Bill 139, the *Building Better Communities and Conserving Watersheds Act, 2017*

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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

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Introduction

The Ontario Bar Association ("OBA") appreciates the opportunity to make a submission on Bill 139, the *Building Better Communities and Conserving Watersheds Act, 2017* to the Standing Committee on Social Policy.

Land use planning is a unique field of practice. In addition to applying statutory and regulatory authorities, our members are challenged to integrate Provincial, Regional, and Local policies that are further translated into regulatory instruments and implementation requirements. There are often multiple layers of approvals necessary in any given matter, leading to a complex intersection of planning, engineering, environmental stewardship, and local politics. Our members strive to ensure that the process of navigating and ultimately resolving these matters is done in a fair, transparent, and supportable manner.

The OBA

Established in 1907, the OBA is the largest voluntary legal organization in Ontario, representing approximately 16,000 lawyers, judges, law professors and law students. 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.

This submission was prepared by members of the OBA Municipal Law Section, which has approximately 350 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").

Overview

The amendments proposed in Bill 139 arise out of the Province's review of the scope and effectiveness of the OMB, which was launched in June 2016. The OBA was pleased to provide comments to the Ministry of Municipal Affairs in December 2016 in the context of that review, focusing on the need for further consultation with stakeholders to determine how best to implement changes that would continue to allow the land use planning system to render substantive, timely, and cost-efficient decisions.

The OBA appreciates the current opportunity to provide comments with respect to the legislative amendments presented in Bill 139, which includes a proposal to replace the OMB with the new Local Planning Appeal Tribunal ("Tribunal"). In particular, our comments below relate to Schedules

1 and 3 of the Bill. All recommendations, when referring to specific provisions of Bill 139, are referring to provisions in Schedules 1 and 3.

As noted above, our members have considerable expertise in municipal and land use planning matters, and work on behalf of a broad spectrum of clients- who at times have diverse and competing interests. As a result of this diversity, there are conflicting opinions within our membership in respect of the desirability of the various legislative changes proposed in Bill 139. While some do not agree, a large segment of our membership remains fundamentally concerned with those aspects of Bill 139 that appear to significantly restrict existing appeal rights and to deny existing, long-standing procedural safeguards in various land use planning matters.

The specific comments below reflect our members' common interest in providing assistance to the Committee by identifying areas where additional legislative clarity is warranted, while restricting our submissions to those priority areas of consensus within our diverse membership. Accordingly, it should be noted that our silence on a particular section or topic in Bill 139 is not to be interpreted as acceptance or endorsement by the OBA or its members.

As indicated below, it is notable that many of the details respecting the new Tribunal have yet to be released. These are expected in the form of new Regulations, practice directions, and rules governing the Tribunal's operations and procedures. Clarification of these matters, as soon as possible and preferably before Bill 139 is enacted, is essential in order to minimize cost, uncertainty and inefficiency for all stakeholders as they transition into the new regime. Otherwise, there is concern that the proposed legislative amendments will result in unnecessary litigation as stakeholders seek to confirm and enforce their statutory protections in the courts, rather than through a specialized land use planning tribunal with the training and expertise to adjudicate such matters based on fair hearing processes and established evidentiary standards. We look forward to carefully reviewing these details when they are made available and providing further comments to assist the Government based on the collective legal experience of our members.

As always, we remain available to discuss any of the proceeding comments in detail.

Schedule 1, *Local Planning Appeal Tribunal Act, 2017*

Our submissions under Schedule 1, *Local Planning Appeal Tribunal Act, 2017*, all relate to Part VI – Practice and Procedure.

Overriding the Statutory Powers Procedure Act

Proposed subparagraph 31(1)(b) and subsection 31(3) indicate that the *Local Planning Appeal Tribunal Act, 2017*, including its Regulations and any Tribunal rules, shall prevail where there is conflict with the *Statutory Powers Procedure Act*.

Given that neither the Regulations nor the Tribunal's rules are presently available, we are not able to comment on whether or to what extent the procedures for the new Tribunal will depart from, or conflict with, the *Statutory Powers Procedure Act*, which has governed administrative proceedings in Ontario for over 40 years, and which enshrines such procedural rights as the right to representation, the right to call evidence and to examine witnesses, and the right to be heard before an appeal is dismissed. While the Province has indicated its strong desire to amend the current hearing process for *Planning Act* appeals, the Province has not provided many details about the new hearing process. Important elements such as timelines, time limits, the admissibility of evidence and the ability to challenge evidence remain unclarified, and in many cases are proposed to be prescribed through forthcoming Regulations. Accordingly, it is not yet clear what new procedural safeguards are proposed to govern various important land use planning disputes and uphold the fundamental principles of natural justice.

