Ontario Bar Association
Submission for Bill 73

Submitted to: Ministry of Municipal Affairs and Housing

Submitted by: Ontario Bar Association

ONTARIO
BAR ASSOCIATION
A Branch of the
Canadian Bar Association

L'ASSOCIATION DU
BARREAU DE L'ONTARIO
Une division de l'Association
du Barreau canadien

Introduction

The Ontario Bar Association (the "OBA") appreciates the opportunity to provide comments to the Ministry of Municipal Affairs and Housing (the "Ministry") as well as to the Legislative Assembly of Ontario (the "Legislature") on Bill 73 - An Act to amend the Development Charges Act, 1997 and the Planning Act ("Bill 73"). This document provides comments on the version of Bill 73 that at the time of writing is under debate at Second Reading before the Legislature.

The OBA

Established in 1907, the OBA is the largest voluntary legal organization in the Province representing nearly 16,000 lawyers, law professors and students. In addition to providing legal education for its members, the OBA is pleased to analyze and assist government with dozens of legislative and policy initiatives each year – both in the interest of the profession and in the interest of the public.

This submission was prepared by the Municipal Law Section, with input from the Environmental Law Section, which collectively have more than 650 lawyers who represent a broad spectrum of stakeholders involved in land use planning and development financing matters, including proponents, municipalities, the public and developers. Members of these sections also appear before courts and tribunals, including the Ontario Municipal Board (the "OMB"), and are leading experts in land use planning, development financing and environmental matters.

Overview

As the OBA is composed of lawyers that represent a broad spectrum of stakeholders involved in land use planning, development financing and environmental matters, our primary objective for our comments is to ensure that the proposed amendments to the *Planning Act,* R.S.O., 1990 c. P.13 (the "*Planning Act*") and the *Development Charges Act*, *1997*, S.O. 1997, c. 27 (the "*DC Act*") result in a more efficient and streamlined land use planning process while ensuring that accountability and transparency are maintained. We have commented on Bill 73 with this objective in mind, and we believe that Bill 73 may require certain amendments to address our comments. Should any revisions be made to Bill 73, we would appreciate the opportunity to provide further comments. We are also available to answer any questions about our comments and/or to provide any additional assistance the Ministry may require.

While we have not commented on the underlying policy, we wish to take this opportunity to note to you that the OBA has taken a position on reducing greenhouse gases (GHG), as has the provincial government. Changes in land use planning can have significant implications for GHG emissions and Ontario's goal to move to a low-carbon economy. We believe that anytime the government is

considering changes to land use planning, it needs to contemplate and advance its stated goals for addressing climate change and reducing GHGs.

Comments

This submission is structured to provide our specific comments on certain proposed revisions to the *Planning Act* and *DC Act* as contained in Bill 73. In the tables that follow, the amendments to the *Planning Act* and the *DC Act* are addressed separately. We have reproduced the relevant extract of the amendment that we have a comment on and we have then provided you with our comment(s) and/or question(s) for your consideration.

Table 1: Comments on Proposed Amendments to the *Planning Act*

Extract of Amendment	Comment
12. Section 2.1 of the Act is repealed and the following is substituted: 2.1 (2) When the Municipal Board makes a decision under this Act that relates to a planning matter that is appealed because of the failure of a municipal council or approval authority to make a decision, the Board shall have regard to any information and material that the municipal council or approval authority received in relation to the matter. (3) For greater certainty, references to information and materials in subsection (1) and (2) include, without limitation, written and oral submissions from the public relating to the planning matter.	If an approval authority or the OMB must have regard to oral submissions in making a decision under the *Planning Act* that pertains to a planning matter, this requires the approval authority or the OMB to have before it an accurate record of all oral submissions. The consequence of this may be that municipalities will be required to produce a transcript of all oral submissions made at a public meeting or Council Meeting. We recommend the Ministry clarify whether municipalities will be required to provide that transcript as part of the appeal record that is forwarded to the OMB, and who is expected to pay for the cost of producing the transcript.
15. Section 8 of the Act is repealed and the following substituted:	The intended purpose, role and function of any planning advisory committee appointed pursuant to Section 8 is not defined in the Act or any Regulation.

