Consultation on TLAB Rules of Practice and Procedures and Related Documents

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Submitted to: Toronto Local Appeal Body

Submitted by: Ontario Bar Association

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Table of Contents

Introduction 2
The OBA 2
Summary 2
1. Timing Obligations 2
2. Matters Requiring Clarification 3
3. Opportunities to Streamline the Process 4
4. Missing Rules 4
5. Other Comments 5
Comments and Suggested Revisions 5
1. Timing Obligations 5
Proposed Deadlines 7
2. Matters Requiring Clarification 9
3. Opportunities to Streamline the Process 10
4. Missing Rules 12
5. Other Comments 12
Conclusion 13

Introduction

On behalf of the Municipal Law Section of the Ontario Bar Association (the "**OBA**"), we write in response to the Toronto Local Appeal Body's ("**TLAB**") invitation to participate in the public consultation on the TLAB Rules of Practice and Procedure (the "**Rules**") and related documents. We thank the TLAB for the opportunity to provide this submission which we understand will be considered at the upcoming TLAB Business Meetings on 18 April 2018 and 30 May 2018.

This submission contains our comments and suggested revisions to the Rules and related documents which we make further to our practice before the TLAB over the past number of months. This submission expands upon and supplements the OBA's initial correspondence commenting on the draft Rules dated 2 May 2017 (the "**OBA Initial Submission**"). For ease of reference, a copy of the OBA Initial Submission is enclosed.

The OBA commends the unique opportunity for public engagement presented by the TLAB's Business Meetings and, in particular, the TLAB's initiative in seeking comments from the public on the Rules and related documents at a special public meeting.

The OBA

The OBA Municipal Law Section (the "**Section**") has approximately 300 lawyers who are leading experts in municipal and land use planning law matters representing proponents, municipalities, residents, developers, and other stakeholders. Though we represent a broad spectrum of clients with diverse and sometimes competing interests, our goal is to provide decision-makers with commentary that represents a balance of the various interests of our members and their clients.

Members of the 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 (the "**OMB**", now the Local Planning Appeal Tribunal, or **"LPAT"**), and the TLAB.

Summary

In summary we make the following comments and suggested revisions regarding the Rules and related documents which we elaborate on in this submission:

1. Timing Obligations

- The requirement for the parties to prepare nearly their entire case within 45 days of the issuance of the Notice of Hearing has, in some cases, made it difficult to meet the deadlines and to retain counsel and witnesses; has the potential to negatively impact settlement as it

puts the parties in an adversarial position from the beginning; and in many cases has made TLAB hearings more expensive for parties when compared to the adjudication of these matters before the OMB/LPAT. We suggest the TLAB consider extending the timelines for filings as follows:[1]

- Identification of Parties/Participants: 20 days from issuance of the Notice of Hearing (no change)
- Applicant's disclosure: no later than 60 days before the hearing
- Document Disclosure: no later than 30 days before the hearing
- Witness Statement/Participant Statement: no later than 30 days before the hearing
- Reply (new): no later than 20 days before the hearing
- Removal of last date for hearing of motions.[2]

With respect to motions, it should be the TLAB's expectation that motions will brought by a party as soon as practicable after the issue has arisen and the TLAB could consider enshrining this expectation in its Rules.

2. Matters Requiring Clarification

- The Rules should clearly identify in what instances a motion is required. The TLAB should consider whether motions are required for procedural matters that are on consent, and if so, whether the requirements of the motion can be simplified to reduce costs to parties and encourage consensus.

- The TLAB should clarify in the Rules what specifically needs to be filed with Document Disclosure. It is submitted that "original work", documents to be presented on cross examination, and case law should be explicitly excluded from the Document Disclosure requirement. Original work of a witness should be disclosed together with a witness statement.[3]

- Consider whether documents may be filed with the TLAB and served on the parties by mail in electronic format on a CD or USB key. This would assist with serving parties that do not have a valid e-mail address. It would also assist with filing of large documents with the TLAB by not requiring these documents to be split into parts to meet the TLAB's 10 MB e-

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[1] It is understood that generally the TLAB will strive to schedule a hearing approximately 100 days from issuance of the Notice of Hearing.
[2] Consistent with existing Rule 17.6, motions could then be filed up to 15 days before the date the motion is to be heard (which could include the hearing date itself).
[3] It is acknowledged that this issue would largely be addressed should the TLAB adopt the recommendation to have Document Disclosure filed on the same date as the Witness Statements and Participant Statements.

mail size limitation.

