OBA Submission on Proposed Bill 139 Transitional Regulations

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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 regulations proposed under Bill 139, the *Building Better Communities and Conserving Watersheds Act, 2017* to the Ministries of the Attorney General and Municipal Affairs.

Land use planning law 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"). In the future, members of the Municipal Law Section will regularly appear before the new Local Planning Appeal Tribunal (the "Tribunal").

Overview

The regulations proposed under 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, as well as to the Standing Committee on Social Policy with respect to Bill 139 in the fall of 2017. Our comments have focused on ways in which to implement reform to the land use planning and appeal system that would support substantive, timely, just, and cost-efficient decisions.

The OBA appreciates the current opportunity to provide comments with respect to proposed regulations under Bill 139. We understand that summaries of the content of three proposed regulations pertaining to transitional matters under Bill 139 have been presented for comment:

1. **17-MMA022**, which appears to propose largely technical updates to existing regulations.
2. **17-MAG011**, which appears to propose transitional rules for matters and proceedings that will come to the Tribunal under the *Planning Act*.
3. **17-MMA021**, which appears to propose transitional rules for planning matters in process "at the time of proclamation of the Bill 139 changes to the *Planning Act*."

As a general comment, it is impossible to fully understand the legal implications of the above proposals without the draft text of the regulations themselves. We therefore strongly recommend the release of the full text of the proposed regulations – as well as any future proposals regarding the operation of the new Tribunal and the implementation of Bill 139 – and that we be provided with an opportunity to make submissions on these regulations in order to properly evaluate the regulations' intended and actual impact.

Based on the information available, however, we are pleased to put forward the following feedback regarding the above regulatory proposals. An overarching comment respecting these proposals is that Schedules 1, 3 and 5 of Bill 139 (under which the regulations proposed by 17-MAG011 and 17-MMA021 will be implemented) should come into force at the same time. While we anticipate that this would be the case, a divergence in the coming into force of these regulations (caused by, for example, the related Schedules of Bill 139 being proclaimed on different days) could cause significant and unnecessary procedural difficulties.

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

Regulatory Proposal 17-MMA022: Proposed amendments to matters included in existing regulations under the *Planning Act* relating to the *Building Better Communities and Conserving Watersheds Act, 2017*

As noted above, without the draft regulatory text the content and potential implications of the proposed regulations cannot be fully understood. As an illustrative example, some of the proposed changes in the proposal appear largely procedural – for example, by updating current references to the OMB in existing regulations to the Tribunal. However, the proposal also includes a reference to "revising what information and material is to be included in a complete application." Thus, there may be substantive changes being contemplated that can only be properly understood and analyzed in light of the draft text itself. Given the apparent technical nature of Regulatory Proposal 17-MMA022, no substantive comments can be provided at this time in the absence of such text as

insufficient information is available to understand the potential and intended impacts of this proposed regulation.

Regulatory Proposal 17-MAG011: Proposed Regulation under the Proposed *Local Planning Appeal Tribunal Act, 2017*

Our comments regarding regulatory proposal 17-MAG011 are set out largely in the same order as presented in the Ministry's summary document, which is included as part of the proposal.

Transition

Consideration should be given to (or, at minimum, clarification provided for) instances where appeals of the same document could potentially fall under different transitional regimes. For instance, the proposal contemplates that the new process set out in the proposed *Local Planning Appeal Tribunal Act, 2017* (the "Act") would apply to certain appeals that are made after the proposed Act comes into force. However, if an appeal period commences before the Act comes into force but does not end until after the Act comes into force, a situation could arise where some of the appeals of the same document would be subject to the "new process" whereas other appeals of the same document would not. In this instance, it is recommended that the first appeal establish the regime applicable to all subsequent appeals.

Similarly, provision should be made for "related" applications to proceed under the same regime – for example, where related Official Plan Amendment ("OPA") and Zoning By-law Amendment ("ZBA") applications are made, but the OPA is complete prior to Royal Assent and the ZBA is only complete thereafter. It does not seem logical for subsequent appeals of these applications, which would ordinarily be consolidated, to proceed under different regimes.

Timelines

With respect to the proposed overall timelines for proceedings before the Tribunal, clarification is required as to what stage(s) of the proceeding is/are to be initiated and/or completed within these proposed timelines. For example, is the hearing to begin within this window, or is the hearing to be concluded, or is the decision to be rendered? While it is clear that the proposed timelines begin "from the date the proceeding is received and validated by the Tribunal", it is unclear when the window closes, and the impact of the timeline will be very different depending on what steps are to be included.

In addition, there are different proposed timelines for appeals of a municipality's or approval authority's decision or a municipality's failure to make a decision in respect of an official plan or zoning by-law as described in s. 38(1) of the Act (10 months) as opposed to appeals of an approval authority's failure to make a decision in respect of an official plan or plan of subdivision (12 months) as described in s. 38(2) of the Act. There is no clear rationale for the different appeal

timelines, and in the absence of a compelling reason for the difference, the timelines should be the same in order to promote consistency.

For any other appeal, the proposed timeline is six months, but it is unclear how these different timelines will operate within the context of multiple related appeals. For example, where there are combined OPA/ZBA and Site Plan Approval ("SPA") applications and appeals, will the SPA appeal (referral) be required to be heard several months in advance of the OPA/ZBA appeals (which is clearly not logical)? Similarly, what is to happen with related matters that would ordinarily be consolidated, but the appeals are filed and received by the Tribunal at different times? The related matters should be permitted to proceed within the same timelines so that they can be consolidated in an effort to promote consistency and efficiency.