8(1) The council of every upper-tier municipality and council of every single-tier municipality that is not in a territorial district except the council of the Township of Pelee, shall appoint a planning advisory committee in accordance with this subsection. ….. [Also see: the remainder of subsection 8]	Will the Province define these, or is the intention for municipalities to define them?
17. (1) Section 17 of the Act is amended by adding the following subsections: (17.1) A copy of the current proposed plan or official plan amendment shall be submitted to the Minister at least 90 days before the municipality gives notice under subsection (17) if, (a) the minister is the approval authority in respect of the plan or amendment; and (b) the plan or amendment is not exempt from approval.	It may be helpful to clarify the intent of requiring the Minister to have a copy of the proposed plan or official plan amendment 90 days before the municipality issues a notice of a public meeting, which may answer some of the following questions/concerns: • Once the official plan is provided to the Minister would that mean no amendments can be made to the official plan during the 90 day period prior to the public meeting? • Alternatively, does any change to the official plan within the 90 day period mean that a revised copy of the amendment needs to be forwarded to the Minister and any scheduled public meeting is then delayed?
17. (4) Subsection 17 (23) of the Act is repealed and the following substituted: (23.1) The notice under subsection (23) shall contain, (a) a brief explanation of the effect, if any, that the written and oral submissions mentioned in subsection (23.2) had on the decision; (b) any other information that is prescribed. [Also see: subsection 22(6.7); 34(10.10); 34(18.1); 51(38) and 53(18)]	In our experience, oral submissions at a public meeting are often delivered to a subcommittee than to Council. If Council or an approval authority is to include an explanation as required under (23.1) (a) of the effect, if any, of any oral submissions made at a public meeting on the decision, this assumes that Council will have either heard the oral submissions, or reviewed a transcript of such submissions. A difficulty we have with this provision is that since the decision is one made by Council, as a whole, and not of individual members, it is not clear that the "effect" of submissions can be determined. Submissions may have had a different impact on each councillor's vote. If the provision anticipates that Council will debate the impact of submissions on their decision, in order to come to a consensus on the "effect"

	of the submissions on their decision, this may lead to an administratively onerous process.
17. (5) Subsection 17 (24.2) of the Act is repealed and the following substituted: (24.4) Despite subsection (24), there is no appeal in respect of a part of an official plan that is described in subsection (24.5).	This provision eliminates appeal rights for certain types of policies in official plans as detailed in subsection 24.5. This may include eliminating appeal rights for such policies where there may have been an error made in the drafting of the official plan provision. We would refer as an example an approved official plan policy inaccurately identifying an area as being within the boundary of the Oak Ridge Moraine Conservation Plan ("ORMCP"), when the ORMCP mapping indicates otherwise. The impugned official plan policy may be precluded from appeal to the OMB by subsection 17(24.4). The Ministry may wish to consider whether an affected landowner should have a remedy to the OMB to correct such errors.
17. (7) Section 17 of the Act is amended by adding the following subsections: (25.1) If an appellant intends to argue that the appealed decision is inconsistent with a policy statement issued under subsection 3(1), fails to conform with or conflict with a provincial plan or, in the case of the official plan of a lower-tier municipality, fails to conform with the upper-tier municipality's official plan, the notice of appeal must also explain how the decision is inconsistent with, fails to conform with or conflicts with the other documents. [Also see: subsection 17(37.1) and 34(19.0.1)]	In our view, it would be helpful for this provision to clarify whether the appellant is required to identify in its notice of appeal the specific subsections of the policy document(s) it takes issue with or whether it is sufficient to provide a general explanation of the inconsistency, non-conformity and/or conflict the appealed decision has with the policy document(s).

17. (7) Section 17 of the Act is amended by adding the following subsections: (26.1) When a notice of appeal is filed under subsection (24), the council may use mediation, conciliation or other dispute resolution techniques to attempt to resolve the dispute. [Also see: subsection 17(37.2); 22(8.2); 34 (11.0.0.1); 51(49.1) and 53(27.1)] (26.3) When the council gives a notice under clause (26.2) (a), the 15-day period mentioned in clauses 29(b) and (c) and subsections (29.1) and (29.2) is extended to 75 days. [Also see: subsection 17(37.4); 22(8.3); 34 (11.0.0.3); 51(49.3) and 53(27.3)]	We have several questions regarding the proposed use of dispute resolution techniques, including: • Who leads the process and who pays for it? • Once a council issues an invitation to participate in the dispute resolution process, is there any requirement for the dispute resolution process to actually occur? • Who determines when the dispute resolution process occurs? • Who determines who can participate in the dispute resolution process? • Does the proposed extension of time from 15 days to 75 days apply even if no one chooses to participate in the dispute resolution process? • If the issues raised are resolved between the municipality and the appellant, what sort of public notice is required? What gets sent to the OMB for approval?
17. (8) Section 17 of the Act is amended by adding the following subsections: (34.1) Despite subsection (34), an approval authority shall not approve any part of a lower-tier municipality's plan if the plan or any part of it does not, in the approval authority's opinion, conform with, (a) the upper-tier municipality's official plan; (b) a new official plan of the upper-tier municipality that was adopted before the 180th day after the lower-tier municipality adopted its plan, but is not yet in effect; and	We do not understand the rationale for an approval authority being precluded from approving any part of a lower-tier municipality's plan, particularly if only another part of the same plan does not conform with the upper-tier municipality's plan. We are concerned that there could there be a dispute about what amendment needs to be done to bring the lower-tier plan into conformity, and if so, would that preclude other parts of the plan that are in conformity from being brought into force until the dispute is resolved as ss.34.2 requires "the modifications remove any non-conformity described in the subsection".