3. Opportunities to Streamline the Process

- The Rules should be expanded to more comprehensively deal with the process for settlements and amended as required to reduce barriers to settlement. By way of example, the TLAB could consider mandating a written hearing where there is a full settlement of the issues, subject to appropriate notice to participants and an opportunity for written submissions regarding same. This could reduce costs to the parties and encourage settlement.

- The Appellant and the City should be consulted regarding their availability for a hearing before a hearing date is set. Such parties should also be canvassed regarding the number of witnesses and anticipated hearing duration to facilitate the scheduling of hearings for more than one day where appropriate.

- The TLAB should continue to attempt to issue timely interim decisions to provide parties with direction at the relevant time.

- The signature of an authorized representative should be sufficient once a party has submitted a form indicating their authorized representative under their signature. The Notice of Intent to be Party or Participant Form 4 should provide for the party and/or participant to indicate their authorized representative.

- Persons residing at the same residence should be treated as one appellant, party and/or participant for the purposes of the proceeding unless they indicate otherwise.

- At the 11 October 2017 TLAB Business Meeting No. 9 a Practice Direction regarding "Document Referencing (Common Document Base)" was considered but not passed. We would encourage the TLAB to pass this practice direction.

4. Missing Rules

- The TLAB should consider adding rules that permit the parties a right to file reply documents, including reply witness statements.

- The TLAB should consider adding a rule requiring the disclosure of documents and submission of a statement of anticipated evidence in respect of witnesses under summons.

5. Other Comments

- Consistent application and enforcement of the Rules is essential to procedural fairness and integrity of the TLAB hearing process. The TLAB should therefore make it a priority to achieve consistent enforcement and application of its Rules except in unusual or extreme circumstances.

Comments and Suggested Revisions

1. Timing Obligations

As noted in the OBA Initial Submission, the Rules introduce timing obligations that differ significantly from those in place at the OMB/LPAT. These timing obligations are in most instances tied to the service of the Notice of Hearing and relate to the timing of the identification of parties and participants, the disclosure of evidence and the filing of witness statements. In effect, the Rules require parties, and to a lesser extent participants, to prepare nearly their entire case within 45 days from the date the Notice of Hearing is served.

While the benefits of early party identification and disclosure are recognized and appreciated, in practice the relatively short and fixed deadlines established by the Rules have given rise to some challenges, including the following:

- **Deadlines are too tight:** The deadlines for disclosure are difficult to meet as detailed below:
  - **Applicant's Disclosure:** The Rules currently require submission of the Applicant's Disclosure, being the application materials that will form the subject of the hearing (whether or not revised from the date of the Committee of Adjustment hearing), within 15 days of service of the Notice of Hearing. In particular where the applicant is not the appellant, 15 days is often insufficient time for the review and, where necessary, revision of application materials in anticipation of a hearing. This is especially the case where the applicant seeks to submit revised plans and seeks the City's zoning examiner to review same and provide a zoning certificate. The applicant has no control over the zoning examiner's timeline for producing a zoning certificate.
  - **Document Disclosure:** The Rules currently provide for document disclosure, which forms a significant portion of a party's case, 15 days after the submission of potential revised application materials as part of the Applicant's Disclosure and only 10 days after the identification of parties and participants. This provides certain

parties very limited time to prepare their case in full and identify and compile all documents required for a hearing.

