

August 14, 2017

BY EMAIL

Mr. Ken Peterson
Provincial Planning Policy Branch
Ministry of Municipal Affairs
777 Bay Street, 13th Floor
Toronto, Ontario
M5G 2E5

Dear Mr. Peterson:

**RE: CELA COMMENTS ON BILL 139 (*Building Better Communities and Conserving Watersheds Act, 2017*)
ENVIRONMENTAL REGISTRY NO. 013-0590**

Please find attached the comments of the Canadian Environmental Law Association (CELA) in relation to various proposals contained within Bill 139 (*Building Better Communities and Conserving Watersheds Act, 2017*). This submission is being filed with you pursuant to the above-noted Environmental Registry notice.

For the reasons described in the attached brief, CELA concludes that Bill 139 is a regressive reform package that subverts, or wholly eliminates, important procedural rights and substantive protections currently enjoyed by Ontarians under the existing law and policy framework.

For example, in relation to *Planning Act* appeals, Bill 139 purports to:

- reduce the number and types of matters which may be appealed to the Local Planning Appeal Tribunal (LPAT);
- limit the grounds of appeal that can be advanced before the LPAT;
- restrict who can participate in LPAT hearings, and constrain how the LPAT hearings will be conducted (e.g. no testimony under oath, no cross-examinations by parties, etc.);
- eliminate *de novo* hearings before the LPAT, and narrow the LPAT's decision-making authority; and
- stipulate that the as-yet unwritten LPAT rules of practice and procedure prevail over the *Statutory Powers Procedure Act* (SPPA) where there is "conflict" between the LPAT rules and the procedural safeguards entrenched in the SPPA.

In our view, none of the foregoing rollbacks from the current land use planning regime can be considered as progressive, justifiable or protective of the public interest. To the contrary, Bill 139 will make it exceedingly more difficult for CELA's client community to play a meaningful role in the land use decision-making process, or to ensure that decision-makers are held accountable through appropriate appellate procedures.

At the same time, Bill 139 contains no new provisions aimed at removing or reducing the financial barriers currently faced by residents or non-governmental organizations who participate in the land use planning system, and who often encounter well-resourced municipalities and/or deep-pocketed developers. In our view, it is long overdue for the Ontario government to address the fiscal imbalance in parties' resources, particularly when appeal hearings are held under the *Planning Act*.

Accordingly, we make two overall recommendations in relation to Bill 139:

CELA RECOMMENDATION #1: Bill 139 should not be enacted as currently proposed. Instead, Bill 139 should be withdrawn by the Ontario government unless the legislative proposals are significantly amended in order to safeguard the public interest, and to ensure that Ontario's land use planning system is fair, robust, participatory, transparent and accountable.

CELA RECOMMENDATION #2: If Bill 139 proceeds to Second Reading, then the Ontario Legislature should refer the Bill to a standing committee for public hearings.

Please contact the undersigned if you require any additional information about CELA's submissions on Bill 139.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



Richard D. Lindgren
Counsel

Encl.

**PROPOSED LAND USE PLANNING REFORMS IN ONTARIO'S BILL 139:
A PUBLIC INTEREST PERSPECTIVE
(Environmental Registry No. 013-0590)**

By
Richard D. Lindgren and Monica Poremba¹

Abstract: *The Ontario government is currently soliciting public comments on Bill 139 (Building Better Communities and Conserving Watersheds Act, 2017). If enacted, Bill 139 will fundamentally alter the existing process for appealing land use decisions under the Planning Act. Among other things, Bill 139 proposes to replace the current Ontario Municipal Board with a new "Local Planning Appeal Tribunal" that will no longer hold de novo hearings, receive testimony under oath, or allow parties to cross-examine expert witnesses. In addition, Bill 139 proposes to reduce the number and nature of planning appeals that can be filed with the new Tribunal. Moreover, the Bill fails to include any meaningful funding tools intended to enable citizens and non-governmental organizations to retain the legal, technical and planning assistance often required within the land use planning system. In this brief, the authors explain why these and other problematic aspects of Schedules 1, 2, 3 and 5 of Bill 139 should be significantly amended or deleted in order to make Ontario's land use planning regime more effective, efficient and equitable. Unless Bill 139 is amended accordingly, this brief concludes that the Bill should be withdrawn by the provincial government. Under separate cover, submissions have been sent from various environmental organizations to the Ontario government in relation to Schedule 4 of Bill 139, which proposes numerous amendments to the Conservation Authorities Act.*

PART I – INTRODUCTION

The Canadian Environmental Law Association (CELA) welcomes this opportunity to provide submissions in relation to Bill 139 (*Building Better Communities and Conserving Watersheds Act, 2017*).

