. Only when there is an informed public consensus about what needs to be done can the political process effectively address such issues.

And while democracy means that government must reflect the wishes of the majority, it also involves the notion that government must provide leadership. Under the Comay system, the need for effective leadership at both the provincial and municipal levels becomes all the more urgent.

1. Comay Report, Sec. 2.15, p. 11.

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