- **Witness Statements / Participant Statements / Expert Witness Statements:** The preparation of witness statements, in particular expert witness statements, is a significant and resource-intensive undertaking. The provision of a maximum of 45 days is often insufficient for preparation of documents such as a witness statement, visual exhibits, lot studies, etc. This can result in difficulties retaining counsel or expert witnesses. In addition, as considered below, increased costs may also be incurred.

- **Motions:** Currently the Rules require that all motions be heard 30 days before the hearing. On the filing of witness statements and other materials, however, issues requiring resolution by motion may arise. As detailed below, with the ideal settlement period occurring early in the pre-hearing process, the hearing of motions close to or on the hearing date should not prevent or negatively impact settlement. Therefore, removal of a "last day for hearing of motions" is requested. Consistent with existing Rule 17.6, this would make the last day for filing of motions 15 days prior to the hearing on the assumption that any such motion would be heard on the hearing date.

- **Difficulty Retaining Counsel and Witnesses:** As noted above, parties have encountered difficulties finding counsel and/or witnesses available to meet the deadlines established under the Rules. In particular, the short time periods provided for the filing of document disclosure and witness statements (including participant statements and expert witness statements) may not be achievable for all witnesses, including because of existing commitments or time lost between issuance of the Notice of Hearing and beginning of the retainer. The matter of finding counsel and witnesses can be particularly challenging for non-appellant parties who may only learn of the TLAB hearing upon receipt of the Notice of Hearing. The challenge of retaining counsel or obtaining witnesses in short order directly impacts a party's ability to participate in the hearing process. We think that the Rules should not inadvertently impact a party's ability to fully participate in the TLAB process.

- **Impacts on Settlement:** While knowing the parties and issues early on in the process can aid in achieving settlement, the requirement to file document disclosure and witness statements within 30 and 45 days from service of the Notice of Hearing obligates the parties to spend considerable resources very early in the process. Significant resource expenditure at the front end of a hearing process can discourage settlement, as the parties seek to minimize their costs through settlement. Also, little time remains available for settlement discussions where parties' efforts are focused on the preparation of substantive materials

for filing. Further, when engaging in negotiations parties are often strategic regarding the extent to which they disclose their full case in order to best position themselves for settlement. Mandatory early and full disclosure limits the parties' ability to be flexible and strategic in this regard. Also, once the parties have gone through the effort of preparing their case, they become more entrenched in their position. It appears that in practice, settlement is being achieved in part by parties seeking to postpone the filing deadlines by motioning the TLAB for an extension. To encourage settlement the TLAB should consider extending the filing deadlines.

- **Cost Impacts:** With the significant disclosure obligations and deadlines as well as the frequent need for motions, some practitioners have noted that the costs of a hearing before the TLAB can be as much as twice the cost of a similar hearing before the OMB/LPAT to parties. The obligation to prepare and file significant document disclosure and witness statements within a relatively short period of time can result in increased costs to the parties, in terms of fees for counsel and expert witnesses engaged in preparing such materials. Further, effective hearing preparation often requires preparation to occur shortly before a hearing. Therefore, where the entire case has been prepared months in advance, additional time and costs are incurred to refresh counsel and witnesses in advance of the hearing. Where filing dates are relatively close to the hearing date, this duplication of effort to prepare the case is avoided. Higher costs for participation may negatively impact accessibility of the TLAB for parties.

Proposed Deadlines

For the reasons described above, we believe all parties would benefit from a material extension of the timelines established under the Rules. In particular, the provision of additional time for the filing of the applicant's disclosure, document disclosure and witness statements would likely improve parties' experience with the TLAB process. Extension of these deadlines could be achieved by materially increasing the number of days provided for such filing requirements and by tying the timing for such filing requirements to the date of the hearing itself. As noted above, tying the timing for such filing requirements to the date of the hearing would prevent duplications of effort in hearing preparation, in particular where hearings are held over 3 months after service of the Notice of Hearing.