(a) Background

CELA is a public interest law group founded in 1970 for the purposes of using and enhancing environmental laws to protect the environment and safeguard human health. Funded as a specialty legal aid clinic, CELA lawyers represent low-income and vulnerable communities in the courts and before tribunals on a wide variety of environmental issues.

Since our inception, CELA's casework, law reform and public outreach activities have increasingly focused on land use planning matters at the provincial, regional and local levels in Ontario. For example, CELA lawyers represent clients involved in appeals under the *Planning Act* in relation to official plans, zoning by-laws, subdivision plans and other planning instruments. In

¹ The authors are staff lawyers at the Canadian Environmental Law Association (CELA). The research assistance of CELA's summer law student, Michael Lucifora, is acknowledged and appreciated by the authors.

some cases, CELA clients are the appellants, while in other cases, CELA clients are added by the Ontario Municipal Board (OMB) as parties in response to appeals brought by other persons or corporations.

At the present time, CELA's OMB cases tend to occur outside of the Greater Toronto Area, and typically involve new or expanded residential, commercial or industrial development in eastern, western and central Ontario. The overall objectives of CELA's clients in these OMB hearings include: conserving water resources; protecting ecosystem functions; preserving prime agricultural lands; safeguarding public health and safety; and otherwise ensuring good land use planning across Ontario.

In some of CELA's quarry cases, the public hearing before the OMB also includes matters under the *Aggregate Resources Act* upon referral by the Ministry of Natural Resources and Forestry. Similarly, CELA has represented clients in landfill hearings before the Joint Board, consisting of members of the OMB and the Environmental Review Tribunal (ERT) pursuant to the *Consolidated Hearings Act*.

In addition to the above-noted OMB casework, CELA continues to participate in broader provincial planning initiatives, such as the periodic review and updating of the Provincial Policy Statement (PPS) issued under the *Planning Act*.² CELA also filed submissions during the Development Charges System Review conducted by the Ministry of Municipal Affairs (MMA) in 2013-14. Similarly, CELA lawyers have appeared before the Standing Committee on General Government in relation to the review of the *Aggregate Resources Act*.

Moreover, CELA filed detailed submissions in response to the province's consultation document on the recent OMB Review.³ In addition, CELA staff participated at the town hall meeting held by the MMA in Toronto on November 15, 2016 in relation to proposed OMB reforms.

CELA has co-authored and submitted detailed comments during the Coordinated Land Use Planning Review of the major provincial land use plans (Niagara Escarpment Plan, Oak Ridges Moraine Conservation Plan, Greenbelt Plan, and Growth Plan for the Greater Golden Horseshoe). Moreover, as a founding member of the Coalition on the Niagara Escarpment, CELA has a lengthy history of involvement in proceedings under the *Niagara Escarpment Planning and Development Act*, including representing clients in appeal hearings held by the Niagara Escarpment Hearing Office.

On the basis of our decades-long experience in land use planning matters throughout Ontario, CELA has carefully considered the various components of Bill 139 from the public interest perspective of our client communities. For the reasons outlined below, CELA's overall conclusion is that Bill 139 should not be enacted in its present form. Instead, Bill 139 should be withdrawn

² CELA's numerous briefs, submissions and backgrounders on land use planning in Ontario are available on the CELA website: <http://www.cela.ca/collections/land/land-use-planning-ontario>

³ MMA and MAG, *Review of the Ontario Municipal Board: Public Consultation Document (October 2016)* [OMB Review Consultation Document]. Many of CELA's comments on Bill 139 in this brief are drawn from the critical analysis and numerous recommendations contained in CELA's December 2016 reply to the OMB Review Consultation Document.

unless it is significantly amended in accordance with the findings, conclusions and recommendations set out in this brief.

CELA RECOMMENDATION #1: Bill 139 should not be enacted as currently proposed. Instead, Bill 139 should be withdrawn by the Ontario government unless the legislative proposals are significantly amended in order to safeguard the public interest, and to ensure that Ontario’s land use planning system is fair, robust, participatory, transparent and accountable.

