Co-ordinated Land Use Planning Review: Feedback on Proposed Revised Plans

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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 ("OBA") appreciates the opportunity to make a submission on the Government's Co-ordinated Land Use Planning Review, including the Proposed Growth Plan for the Greater Golden Horseshoe, 2016 (the "Proposed Growth Plan"), the Proposed Greenbelt Plan (2016) (the "Proposed Greenbelt Plan"), the Proposed Oak Ridges Moraine Conservation Plan (2016) (the "Proposed ORMCP") and the Proposed Niagara Escarpment Plan (2016) (the "Proposed NEP").

The OBA

Established in 1907, the OBA is the largest voluntary legal organization in the province, representing approximately 16,000 lawyers, judges, law professors and law students in Ontario. In addition to providing legal education for its members, the OBA is pleased to analyze and assist government with many policy and legislative initiatives each year – both in the interest of the profession and in the interest of the public. Recently, we have assisted the Ministry of Municipal Affairs and Housing and the Ministry of the Attorney General by providing our comments on the 2014 Provincial Policy Statement review; the *Smart Growth for Our Communities Act, 2015* (Bill 73); and the Municipal Legislation Review.

This submission was prepared by members of the OBA Municipal Law Section, which is comprised of over 300 lawyers who are leading experts in municipal and land use planning law matters representing proponents, municipalities, residents, developers, and other stakeholders. Members of the Municipal Law Section often advocate before municipal councils and committees, all levels of court in the Province of Ontario, and the various tribunals that comprise the Environment and Land Tribunals Ontario ("ELTO"), including the Ontario Municipal Board ("OMB"). As we represent a broad spectrum of clients, who at times have diverse and sometimes competing interests, our objective is to assist government by putting forward a position that represents a balance of the various interests of our members and their clients.

Comments

The provincial plans under review have a significant impact on the advice we provide to our clients, most notably because the *Planning Act* requires that all land use planning decisions must conform with any applicable provincial plans. The OBA, therefore, has an

interest in ensuring that the plans contain clear, rational, consistent and coherent policy direction, and we would certainly appreciate the opportunity to review any further revised drafts of the proposed provincial plans arising out of this review.

I. Proposed Growth Plan for the Greater Golden Horseshoe, 2016

We offer the following comments with respect to the Proposed Growth Plan. Unless otherwise noted, all italicized terms reflect the original emphasis as set out in the proposed Growth Plan:

A. Section 1 – Introduction

In addition to input from the Municipal Law Section of the OBA, the provincial plans under review have also been considered by members of the OBA Aboriginal Law Section, who note positively that the plans contain the following commitment with respect to indigenous rights:

> Provincial plans must be implemented in a manner that is consistent with the recognition and affirmation of existing Aboriginal and treaty rights under section 35 of the Constitution Act, 1982.[1]

We support this statement and other additions to the plans which make reference to consultation with First Nations and Métis communities and the need to engage them in provincial and municipal land planning processes in the Greater Golden Horseshoe.

B. Section 1.2.2 – Legislative Authority

This section does not provide sufficient guidance on how the Proposed Growth Plan will be applied to pending development applications or municipally-initiated amendments intended to implement recently approved official plan policies. It is problematic to state that all decisions made on or after the effective date will conform to the new plan, especially since the timelines for bringing official plans into conformity are not yet clear. If the intention is to release a new transition regulation which will address this in more detail, then we submit that stakeholders should have an opportunity to comment on the proposed transition rules. It should be clarified as to whether municipalities will have to bring their plans into conformity within three years (or such other period of time as the Minister may direct, as required by s.12 of the *Places to Grow Act, 2005*) or whether they

[1] Proposed Growth Plan for the Greater Golden Horseshoe, 2016 at 3.

will be able to rely on the Bill 73 revisions to section 26 of the *Planning Act* which do not require a new official plan to be reviewed until it has been in effect for ten years.

C. Section 2.2 – Policies for Where and How to Grow

Subsection 2.2.1 – Managing Growth

- Policy 2.2.1.4 – This policy includes a requirement at subparagraph (c) that "upper- and single-tier municipalities will each develop an integrated approach to planning and managing growth to the horizon of this Plan, which will … identify a hierarchy of *settlement areas*, or areas within *settlement areas,* where forecasted growth to the horizon of this Plan will be accommodated …". It is not sufficiently clear how municipalities are to identify a hierarchy of areas within *settlement areas* where new growth will be permitted, or why this is necessary or appropriate. While the intent may be to provide municipalities with the discretion to interpret the policy as they see fit, we are concerned that this lack of clarity could lead to unnecessary disputes since all lands within *settlement areas* are by definition required to accommodate growth within the horizon. In the same vein of requiring further detail, subparagraph (d) does not provide sufficient direction with respect to the basis upon which municipalities can identify areas where development is prohibited.