We specifically suggesting the following timelines[4]:

- Identification of Parties/Participants: 20 days from issuance of Notice (no change)
- Applicant's disclosure: no later than 60 days before hearing
- Document Disclosure: no later than 30 days before hearing
- Witness Statement/Participant Statement: no later than 30 days before hearing
- Reply (new): no later than 20 days before hearing
- Removal of last date for hearing of motions[5]

Continuing with early identification of the parties, but extending the time for filings creates an opportunity early in the process for settlement discussions prior to significant costs being incurred. Although settlement discussions can continue following the filing of Witness Statements, as detailed above, settlement may become less likely as the parties incur costs and become entrenched in their positions. For the timelines proposed above, where the hearing is 100 days from issuance of the Notice, the ideal time period for settlement discussions would occur between the date of identification of the parties/participants and the date of filing of the witness statement/participant statement and document disclosure. In such instance, the ideal settlement period is likely to be approximately 40 days. This ideal time period for settlement is extended as the hearing date is further from the issuance of the Notice. Effectively, the "quiet period" is being moved from the end of the pre-hearing process to the beginning, as in our respectful opinion this is most likely to encourage settlement.

It is also proposed to have the Document Disclosure, Witness Statement and Participant Statement filing occur on the same date. Filing of the Document Disclosure in advance of the Witness Statement or Participant Statement is not necessary and combined filing will provide the parties with more time for preparation and allow the materials to be filed together in a manner or form for easy use at the hearing.

With respect to motions, it should be the TLAB's expectation that motions will brought by a party as soon as practicable after the issue has arisen and the TLAB may consider enshrining this expectation in its Rules. If a moving party has requested a date for the hearing of an oral motion in advance of the hearing date, the TLAB should consult with the other parties regarding scheduling where possible, and once an oral motion date has been scheduled, the TLAB should formally advise all parties to ensure that all parties are aware of the date and that there is no confusion as to whether the motion will be heard orally or in writing. If a motion is to be heard in writing, the

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[4] It is understood that generally the TLAB will strive to schedule a hearing approximately 100 days from issuance of the Notice of Hearing.
[5] Consistent with existing Rule 17.6, motions could then be filed up to 15 days before the date the motion is to be heard (which could include the hearing date itself).

TLAB should also confirm this in writing and advise all parties as to the deadline for serving responding materials.

2. Matters Requiring Clarification

- **Motions:** Currently, motions are required by the TLAB for all procedural and administrative matters, no matter how small and whether or not all parties consent to the procedural or administrative matter that would be the subject of the motion. The prolific need for motions is not clearly set out in the Rules (i.e., the Rules do not always state that a motion is required where one is in needed). Accordingly, amendment of the Rules to clearly state when motions are required would be of benefit. For example, in some instances the Rules simply indicate the need to provide the TLAB with written notice where, in practice, a motion is in fact required (for example, for settlement). In addition, should motions be required for simple matters on consent, limiting the materials required to be filed in support of such a motion would be of assistance (e.g., no need for an affidavit). Minimizing costs for matters on consent is likely to encourage consensus among the parties.

- **Filing Obligations:** Clarification by the TLAB of what is required to be filed at the time of document disclosure and the time of witness statement filing would be of assistance in ensuring fair and consistent application of the Rules.[6] In practice, while some parties disclose most documents, policies, and visual exhibits to be relied upon at the hearing when filing their document disclosure, others may disclose these documents for the first time when filing their witness statements. Generally, allowing the disclosure of any "original work" for use at the hearing (e.g., visual exhibits prepared by an expert witness, lot studies, etc.) at the time of witness statement filing would be reasonable as this would allow the parties the time necessary to prepare any original documents or visual exhibits (subject to the comments above regarding the need for an extension of this timing and comments below regarding a right of reply). This would also make the identification and disclosure of non-original documents or materials, such as Provincial and municipal policies, at the earlier deadline for document disclosure less onerous.