In making this recommendation, CELA is not suggesting that the status quo should remain intact and unchanged. To the contrary, CELA recognizes that there is a pressing need to strengthen and improve Ontario’s existing land use planning system, particularly in terms of protecting provincial interests, enabling local decision-making, ensuring meaningful public participation, and providing effective appellate oversight by a specialized administrative body. However, we conclude that Bill 139 is not a panacea for resolving the widespread public concerns about the efficacy and fairness of province’s land use planning regime. Indeed, we reasonably anticipate that Bill 139 may compound or exacerbate several current problems within the land use planning system, and may create new difficulties or unintended consequences, as described below.

Accordingly, CELA respectfully urges the Ontario government to not proceed with Bill 139 as proposed. Instead, CELA suggests that Bill 139 should be withdrawn so that provincial officials can continue their stakeholder consultation efforts in order to develop further and better reforms to Ontario’s land use planning system. On this point, we note that some developers have also expressed concern about the various proposals within Bill 139.⁴ CELA therefore concludes that considerably more provincial work needs to be done on how to design and implement an optimal land use planning regime that can meet the challenges of the 21st century.

(b) Overview of Bill 139

Bill 139 was introduced for First Reading in Ontario Legislature on May 30, 2017. The Bill is divided into five main schedules, each of which contains new legislation aimed at different aspects of Ontario’s current land use planning regime:

- Schedule 1 repeals the *Ontario Municipal Board Act* (OMBA) and establishes and empowers a new appellate tribunal, known as the Local Planning Appeal Tribunal (LPAT), to decide appeals filed under the *Planning Act* and other statutes;
- Schedule 2 creates a new non-share corporation, known as the Local Planning Appeal Support Centre (LPASC), to provide support services to eligible persons involved in land use matters under the *Planning Act*;
- Schedule 3 sets out numerous amendments to the *Planning Act*, *City of Toronto Act 2006*, and *Ontario Planning and Development Act 1994* that are intended to give greater weight

⁴ Jeff Gray *et al.*, “Ontario Developers Form Group Aimed at Housing Reform”, *Globe & Mail* (July 10, 2017).

to municipal and provincial land use decisions, and to decrease the number and types of appeals that can be brought to the LPAT;

- Schedule 4 contains wide-ranging changes to the *Conservation Authorities Act* in order to clarify and enhance the powers, duties, governance structure and geographic jurisdiction of Conservation Authorities across Ontario; and
- Schedule 5 sets out consequential amendments to a number of other provincial statutes, including the *Aggregate Resources Act*.

Together with other non-governmental organizations, CELA has recently filed submissions on the Schedule 4 amendments to the *Conservation Authorities Act*.⁵ Accordingly, the purpose of this brief is to focus on Schedules 1, 2, 3 and 5 of Bill 139, and to identify the legal and policy reasons why many of these legislative proposals are unacceptable from the public interest perspective.

PART II – CELA’S GENERAL COMMENTS ON BILL 139

As the general starting point for our analysis of Bill 139, CELA submits that the issue of land use planning reform should be viewed through the lens of ensuring access to justice.

In our view, any Ontarian interested in, or potentially affected by, land use planning decisions must have a meaningful opportunity to fully participate in the decision-making process, particularly where such decisions are under appeal. In this regard, the overall goal of the Ontario Legislature should be to design a land use planning system which ensures that “different views about land use can be resolved fairly at less cost and in an accessible manner.”⁶ Accordingly, any Bill 139 changes which are inconsistent with this overarching public policy objective should not be enacted or implemented.

CELA also endorses the guiding principles that were used to frame the OMB Review: protect long-term public interests; provide transparency in hearing processes and decision-making; maintain or enhance access to dispute resolution; and minimize impacts on the court system.⁷ On this latter point, CELA submits that it is far preferable to have planning disputes adjudicated by a specialized administrative tribunal rather than a reviewing court, particularly in light of the cost, complexity and time-consuming nature of judicial proceedings. Unfortunately, for the reasons described below, CELA anticipates that the proposed Bill 139 regime will likely result in more litigation in the courts – not less – as stakeholders increasingly (and correctly) perceive that they are being shut out of the amended decision-making process under the *Planning Act*, as described below.

More generally, CELA concludes that the Bill 139 is a regressive reform package that subverts, or wholly eliminates, important procedural rights and substantive protections currently enjoyed by all Ontarians under the existing law and policy framework.

⁵ Letter dated July 26, 2017 from CELA *et al.* to the Ministry of Natural Resources and Forestry re Environmental Registry No. 013-0561.