- Policy 2.2.1.6 – According to this policy, upper- and single-tier municipalities in the *outer ring* are required to identify *excess lands*[2] in official plans and prohibit development on all *excess lands* to the horizon of the Plan. There is insufficient guidance as to how this exercise is to be implemented, and it is unclear whether this policy is intended to:

  a. be a mechanism for municipalities to down-designate outlier urban area lands that were historically designated but have no realistic prospect for development (whether for infrastructure access or other reasons); or

  b. provide municipalities with an opportunity to unwind previous urban expansions.

  Moreover, even if a municipality is able to identify the amount of designated but unbuilt land that would constitute *excess lands*, it is not clear how the municipality would be able to determine which of the designated but unbuilt lands should be identified as the *excess lands* (and therefore prohibited from development), or the

[2] Defined as lands within a *settlement area* that are in excess of what is required to accommodate forecasted growth to the horizon of the Plan.

extent to which it is required to consider the potential impact on landowners who have relied upon the designation of their lands for development purposes. As currently drafted, this policy presents potential for a significant amount of litigation.

There also appears to be an inconsistency in the definitions of *excess lands* and *settlement area*. If *excess lands* are continued to be located within a *settlement area* but development is prohibited on such lands, then they are not captured in the definition of *settlement area*.

In addition to the substantive concerns raised above, it appears that policy 2.2.1.6 is misplaced; any identification of *excess lands* should occur within the context of a *municipal comprehensive review*. We therefore suggest that this policy should not be separately stated, but instead be inserted as a subparagraph under policy 2.2.1.4.

Subsection 2.2.2 – Built-up Areas

- Policy 2.2.2.3 – This policy requires that all upper- and single-tier municipalities "at the time of their next *comprehensive review*, increase their minimum intensification target such that a minimum of 60 per cent of all residential development occurring annually within each upper- and single-tier municipality will be within the *built-up area*." While we have no comment as to the policy rationales behind such an increase to the intensification targets in existing built-up areas, we query the approach to implementation of this revised policy. More specifically: we suggest that there may be conflicts between implementation of this policy with other transition policies if municipalities do not have to update their plans to provide for the 60 per cent intensification until the next *municipal comprehensive review* (which in some cases might not occur for seven to ten years). Furthermore, we question how this revised intensification target is to be reconciled with the requirements in section 1.2.2 and policy 2.2.7, which would require the increased density targets and other policies to be implemented immediately. There is no clear rationale as to why there would be a longer transition period afforded to the intensification target as compared to the new density target.

Subsection 2.2.4 – Transit Corridors and Station Areas

- Policy 2.2.4.4 – We suggest that the definition of *major transit station area* be clarified, as the first part of the definition refers to these areas as being "the area including and around any existing or planned *higher order transit* station or stop" [emphasis added]. The definition continues to explain that these areas are generally the area "within an approximate 500 m radius of a transit station," without reference to the radius around transit stops. It should be more explicit as to whether stops are included or excluded in this 500 m radius general rule so as to

understand whether all areas within 500 m of a light rail or dedicated bus line stop are captured.

- Policy 2.2.4.7 – This policy requires that within *major transit station areas*, development will be supported by … (e) prohibiting land uses and built form that would adversely affect the achievement of the minimum density targets in policy 2.2.4.5, and the other policies of this Plan. It should be clarified as to whether subparagraph (e) is intended to prohibit the development of new single-detached and semi-detached dwellings within *major transit station areas*, or whether municipalities will maintain some discretion to consider the implications of this policy on its existing low-density neighbourhoods.

Subsection 2.2.8 – Settlement Area Boundary Expansions

- Policy 2.2.8.3 – The policies permitting *settlement area* boundary expansions where upper- and single-tier municipalities in the *outer ring* have identified *excess lands* in accordance with policy 2.2.1.6 are not clearly stated. If the intent of this policy is to permit municipalities to "rationalize" their urban boundaries (by expanding the boundaries in certain appropriate locations provided that the boundaries are contracted in other locations, resulting in no net increase in *designated greenfield areas*), it is not obvious why the identification of *excess lands* should be a prerequisite to this exercise or why this option is only available to upper- and single-tier municipalities in the *outer ring*.

  The introduction to this policy states that "Upper- and single-tier municipalities in the *outer ring* that have identified *excess lands* in their in effect official plan … may undertake a *settlement area* boundary expansion only …" [emphasis added]. Do the words "in effect" mean that prior to considering an expansion of a *settlement area* boundary, a municipality must pass a separate official plan amendment to identify *excess lands*, or can the identification of *excess lands* and the *settlement area* boundary expansion take place within the same *municipal comprehensive review* (see comments under policy 2.2.1.6 above)? If not, the required two-step amendment process could lead to additional delay and expense.