The foregoing procedural elements of practice before the new Tribunal should be clarified as soon as possible given the significant procedural changes being contemplated. Further, various timelines and evidentiary requirements are already prescribed under the *Planning Act* and it is not clear how existing and proposed *Planning Act* requirements are going to intersect with the requirements to be imposed via Regulations, or the new Tribunal rules, under *Local Planning Appeal Tribunal Act, 2017*. Moreover, given that the new Tribunal will retain jurisdiction over various other types of disputes, including, *inter alia*, expropriation proceedings, development charge complaints and *Planning Act* appeals which are not specifically referenced in section 38, there is concern as to how the amended procedural protections for the types of appeals referenced in section 38 will be administered in a practical, fair and cost-effective manner.

For example, one element of the new process that is addressed in the *Local Planning Appeal Tribunal Act, 2017* is found in subparagraph 42(3)(b), which indicates that no person may "adduce" evidence at an oral hearing or call or examine witnesses in support of or in opposition to various *Planning Act* appeals. It is not clear what "adduce" is intended to connote in this context. Is the intent to limit what can be considered by the new Tribunal to only those materials that were originally before municipal council or the approval authority, without any ability for parties to challenge the accuracy or veracity of such materials? Other sections of the *Local Planning Appeal Tribunal Act, 2017* would appear to allow the introduction of new or additional evidence. For example, if the Tribunal exercises what is proposed to be a broad procedural authority under subsection 33(2), the Tribunal could itself require or create new evidence through its powers to examine and cross-examine witnesses. It is not clear whether the Tribunal will be permitted to call and examine witnesses in advance, nor is it apparent whether the parties will be entitled to ask questions of witnesses which arise out of the examinations conducted by the Tribunal. Clarification of these points would be of assistance.

Mandatory Case Management & Public Participation

Our membership is pleased to see that the *Local Planning Appeal Tribunal Act, 2017* proposes to place greater emphasis on pre-hearing organization. As indicated in our previous submission to the

Ministry of Municipal Affairs, we believe that making pre-hearing conferences more akin to judicial pre-trial conferences – where the adjudicator at the outset can take a more active role in directing the parties, the issues, the evidence, and the proceeding – would greatly assist the process. The list of powers exercisable at a "case management conference" indicated in proposed subsection 33(1) appears to be heading in this direction.

However, there are fundamental details concerning case management that are not outlined in the *Local Planning Appeal Tribunal Act, 2017*. It is not clear who will be responsible for serving notices of case management conferences, nor is it indicated how persons and public authorities other than the appellant and the relevant municipal authority will be made aware of the scheduling of a case management conference.

Proposed subsection 40(1) of the *Local Planning Appeal Tribunal Act, 2017* confirms that other persons will be permitted to seek status on an appeal and proposed subsection 40(2) imposes a submission timeline on these interested persons of at least 30 days' prior to the case management conference. However, the Act does not indicate how the "other persons" will be notified, nor does it indicate how much time interested persons will have between being notified of a pending case management conference and the deadline for making a submission. As well, subsection 40(3) indicates that a submission from an interested outside person must be served on the municipal or approval authority. The subsection makes no mention of the affected applicant or any other party to the proceeding also being served with the interested person's submission.

There are various sections of the *Local Planning Appeal Tribunal Act, 2017* that address the addition of parties or participants to a Tribunal hearing (see ss. 40(1), 40(4), 41(1), 41(3)). However, various sections of the *Planning Act* already deal with the grounds upon which a party may be added to an appeal (see ss. 17(44.2), 34(24.2), 51(52.2)). None of the relevant subsections of the *Planning Act* dealing with the addition of parties is proposed to be amended by Bill 139; consequently, it is unclear where interested stakeholders, authorities, and members of the public should look for guidance on when and how they may be added to an existing proceeding.