⁶ OMB Review Consultation Document, page 2.

⁷ *Ibid*, page 5.

For example, in relation to *Planning Act* appeals, Bill 139 purports to:

- reduce the number and types of matters which may be appealed to the LPAT;
- limit the grounds of appeal that can be advanced before the LPAT;
- restrict who can participate in LPAT hearings, and constrain how the LPAT hearings will be conducted (e.g. no testimony under oath, no cross-examinations by parties, etc.);
- eliminate *de novo* hearings before the LPAT, and narrow the LPAT's decision-making authority; and
- stipulate that the as-yet unwritten LPAT rules of practice and procedure prevail over the *Statutory Powers Procedure Act* (SPPA) where there is "conflict" between the LPAT rules and the procedural safeguards entrenched in the SPPA.

In our view, none of the foregoing rollbacks from the current land use planning regime can be considered as progressive, justifiable or protective of the public interest. To the contrary, Bill 139 will make it exceedingly more difficult for CELA's client community to play a meaningful role in the land use decision-making process, or to ensure that decision-makers are held accountable through appropriate appellate procedures.

At the same time, Bill 139 contains no new provisions aimed at removing or reducing the financial barriers currently faced by residents or non-governmental organizations who participate in the land use planning system, and who often encounter well-resourced municipalities and/or deep-pocketed developers. In our view, it is long overdue for the Ontario government to address the fiscal imbalance in parties' resources, particularly when appeal hearings are held under the *Planning Act*.

For these and other reasons, CELA recommends that Bill 139 should be withdrawn, re-written, and re-introduced with more appropriate changes to the province's land use planning system. In the alternative, if Bill 139 proceeds to Second Reading, then CELA requests the Ontario Legislature to refer the Bill to a standing committee for public hearings in order to receive stakeholders' unresolved concerns, and to identify the numerous amendments to the Bill that are required to safeguard the public interest.

CELA RECOMMENDATION #2: If Bill 139 proceeds to Second Reading, then the Ontario Legislature should refer the Bill to a standing committee for public hearings.

Our more detailed comments on the legislative proposals in Bill 139 are outlined below in Part III of this brief.

PART III – CELA'S SPECIFIC COMMENTS ON BILL 139

Our specific comments on Schedules 1, 2, 3 and 5 of Bill 139 are set out in the following submissions.

(a) Schedule 1: Establishing and Empowering the LPAT

The Ontario government's OMB Review Consultation Document correctly stated that the OMB plays a fundamentally important role in Ontario's land use planning system.⁸ However, Schedule 1 of Bill 139 now proposes to replace the OMB, wholly repeal the OMBA and the regulations thereunder,⁹ and establish the LPAT to serve as the new appellate body under the *Planning Act* and other statutes.

In general, Schedule 1 (entitled *Local Planning Appeal Tribunal Act, 2017*) contains many of the same provisions found in the OMBA, and proposes to continue the OMB as the re-named LPAT.¹⁰ CELA is not concerned about the name of the new institution, nor do we have any particular objections to incorporating many of the existing OMBA provisions into Schedule 1.

However, CELA remains concerned about certain Schedule 1 provisions which vary or delete key provisions currently contained in the OMBA. In addition, CELA is strongly opposed to many of the new legislative proposals in Schedule 1 which will fundamentally alter, or unduly constrain, the current powers, procedures and practices of the OMB, as described below.

LPAT Powers, Procedures and Rules

In comparison to the OMBA, it appears to CELA that Schedule 1 of Bill 139:

- omits the OMBA provision¹¹ that confers "all the powers of a court of record" upon the OMB;
- narrows the general grant of general jurisdiction and powers enjoyed by the OMB;¹² and
- omits the OMBA provision which enables the OMB, on its motion or at the request of Cabinet, to inquire into, hear and decide "any matter."¹³

We are unaware of any persuasive public policy reasons for these new proposed constraints on the LPAT's general jurisdiction and powers, and would respectfully request the Ontario government to provide its rationale for such changes.

Similarly, the Schedule 1 provisions pertaining to LPAT proceedings go beyond what is currently set out in the OMBA, and specifically empower the LPAT to make rules that conflict directly with, and prevail over, the important procedural requirements of the SPPA.

⁸ *Ibid*, pages 3 to 4.

⁹ Schedule 1, sections 44 and 45.

¹⁰ Schedule 1, section 2.