D. Section 4.2 (and associated definitions) – Policies for Protecting What is Valuable

We suggest that the Proposed Growth Plan eliminate those definitions of natural heritage features that are not otherwise referenced in the Proposed Growth Plan itself. Given the detailed regulation of natural heritage and source water protection matters in the 2014 Provincial Policy Statement (the "PPS") (which applies to the entire province), we also question the utility of introducing these concepts and attempting to further regulate these issues in the Proposed Growth Plan. For example, the word "enhanced" is used almost interchangeably with the word "improved" (compare policies 4.2.2.1 with 4.2.2.2.), which is

a different approach than that taken by the in force Growth Plan and the 2014 PPS and may be confusing if the words are intended to have the same meaning.

Subsection 4.2.4 – Lands Adjacent to Key Hydrologic Features and Key Natural Heritage Features

- Policy 4.2.2.4 – This policy states that an official plan may, based on an environmental impact study, establish "alternative" standards for development within the *natural heritage system* outside of the key features and *vegetation protection zones*. While this policy appears to be intended to permit flexibility for lower standards based on further study, it is not clear whether the intent is to also require municipalities seeking higher standards to undertake an environmental impact study.

E. Section 5.2 – Policies for Implementation and Interpretation

- Definition of *Municipal Comprehensive Review* ("MCR") – the definition is proposed to be amended such that an MCR can only be initiated by an upper- or single-tier municipality, and not by a lower-tier municipality. Given that various policies requiring an MCR are most likely to be implemented by lower-tier municipalities (e.g. an employment land conversion), there is no clear rationale for excluding lower-tier municipalities from being able to conduct an MCR.

Subsection 5.2.2 – Supplementary Direction

- As a general comment, we note that provincial oversight of municipal matters is significantly increased in the Proposed Growth Plan. However, we suggest that there appears to be a lack of reciprocal policy direction for public and stakeholder input. For example, policies 5.2.2.1 and 5.2.2.2 place the onus on the Minister and the Province, respectively, to undertake extensive mapping exercises (including mapping of the *agricultural system* and the *natural heritage system* for the *Greater Golden Horseshoe*) and to provide detailed guidance on growth management issues. To fully understand the implications of the Proposed Growth Plan, those documents should be provided in advance of the approval of the Proposed Growth Plan. Also, in support of greater transparency, we question how such documents/mapping will be produced and what mechanism(s) will be used to ensure that those impacted by such documents/mapping have meaningful input? There is no indication in the policies as to how landowners, municipalities, public agencies and other stakeholders will be consulted in these important planning exercises.

- Policy 5.2.2.1 – We understand that there is no current intent on the part of the Minister to update the *built boundary* despite the power granted to the Minister to do so. However, without an update to the *built boundary*, we are concerned that it

may be more difficult to achieve the objectives set out in the Proposed Growth Plan than it otherwise would be. By the time official plans are updated to implement the Proposed Growth Plan, many of the lands previously identified as *designated greenfield areas* in 2006 will be built out, so it is unclear why such lands should not be able to contribute to the increased intensification target (in the same way as the built up area that existed in 2006), and why such lands should count toward the increased density target.

Subsection 5.2.8 – Other Implementation

- Policy 5.2.8.3 – We suggest that this policy casts a wider net than it should, resulting in un-intended consequences. While some plans of subdivision will have been registered for more than eight years and remain vacant, many other plans of subdivision will have been registered for more than eight years and will be fully built out. It would be more proper to distinguish between registered plans and undeveloped or unserviced plans, and we suggest that the policy be clarified accordingly.

II. Proposed Greenbelt Plan (2016)

We offer the following comments with respect to the Proposed Greenbelt Plan:

- Policy 3.4.2.1 – This policy prohibits *settlement areas* outside the Greenbelt to expand into the Greenbelt. At a minimum, this policy seems to be misplaced, as it is located within a section dealing with lands already within the Greenbelt.

- Policy 3.4.3.3 – The explanatory text regarding expansions of the Greenbelt states that the revised policy allows upper- or single-tier municipalities to consider "modest" expansions of settlement area boundaries under an MCR. However, there is no direction in policy 3.4.3.3 to qualify the type of expansion that a municipality may allow or consider, aside from the reference to section 2.2.8 of the Growth Plan.

- Policy 3.2.5.6 – It is unclear how this policy, which exempts development and site alteration from a natural heritage evaluation where the only *key natural heritage feature* is habitat of endangered and threatened species, be reconciled with policy 2.1.7 of the 2014 PPS, which prohibits development in such habitat except in accordance with provincial and federal requirements.