Interested members of the public often appear at OMB hearings in unincorporated groups. In these circumstances, the OMB's standard practice is to have the unincorporated group appoint a spokesperson that will take status in the hearing and represent the interests of the unincorporated group. Proposed subparagraph 32(3)(e) of the *Local Planning Appeal Tribunal Act, 2017* appears to formalize this practice, but instead of allowing the unincorporated group to appoint its own spokesperson, the Tribunal will be empowered to appoint a person to represent a "class" of "common interests". While this appears to be a discretionary authority to be included in the Tribunal's rules, our membership is concerned that such authority (a) not conflict with section 10 to the *Statutory Powers Procedure Act* and (b) not be exercised over the objection of a party or participant.

Given the Province's goal of increasing community participation in the planning process, including at the appellate stage, it is important that the *Local Planning Appeal Tribunal Act, 2017* clarify how the

community will be (a) made aware that the appellate stage has been engaged and (b) provided with sufficient time to decide their desired level of participation. This may include engaging the resources proposed to be made available to the public through the new Local Planning Appeal Support Centre. Clarification of these points would be of assistance.

Categorization of Appeals & Prescription of New Timelines

Subsections 38(1) and (2) of the *Local Planning Appeal Tribunal Act, 2017* create different categories of appeals under the *Planning Act*. The first category under subsection 38(1) includes appeals from the approval of new official plans; appeals from the approval, refusal or non-decision on an official plan amendment; and appeals from the approval, refusal or non-decision on a zoning by-law and/or zoning by-law amendment. The second category under subsection 38(2) includes appeals of non-decisions by approval authorities on official plans and official plan amendments and non-decisions on plan of subdivision applications. These two "categories" of appeal are not created by the *Planning Act* and it is not readily apparent why these two categories are being created for the *Local Planning Appeal Tribunal Act, 2017*.

A further concern arises under proposed subsections 42(1) and (2) of the *Local Planning Appeal Tribunal Act, 2017*. These subsections deal with oral hearings of appeals under the *Planning Act*. Subsection 42(1) would apply to subsection 38(1) appeals and would limit participation in such appeals to only "the parties". By comparison, subsection 42(2) would apply to subsection 38(2) appeals and specifies that not only "the parties" may participate, but also "such persons identified by the Tribunal… as persons who may participate in the oral hearing."

While proposed subsections 40(4) and 41(3) would appear to allow the Tribunal to add parties to any 38(1) or 38(2) appeals, the implication of subsection 42(1) (which reads more restrictively than subsection 42(2)) is that these added parties would not be permitted to participate in an oral hearing if the appeal falls under 38(1). We are unsure if this distinction is intentional or merely a drafting oversight.

Subsection 38(3) indicates that the appeals referred to in subsections 38(1) and (2) (which cover many of the appeals permitted by the *Planning Act*) must adhere to any timelines prescribed by the Regulations made under the *Local Planning Appeal Tribunal Act, 2017*. However, the *Planning Act* already prescribes much of the timelines applicable to the foregoing appeals. We assume the reference in subsection 38(3) is to timelines that will be applicable once an appeal has been filed with the new Tribunal – in other words, practice timelines applicable to the new Tribunal that will apply *after* the statutory timelines in the *Planning Act* have been adhered to. Clarification of this point would be of assistance.

Schedule 3, Amendments to the *Planning Act*

Dismissal without a Hearing

Currently under the *Planning Act*, the OMB is empowered to dismiss an appeal without a hearing if the OMB is of the opinion that the appeal or the appellant does not meet certain statutory requirements. As examples, see ss. 17(45), 34(25), 45(17), 51(53), and 53(41). The power to dismiss without a hearing is discretionary and may be exercised either on the OMB's own initiative or in response to a motion brought by one or more of the parties to an appeal.

Bill 139 proposes to amend the *Planning Act* sections dealing with dismissals without a hearing such that the new Tribunal "shall" dismiss all or part of an appeal if the appeal or the appellant does not meet the prescribed statutory requirements. This amendment would appear to make it mandatory that all appeals be assessed by the Tribunal for potential dismissal without a hearing. It is not clear when such an assessment would occur – perhaps as part of the case management conferences contemplated by the *Local Planning Appeal Tribunal Act, 2017*. If so, then the Province should give consideration to prescribing a process for this assessment. Though various sections of the *Planning Act* currently indicate that the OMB may dismiss an appeal with or without a hearing, section 4.6 of the *Statutory Powers Procedure Act* does require that notice and an opportunity to be heard be provided before a proceeding is dismissed without a hearing. Accordingly, any amendment to the *Planning Act* that increases the possibility of an appeal being dismissed without a hearing should carry with it the necessary procedural safeguards to ensure that a dismissal cannot occur without appropriate notice and the opportunity to be heard.