¹¹ OMBA, section 34.

¹² See OMBA, sections 37, 48 and 53; see also Schedule 1, sections 11 to 13.

¹³ OMBA, section 41.

For example, Schedule 1:

- enables the LPAT to make rules relating to its practice and procedure;¹⁴
- allows the LPAT rules to require or authorize:
 - (i) the use of hearings, practices or procedures “that are alternatives to traditional adjudicative or adversarial procedures;”
 - (ii) conducting hearings or proceedings “in writing or by any electronic or automated means;” and
 - (iii) appointing persons to serve as a representative of a class of parties that have a “common interest,” at least in the opinion of the LPAT;¹⁵ and
- stipulate that if there is conflict between the LPAT rules and the SPPA, then the rules prevail over the statute;¹⁶

As a matter of law, CELA notes that the SPPA generally applies to Ontario tribunals (including the OMB and the proposed LPAT) that exercise statutory powers of decision under provincial law, and that are required to hold hearings before making decisions.¹⁷ Significantly, the SPPA entrenches a number of important procedural protections that govern pre-hearing and hearing procedures, including the parties’ right to notice,¹⁸ right to attend or access hearings,¹⁹ right to representation,²⁰ right to examine and cross-examine witnesses,²¹ and right to notice of the decision²² and the reasons for decision.²³ These public statutory rights are accompanied by the SPPA requirement that a tribunal’s rules of practice and procedure “shall be consistent” with the SPPA.²⁴

In this regard, the SPPA contains a paramountcy provision specifying that in cases of conflict, the SPPA prevails over any other provincial statute (or regulations, rules or by-laws made under it), unless the other statute expressly provides that it prevails over the SPPA.²⁵ While this latter exempting clause provides the legislative basis for the attempt in subsection 31(3) of Schedule 1 to override the SPPA, the public policy reasons for doing so in Bill 139 remain unclear to CELA.

¹⁴ Schedule 1, subsection 32(1).

¹⁵ Schedule 1, subsection 32(3).

¹⁶ Schedule 1, subsection 31(3).

¹⁷ SPPA, section 3.

¹⁸ SPPA, section 6.

¹⁹ SPPA, section 9.

²⁰ SPPA, section 10.

²¹ SPPA, section 10.1.

²² SPPA, section 18.

²³ SPPA, section 17.

²⁴ SPPA, subsection 25.1(3).

²⁵ SPPA, section 32.

In fact, there is no comparable provision to subsection 31(3) within the rule-making section of the current OMBA,²⁶ and its sudden appearance in Bill 139 is both surprising and unacceptable to CELA. In our experience, the OMB has traditionally been able to control its hearing process without developing or applying rules that are contrary to the SPPA and its procedural safeguards.

Schedule 1 of Bill 139 further provides that any failure by the LPAT to follow its own rules is not judicially reviewable unless there has been a “substantial wrong that affected the final disposition of a matter.”²⁷ This privative clause does not appear in the OMBA, and its inclusion in Bill 139 appears to be an ill-conceived attempt to insulate the LPAT from judicial scrutiny in all but the most egregious cases. In our view, this provision is fundamentally at odds with the public interest need to ensure procedural fairness and legal accountability of the LPAT’s appellate decision-making process, and it should therefore be deleted from Bill 139.

Subsection 33(1) of Schedule 1 of Bill 139 goes on to provide the LPAT with discretion to require parties to attend “case management conferences.” In principle, CELA has no objection to such discretion, but we remain unclear why this interlocutory proceeding warrants specific mention in the statute (as opposed to the rules). Moreover, as a practical matter, it is unknown whether – or to what extent – that case management conferences may differ from the pre-hearing conferences that currently occur under the OMB’s existing rules. CELA’s further submissions on case management conferences for *Planning Act* appeals are set out below.

Subsection 33(2) enables the LPAT to “examine” parties or other persons, and to compel parties or other persons to produce evidence or witness statements. While LPAT members should be free to pose questions to, and elicit information from, parties or other persons appearing before the hearing panel, we are unclear why Bill 139 needs to entrench this specific power, particularly since it does not appear in the OMBA. We also find it ironic and unacceptable that while LPAT is given the general right to examine witnesses or evidence, that same right is not accorded to parties in *Planning Act* appeals under Bill 139, as discussed below.