(c) a revision of the upper-tier municipality's official plan that was adopted in accordance with section 26, before the 180th day after the lower-tier municipality adopted its plan, but is not yet in effect.	
17. (9) Subsection 17(35) of the Act is repealed and the following substituted: (35.1) The notice under subsection (35) shall contain, (a) a brief explanation of the effect, if any, that the written submissions mentioned in subsection (35.2) had on the decision; and (b) any other information that is prescribed.	It is our understanding that if the approval authority is to consider any written submissions made to it and indicate the effect that written submission had on its decision, the approval authority will need to identify the person to whom written submissions are to be made and the time period in which such submissions will be accepted. Would a brief explanation need to be made about each submission? We are concerned if this is the requirement because it could be administratively onerous.
17. (13) Subsection 17(40) of the Act is repealed and the following substituted: (40.1) the 180-day period referred to in subsection (40) may be extended in accordance with the following rules: 7. No notice of an extension or of the termination of an extension need be given to any person or entity.	We are concerned about procedural fairness in the provision that no notice of an extension need be given. If notice is not required, how does any other person or entity who may wish to appeal the non-decision know whether or not the appeal period has started?

17. (14) Section 17 of the Act is amended by adding the following subsections: (40.2) Despite subsection (40), there is no appeal with respect to any part of the plan of a lower-tier municipality if, within 180 days after receiving the plan, the approval authority states that the plan or any part of it does not, in the approval authority's opinion, conform with, (a) the upper-tier municipality's official plan; (b) a new official plan of the upper-tier municipality that was adopted before the 180th day after the lower-tier municipality adopted its plan, but is not yet in effect; or (c) a revision of the upper-tier municipality's official plan that was adopted in accordance with section 26, before the 180th day after the lower-tier municipality adopted its plan, but is not yet in effect.	It is our view that further guidance would be helpful, which can be provided by indicating how an approval authority may satisfy the requirement to 'state' that a plan or part of a plan does not conform with, for example, the upper-tier municipality's official plan, and whether and how it is contemplated that this will then be communicated to stakeholders. We also reiterate our concern about the impacts of holding up an entire plan of a lower tier municipality if only part of it is determined not to conform.
17. (15) Section 17 of the Act is amended by adding the following subsection: (41.1) At any time after receiving a notice of appeal under subsection (40), an approval authority may give persons and public bodies listed in clauses 35 (a) to (d) a written notice, relating to the	We believe the provision needs to be clearer about what is meant by "the relevant plan," and suggest the subsection should refer to the "plan subject to the appeal" If the notice of appeal for non-decision only applies to part of an official plan, is the written notice issued by the approval authority and the consequent 20 day appeal

relevant plan and including the prescribed information; on and after the day that is 21 days after the date of the notice, no person or public body is entitled to appeal under subsection (40) with respect to the relevant plan.	period apply to additional appeals of that part of the plan, or all of the plan?
17(17) Subsection 17 (45) of the Act is amended by adding the following clause: (c.1) the appellant intends to argue a matter mentioned in subsection (25.1) or (37.1) but has not provided the explanations required by that subsection; [Also see: subsection 34(25)(b.1)]	In our view, it is unclear how to determine that an appellant "intends" to argue a matter in subsection (25.1) or (37.1) without further guidance. Also, we do not understand the rationale for specifically authorizing the OMB to dismiss all or part of an appeal where the appellant intended to argue a matter in subsection (25.1) or (37.1) but failed to provide an explanation of that in its notice of appeal, particularly when the OMB is required by subsection 3(5) of the *Planning Act* to make decisions that are consistent with the policy statement issued under subsection 3(1) and conform with the provincial plans that are in effect or shall not conflict with them, as the case may be.
20. (1) Subsection 22 of the Act is amended by adding the following subsection: (2.1) No person or public body shall request an amendment to a new official plan before the second anniversary of the first day any part of the plan comes into effect. [Also see: 34 (10.0.0.1)]	In our view, this provision does not take into account a situation where there is an error or revision to the official plan that the approval authority agrees with and consents to within the two year period. This provision has the potential to increase the volume of appeals to a new official plan and/or comprehensive zoning by-law amendment, which may increase the time it will take to approve same or, alternatively, may result in a large number of applications being filed at approximately the same time after the two year period, which could impact on the resource needs of municipalities.
28. (2) Section 45 of the Act is amended by adding the following subsections: (1.3) No person shall apply for a minor variance from the provisions of the by-law in respect of the land, building or structure before the second anniversary of the day on which the by-law was amended, unless the council has declared by resolution that the	In our view, this provision makes the process more onerous on an applicant for a development proposal if minor changes are required to the development proposal subsequent to zoning approval, and the consequence of this is that there will likely be more demand for flexibility in site specific zoning provisions. In our experience, such changes are not uncommon in large proposals where variances are required to respond to issues that are not apparent until