The Province is also proposing to add a new ground for dismissal without a hearing. Where the Tribunal is of the opinion that an appellant has not provided an explanation that discloses how the decision being appealed is inconsistent with a policy statement, fails to conform or conflicts with a provincial plan, or fails to conform with an upper-tier official plan, the appeal may be dismissed without a hearing. This new ground replaces the existing "apparent land use planning ground" test for dismissals without a hearing.

However, this new ground appears to create a redundancy. The powers to be accorded to the new Tribunal under the Bill 139 amendments indicate that certain appeals are to be dismissed without a hearing unless an exception applies (see ss. 17(49.1), 22(11.0.8), 34(26)). In other words, as a first step, the Tribunal will be required to engage in a preliminary assessment of every appeal to ensure that, among other things, the notice of appeal contains an explanation for why the "conformity/consistency" test is not met. Provided this hurdle is cleared, the next step is the "first appeal", at which stage the test appears to be largely the same as the new ground for dismissal without a hearing: inconsistency with a policy statement, failure to conform or conflict with a provincial plan, or failure to conform with an upper-tier official plan. As currently proposed, Bill 139 appears to have the new Tribunal applying the same test (a) for dismissals without a hearing and (b) in rendering decisions on first appeals.

If the tests at the dismissal and first appeal stages are indeed the same, this would create a redundancy given that they appear to involve the same facts and evidence at both stages. This has the potential to create confusion for many appellants and objectors. If the two stages are meant to have different tests, the provisions should be clarified to indicate what is required at each stage.

Moreover, it is unclear how the proposed test will operate in concert with existing *Planning Act* requirements regarding conformity. In particular, the proposed test will require demonstration of the failure of the existing zoning by-law to conform with the official plan. However, per subsection 24(4) of the *Planning Act*, if a zoning by-law is in force, it is deemed to be in conformity with the official plan. It would therefore seem impossible to demonstrate a failure of conformity where this is already explicitly addressed through the legislation. Clarification of this point is required; in particular, it may necessary for the Bill to indicate that subsection 24(4) of the *Planning Act* does not apply to these appeals.

Finally, the proposed structure appears to permit a mediated settlement at a first hearing. If this is intended, it is unclear how this would operate in practice within the two-step appeal process. At present, a mediated settlement results in a final order of the OMB. In the new system, it is possible that the Tribunal would issue a first-appeal decision based on a mediated settlement and the matter would then revert to council (this is seemingly the only reasonable resolution available to the Tribunal, with the other option being refusal). Clarification of this point would be of assistance.

No Appeals from Minister Approvals

Bill 139 proposes new subsection 17(36.5), which states that there will be no appeals in respect of a decision of an approval authority if the approval authority is the Minister of Municipal Affairs. This new subsection must be read in the context of "exemptions" under subsection 17(9). There are many instances where single-tier official plan amendments do not require Ministerial approval. There are also many instances where upper-tier municipalities are the final approval authorities of local amendments. However, where there is no Ministerial exemption – as is the case for amendments undertaken pursuant to section 26 of the *Planning Act* (i.e. provincial plan conformity exercises and 5/10 year official plan reviews) – new subsection 17(36.5) would apply to make the Minister's decision the final decision with no rights of appeal to the new Tribunal.

Our membership understands that having a Minister's decision on provincial plan conformity exercises and official plan reviews be final is the driving intention behind this new restriction. However, our members have in the past been approached by municipalities and private landowners about how to amend or alter a Minister's decision where the decision exhibits a manifest error. Often, the error is as simple as a factually incorrect line on a map or plan. Clarity is needed on how such errors could be corrected.

Conclusion

As indicated in our previous submission, our membership understands the challenges raised by both the private and public sectors in dealing with appeals to the OMB, as well as the public perception of how OMB appeals are adjudicated and ultimately resolved. While we understand the general intent behind various proposals in Bill 139, it is difficult to critically examine the practical operation of the new Tribunal within the land use planning system in the absence of the Regulations and the Tribunal's rules of procedure. As indicated above, we look forward to examining these elements with a view to ensuring that planning decisions are rendered in a substantive, timely, and cost-effective manner.

We thank you for considering our input and we look forward to reviewing any further or more refined proposals arising out of this review and making further comments at that time.