- **Service:** The Rules require, for example, document disclosure and witness statements to be filed with the TLAB and served on all parties. The Rules primarily provide for service by email; however, email addresses for all parties and participants are not always available. Under such circumstances, the Rules are unclear regarding a party's service or notice obligations and while Practice Direction 5 partially addresses this issue, it only applies where a party <u>cannot</u> communicate electronically. Further, the provision of hard copies to

[6] It is acknowledged that this issue would largely be addressed should the TLAB adopt the recommendation to have Document Disclosure filed on the same date as the Witness Statements and Participant Statements.

such persons may be feasible, but is more costly and may not be appropriate given the electronic nature of TLAB proceedings. Consideration should be given to allowing the serving and filing of materials by mail in electronic format on a CD or USB key. This will allow larger documents to be filed without having to split the document in parts because of the TLAB's e-mail size restriction of 10 MB.

3. Opportunities to Streamline the Process

- **Settlements:** In addition to extending the deadlines established by the Rules to encourage settlement as detailed above, the Rules may also benefit from amendments designed to streamline the settlement process. Currently, the Rules include limited direction regarding the process for submitting settlements to the TLAB and achieving their prompt resolution. For example, it is understood from practice that a motion is required when requesting a settlement hearing; however, the Rules make no reference to any such requirement. Further, while a "quiet zone" has been established to allow for settlement, no motions may be brought within this 30-day period prior to the hearing and the Rules do not create any exceptions to allow motions required to facilitate settlement. The Rules should be expanded to more comprehensively deal with the process for settlements and amended as required to reduce barriers to settlement. By way of example, the TLAB could consider mandating a written hearing where there is a full settlement of the issues between all parties with appropriate notice to any and all participants and an opportunity for participants to make a written submission regarding same. This could reduce costs to the parties and encourage settlement.

- **Motions for Matters on Consent:** As noted above, currently motions are required by the TLAB for all procedural and administrative matters, no matter how small and whether or not all parties to the hearing consent to the request. The need for motions introduces added costs and delays. Accordingly, where the need for a motion can be avoided, such as for matters that are proceeding on consent, there is an opportunity to save costs and prevent delays. For example, parties should be permitted to extend filing deadlines without filing a motion where the request is on consent of all parties and notice is provided to the TLAB with a copy to all Participants.

- **Scheduling of Hearings:** At this time, the TLAB does not consult with parties regarding scheduling of a hearing prior to issuance of the Notice of Hearing. As a result, formal motions for adjournment have been necessary, for example, where a party or its counsel or witness is unavailable on the scheduled hearing date, even if all parties consent to the adjournment. While it is appreciated that the TLAB may not be able to accommodate all scheduling requests, to the extent possible (in particular where all parties consent)

accommodation of party requests for hearing scheduling would be of assistance in avoiding the need for adjournment motions and satisfy the obligation to comply with the original (likely earlier) filing deadlines.

- **Hearings of More Than One Day:** A clearer process for the scheduling of hearings for more than one day is required. For example, upon providing notice of intention to become a party, parties could be canvassed as to the number of witness and number of days they anticipate being required for the hearing. Allowing the hearing of complex multi-party proceedings to take place on consecutive days would result in more efficient use of resources and a fair hearing process by preventing the splitting of evidence or witnesses being "in cross examination" for extended periods of time.

- **Timely Issuance of Interim Decisions:** The timely issuance of decisions relating to procedural matters, such as deadline extensions and/or adjournments, is essential to their efficacy. Otherwise, where an extension or adjournment will be granted, parties may nevertheless find themselves required to meet the earlier filing deadlines or appearance dates as no decision confirming the extension or adjournment has been issued.

- **Forms:** Currently, a party is required to sign many forms required for filing, such as the form for filing of Applicant's Disclosure, even where they have filed an Authorized Representative Form 5 or the Notice of Appeal Form 1 that indicates their authorized representative. The signature of the authorized representative should be sufficient once a party has submitted a form indicating their authorized representative under their signature. Also, the TLAB should consider whether the Notice of Intent to be Party or Participant Form 4 should provide for the party and/or participant to indicate their authorized representative (similar to the Notice of Appeal Form 1). This may in some instances preclude the need for filing of an Authorized Representative Form 5.