- Policy 5.7.1.2 – This policy recognizes that the Minister may initiate amendments to the Greenbelt boundary regulation and Greenbelt Plan to grow the Greenbelt. If such lands include privately owned lands, there should be a process by which the potentially affected landowner(s) can have meaningful input.

III. Proposed ORMCP and Proposed NEP

We offer the following comments with respect to the Proposed ORMCP and Proposed NEP:

- Similar to the comments above, our general concern with the Proposed ORMCP and Proposed NEP is that the Province is proposing that it assume a greater oversight role, or at least is providing itself with the policy framework to assume that role, without providing necessary implementation guidelines or having identified mapping for municipalities and landowners to review and provide comment. As an example, the Proposed ORMCP states that an Agricultural System will be identified for the Greater Golden Horseshoe ("GGH") through an Agricultural Support Network ("ASN"). We suggest that the Province provide more clarity on how this ASN will be identified and how the Agricultural System will be established.

- It is unclear how the oversight functions between the Province and municipalities will be allocated. The Proposed ORMCP states that the ASN will be identified by the Province, with municipalities tasked to sustain and enhance the ASN. Will the Province or the municipality be tasked with implementing the ASN? The exercise of creating an ASN to create an Agricultural System is similar to the Agricultural Impact Assessments ("AIA") referenced in the Proposed Growth Plan and the Proposed Greenbelt Plan, where we also suggest there is insufficient guidance with respect to how those AIAs might function.

- There is already extensive guidance provided to municipalities and conservation authorities through the 2014 PPS and Ministry of Natural Resources documents. As such, we suggest that it is redundant and causes potential confusion for the Province to map a Natural Heritage System and the component features, as has been done in the Proposed ORMCP and Proposed NEP. The Niagara Escarpment Commission is also proposing to undertake some mapping updates which show more land in the NEP area that is designated as Escarpment Natural Area, together with reductions in other NEP designations. It is not clear that proposed mapping changes to the Proposed NEP include the proposed mapping updated by the Niagara Escarpment Commission, but this mapping exercise should be considered as part of the Province's review to avoid future conflicts and implementation issues.

- The Proposed NEP does not appear to integrate the Agricultural System initiative that has been reflected in the other three proposed plans. In addition to the lack of clarity as to how the Province plans to identify an Agricultural System, this initiative is only reflected in the Proposed ORCMP, the Proposed Greenbelt Plan and the Proposed Growth Plan.

- Generally, we acknowledge that the Proposed ORMCP and the Proposed NEP have been amended to be more consistent with the other Plans (especially the Proposed NEP). However, there are some outstanding inconsistencies. For example:

    - The 2014 PPS removed the requirement that an agricultural use must be existing in order to be permitted and continue in a natural heritage area (s. 2.1.9), but this has not been reflected in the Proposed NEP, making it inconsistent to the PPS policies relating to agricultural uses within and adjacent to natural areas and features.

    - Policy 2.4.22 of the Proposed NEP excludes some uses like wineries from new Agricultural Purpose Only lands, whereas the 2014 PPS and the Proposed ORMCP would permit a variety of supportive agricultural uses on new/severed lots.

    - The Proposed NEP does not have the same definition of *excess soil*, which is defined in the other three plans. The Proposed NEP only speaks to the movement and management of 'fill'.

    - Policies related to natural heritage performance standards differ between the plans. For example, the Proposed Greenbelt Plan permits narrower setbacks for natural heritage features to ditches or drains in some areas of the plan, but this is not carried forward in the Proposed NEP or Proposed ORCMP.

    - Policy 2.12.6 in the Proposed NEP restricts infrastructure in prime agricultural areas and speciality crop areas to only linear facilities, where the other plans recognize that essential infrastructure and related planning cannot always avoid certain protected areas.

We urge you to address and clarify and/or resolve the above noted inconsistences so that the Proposed Plans, along with the 2014 PPS, work together coherently and do not result in confused interpretation or conflicting applications.

Conclusion

Overall, the proposed changes to the provincial plans appear to provide some welcome improvements, but a general concern is that in many cases there is insufficient direction as to how they might be implemented. The language could be more flexible as to how these guidelines or requirements should be met, as we are not sure what issues might manifest and what would be needed to adapt the current process to strictly adhere to these requirements. Further, as noted above, some of the proposed amendments would benefit from more clarity, particularly where there are apparent inconsistencies. Finally, in the

interests of clarity and transparency, other documents to be prepared by the Province that are intended to complement the proposed new provincial plans should be released for concurrent review, and a process should be established to ensure that those persons and/or agencies most likely to be impacted by any new documents to be prepared by the Province be given an opportunity to provide meaningful input.

We thank you for considering our input and we look forward to reviewing any revised drafts of the proposed provincial plans arising out of the review and making further comments at that time.