Finally, the Province will need to ensure that it provides the Tribunal with the resources necessary to ensure that the timeframes established by the regulation are achievable and that there will be no negative impacts to other proceedings before the Tribunal as a result, including potential delays for hearing events and/or the ability of the Tribunal to conduct mediation.

Time Limits

The summary document indicates that at an oral hearing of an appeal under ss. 38(1) and 38(2) of the Act, each party would have up to 75 minutes to make a submission to the Tribunal. Though the Tribunal would be given discretion to increase these limits (which is appropriate), the idea of having a one-size-fits-all "default" time limit for every party for every matter is, in our view, problematic.

First, the proposed time limit fails to recognize the wide diversity of planning matters that will come before the Tribunal. While 75 minutes might be reasonable for a relatively simple matter, it is, in our view, unreasonable to think that 75 minutes would be adequate to deal with a complex matter involving potentially hundreds of documents.

Moreover, the proposed time limit fails to recognize the potential imbalance that would be created where there are a significant number of parties on one side and only one party on the other. For example, where a private applicant is being opposed by multiple municipalities/public agencies and/or third parties, it does not seem just that the applicant would have only 75 minutes to present its case while the opposing parties would have 75 minutes each. Similarly, where there are multiple (in some cases, over one hundred) appeals of the same municipal document, each of which may raise different issues, it is not reasonable for the municipality to be given only 75 minutes to present its case, while each appellant would have 75 minutes.

The proposal also makes no reference to time limits on any reply. It is unclear whether the proposed 75 minutes is intended to include the reply, or whether the party with the right of reply is to have an unlimited amount of time (subject to any limits that may be imposed by the Tribunal).

These practical realities will make the proposed time limits a challenge to enforce in a way that respects the procedural rights of the parties in a fair and logical way.

The Tribunal will be in the best position to determine appropriate time limits for parties' submissions at a proceeding and a "one-size-fits-all" approach may negatively impact procedural fairness. Therefore, the Tribunal should be provided with the clear authority and discretion to amend any time limit for party submissions as well as any other time limits established for submissions before the Tribunal (including participant submissions) as required on a case-by-case basis.

Practices and Procedures

The regulatory proposal contemplates the prohibition of examinations of a party or any other person, other than by the Tribunal, for appeals described in ss. 38 (1) and (2) of the Act. Rather than having an outright prohibition on examination by a party, the Tribunal should be given discretion to allow this to occur where determined to be appropriate – and subject to hearing submissions from the parties.

In addition, the Tribunal has considerable power to examine parties or other persons on its own initiative (see for example s. 33(2) of the Act). If there is going to be examination by the Tribunal, the parties should, at minimum, be given the right to ask questions of the witness(es) arising from the examination by the Tribunal, and this time should be allowed on top of any time limit placed on submissions.

Regulatory Proposal 17-MMA021: Proposed Regulation under the *Planning Act*

Appeals of Initial Interim Control By-laws

For transition regarding appeals of initial Interim Control By-laws ("ICBL"), the proposal indicates that the removal of appeals would apply to "decisions" made after the Bill comes into force – but it is unclear what "decision" is being referred to. Presumably "decision" is intended to refer to the passage of the by-law that is intended to act as the trigger, but the reference to the word "decision" is confusing and should be clarified. For example, if municipal Council passes a resolution to enact an ICBL at a subsequent meeting, the result could produce confusion about which is the intended trigger date.

Effective Date

At different points, with respect to the timing for various transition events, the regulation proposal makes reference to the date of "Royal Assent", the date of "proclamation" and the date that "the Bill comes into force". Use of this varying language, however, introduces confusion regarding the proposed timing for transition.

Pursuant to subsection 2(1) of Bill 139, the "Bill" came into force on the date of Royal Assent. Therefore, the date that "the Bill comes into force" is the same as the date of "Royal Assent" (being December 12, 2017) and it is unclear why different language is used to describe this same date if that was the intention. However, it appears that the intended reference is to the date that the "Schedules to the Bill" (or, in this case, at least Schedule 3 to the Bill) come into force, which is to occur upon proclamation. This expectation is based on, among other things, the following reference in the summary of the proposal: "… the proposed transition regulation would set out rules for planning matters in process **at the time of proclamation of the Bill 139 changes to the Planning Act** …". [emphasis added]

In other words, it appears that the transition regulation is intended to involve two key dates – the date of Royal Assent for Bill 139 (i.e., December 12, 2017) and the date that Schedule 3 of Bill 139 is proclaimed into force. Accordingly, the proposed regulation's use of varying terminology to reference these dates and, in particular, the reference to the date "the Bill comes into force" is confusing and causes uncertainty regarding the proposed timing for transition. Therefore, consistent terminology and clear reference to the dates for transition will be required in order to allow for clear and effective transition regulations. Given this lack of clarity, full appreciation and understanding of the proposed transition regulations to allow for meaningful comment will only be possible upon the provision of the draft regulations (which will presumably make clearer reference to the intended dates for transition).

Conclusion

As indicated in our previous submissions, our membership understands the challenges raised by both the private and public sectors in dealing with land use planning appeals, as well as the public perception of how land use appeals are adjudicated and ultimately resolved. While it is difficult to critically examine the practical operation of the new Tribunal within the land use planning and appeal system in the absence of the draft text of the regulations, we hope that the above feedback, based on the high-level information currently available, is helpful moving forward.

We thank you for considering our input, and we look forward to reviewing further proposals regarding the Tribunal and making comments at that time.