- **Identification of Parties and/or Participants:** Persons residing at the same residence should be treated as one appellant, party and/or participant for the purposes of the proceeding unless they indicate otherwise. These persons should be permitted to use one TLAB form for making their filings as this will make it less onerous to file forms. Where more than one person residing at the same property seeks to file an appeal, they should all be treated as one appellant unless they indicate otherwise. This would minimize duplication of appellants at the hearing. It would also be reasonable in terms of filing of appeal fees whereby only one appeal fee would be required.

- **Documents Database:** At the 11 October 2017 TLAB Business Meeting No. 9 a Practice Direction regarding "Document Referencing (Common Document Base)" was considered but not passed. We would encourage the TLAB to pass this practice direction as it would

allow the parties to identify common documents they would be utilizing during the hearing without having to file these documents. This would make the document disclosure process less onerous.

4. Missing Rules

- **Right of Reply:** The introduction of a right of reply to the Rules would be of assistance. Upon receipt of parties' document disclosure and witness statements, the need for reply witness statements and/or additional documents or materials to address unanticipated issues may arise. Currently, the Rules do not provide any opportunity for the submission of such materials to the TLAB. As a result, a motion to permit such a submission is required, adding an additional administrative step (i.e., cost and time) to the process. Facilitation of the right of reply under the Rules would improve and simplify this process recognizing that the right may not be exercised in all cases.

- **Document Disclosure By Witnesses Under Summons:** Currently, under the Rules all persons intending to make submissions at a hearing must submit a witness statement (or some form of "will say" statement). This obligation imposed uniformly on all parties and participants allows for all involved to know the case they have to meet. There is no obligation, however, for document disclosure or submission of a witness statement in respect of witnesses under summons. While the difficulties of imposing obligations on a witness under summons are appreciated, in order to preserve procedural fairness, including the parties' understanding of the case to meet, we would suggest that the TLAB consider requiring a party who puts a witness under summons to file and disclose any additional or previously undisclosed documents or materials intended to be presented as part of the testimony of the summonsed witness. This would avoid imposing onerous obligations on a summonsed witness, while also ensuring all parties are given all information necessary to prepare their case in full.

5. Other Comments

- **Enforcement of the Rules:** Consistent application and enforcement of the Rules is essential to procedural fairness and the integrity of the TLAB hearing process. In practice, there appears to be inconsistent enforcement of the Rules, in particular for failure to request party or participant status in a timely fashion and failure to comply with filing deadlines. Additionally, while all filed materials are posted online by the TLAB, many parties do not serve their materials on all parties and participants as required under the Rules, meaning that some parties do not receive such materials at the time of filing. While

we recognize that Rule 15.2 requires all parties to regularly consult the TLAB's website, where materials are not properly served parties will be delayed in their receipt of such materials which may cause prejudice. Parties are not provided with notice when new materials are posted on the TLAB website and may not be aware of new materials posted absent notice from the filing party. In some instances, where the Rules are not enforced procedural fairness may be materially and detrimentally impacted.

Regardless, in all instances, where a party has complied with all of the Rules, including all notice and filing deadlines, and observes that there is no penalty or consequence for another party's failure to do so, the administration of justice and perception of procedural fairness is undermined. Accordingly, it is strongly recommended that where exceptions to the Rules are permitted or failure to comply with the Rules is forgiven, that the TLAB provide all affected parties with an opportunity to make submissions prior to the making of any such decision and that any decision be made with a view to upholding the spirit of the Rules, which require compliance except in unusual or extreme circumstances. The establishment of guidelines or practice directions in this regard may be of assistance.

Conclusion

We thank you for considering this submission and the important matters it identifies. We would be pleased to answer any questions you may have regarding our comments and suggestions noted above and members of our Executive would be pleased to meet with you regarding same. We look forward to developing an ongoing relationship and dialogue between the OBA Municipal Law Section and the TLAB, recognizing that it is in our collective interest that this body operates in an efficient and effective manner given the important role it plays in the land use planning system within the City of Toronto regarding minor variances, consents, and potentially site plan applications in the future.