application for the minor variance is permitted.	construction begins, or where there is an error in the by-law.
28. (3) Subsection 45(8) of the Act is repealed and the following substituted: (8.1) The decision of the committee, whether granting or refusing an application, shall be in writing, shall be signed by the members that concur in the decision and shall, (a) set out the reasons for the decision; and (b) contain a brief explanation of the effect, if any, that written and oral submissions mentioned in subsection (8.2) had on the decision.	Is it reasonable and/or necessary to require the committee of adjustment to set out an explanation of the effect of any written and/or oral submission on its decision? What is the effect if the committee of adjustment fails to do this – i.e. does it invalidate the decision? What are the practical implications for large municipalities that deal with thousands of variances a year? The appeal period runs from the date of the decision, and compiling and mailing reasons for so many decisions may affect the timing of receipt of notice of the decision.
37. The Act is amended by adding the following section: (70.6) (1) The Minister may make regulations providing for transitional matters respecting matters and proceedings that were commenced before or after the effective date.	It would be helpful if the Minister could indicate his intentions regarding transitional matters, so that stakeholders are aware whether the proposed amendments contained in Bill 73 will be applicable to a particular matter. We would appreciate the opportunity to review and comment on any proposed regulation prior to the regulation being made.

Table 2: Comments on Proposed Amendments to the *DC Act*

Extract of Amendment	Comment
2. (2) Subsection 2(4) of the Act is repealed and the following substituted: (4) A development charge by-law may not impose development charges to pay for increased capital costs required because of increased needs for a service that is prescribed as an ineligible service for the purposes of this subsection.	If the intent is simply to remove the ineligible services listed in the *DC Act* and carry these into the regulation, the regulation should be in place prior to this provision coming into force. If the intent is to eliminate some of the existing ineligible services, there should be further consultation with stakeholders relating to the services proposed to be eliminated as ineligible services prior to this provision coming into force. We would also appreciate the opportunity to review and comment on any proposed regulation prior to the regulation being made.
4. The Act is amended by adding the following subsection: 5.2 (1) In this section, "prescribed service" means a service that is prescribed for the purpose of this section. (2) Paragraph 4 of subsection 5(1) does not apply in determining the estimate for the increase in the need for a prescribed service. (3) For the purposes of section 5, the estimate for the increase in the need for a prescribed service shall not exceed the planned level of service over the 10-year period immediately following the preparation of the background study required under section 10.	We strongly urge for there to be further consultation with stakeholders regarding the types of services that are proposed to be prescribed prior to this provision coming into force. We would also appreciate the opportunity to review and comment on any proposed regulation prior to the regulation being made.

(4) The method of estimating the planned level of service for a prescribed service and the criteria to be used in doing so may be prescribed.	
6. Section 26 of the Act is amended by adding the following subsection: (1.1) If a development consists of one building that requires more than one building permit, the development charge for the development is payable upon the first building permit being issued.	Please clarify what is meant by "one building".
8. The Act is amended by adding the following section: 59.1 (1) A municipality shall not impose, directly or indirectly, a charge related to a development or a requirement to construct a service related to development, except as permitted by this Act or another Act. (2) Subsection (1) does not apply with respect to, (a) a prescribed class of developments; (b) a prescribed class of services related to developments; or (c) a prescribed Act or a prescribed provision of an Act. …..	It would be helpful for there to be greater clarity about the types of exceptions that are contemplated in proposed subsection 59.1 (2). We would also appreciate the opportunity to review and comment on any proposed regulation prior to the regulation being made.

Conclusion

Once again, the OBA appreciates the opportunity to provide comments to the Ministry of Municipal Affairs and Housing and the Legislative Assembly of Ontario on Bill 73 - An Act to amend the Development Charges Act, 1997 and the Planning Act .