Planning Act Appeals

While sections 31 to 37 in Schedule 1 of Bill 139 generally govern LPAT practice and procedure, Schedule 1 goes on to prescribe special provisions that apply to appeals of certain decisions (or non-decisions) of municipalities and approval authorities under the *Planning Act* (as amended by Bill 139).²⁸

For example, Schedule 1 stipulates that such appeals “must adhere to any timelines prescribed by regulation” under Bill 139. Because draft regulations have not been disclosed to date, CELA is unable to comment on the adequacy (or inadequacy) of the timelines that are being contemplated for *Planning Act* appeals. While CELA has no objection to the promulgation of non-binding guidelines setting out the anticipated timeframes for appeals (or types of appeals), we seriously question the need for, and utility of, establishing fixed, inflexible or “one-size-fits-all” deadlines for adjudicating *Planning Act* appeals.

²⁶ OMBA, section 91.

²⁷ Schedule 1, section 32(5). See also section 34 of Schedule 1.

²⁸ Schedule 1, section 38.

As noted by the Environmental Commissioner of Ontario, it is highly debatable whether “faster” decisions are necessarily “better” decisions,²⁹ and numerous legal and policy concerns (e.g. fairness and natural justice, tribunal independence, purpose of public hearings, transparency of decision-making, etc.) have been raised about the imposition of time limits upon the ERT under Ontario’s environmental assessment regime.³⁰ In our view, these concerns are equally applicable to the LPAT, which, of course, should endeavor to conduct efficient hearings.

In any event, while we support the need for timely appeal decisions, CELA is strongly opposed to any proposal to establish hearing day limits for LPAT appeals under the *Planning Act*. First, by way of comparison, CELA notes that in civil and criminal proceedings, judges are not bound by pre-set regulatory limits on the number of trial days that are to be used to hear the matters in dispute. In principle, it is unclear why such limits would be placed on a specialized administrative tribunal that is supposed to be expert, independent and quasi-judicial.

Second, CELA points out that the ERT is not subject to maximum hearing day limits for the various statutory appeals that it adjudicates under provincial environmental law. We are unaware of any persuasive reasons why hearing day limits should be imposed on the LPAT, but not on the ERT or other tribunals within the Environment and Lands Tribunals Ontario (ELTO). In this regard, it should be noted that when dealing with a renewable energy appeal, the ERT is compelled to complete the hearing and render its decision within the prescribed six-month timeframe, or else the approval decision under appeal is deemed to be confirmed.³¹ However, this is a limit on the overall process, not the number of hearing days, and it has proven to be problematic in practice where, for example, new information arises, material changes in the project are proposed, and a “time-out” is needed by the parties.

Thus, CELA submits that when adjudicating planning appeals, the LPAT should not be subject to arbitrary regulatory deadlines, particularly since Schedule 1 does not spell out the consequences for failing to adhere to the prescribed timelines (e.g. are the appeals automatically dismissed/granted, or are the impugned decisions deemed to be valid/invalid?). Accordingly, CELA does not support the establishment of binding time limits in any regulations under Bill 139. Instead, a case-specific timetable for the conduct of *Planning Act* appeals should be negotiated between the parties, or, if no agreement can be reached, then the timetable should be crafted and ordered by the LPAT on a case-by-case basis after receiving submissions from the parties.

Upon receipt of the appeal record, section 39 of Schedule 1 requires a mandatory case management conference among the parties in order to discuss settlement prospects, including the potential use of mediation or alternative dispute resolution. On this point, we note that while case management conferences for other LPAT proceedings appear to be optional under subsection 33(1), such conferences are obligatory in every *Planning Act* appeal, regardless of the nature of the appeal, the complexity of the issues, or the number of parties involved in the matter. CELA is unaware of any persuasive reasons why this distinction is being drawn between planning and non-planning

²⁹ ECO, Annual Report 2008-09, at pages 78-81.

³⁰ Alan D. Levy, “Scoping Issues and Imposing Time Limits by Ontario’s Environment Minister at Environmental Assessment Hearings – A History and Case Study” (2001), 10 JELP 147.

³¹ *Environmental Protection Act*, subsection 145 (2.1)(6); O.Reg. 359/09, section 59.

appeals. In addition, CELA observes that because the LPAT will no longer conduct *de novo* hearings or receive *viva voce* evidence from the parties' witnesses (see below), there appears to be relatively little case management that will actually be required (e.g. production/disclosure, exchange of witness statements, order of presentation and cross-examination, etc.) in relation to planning appeals if Bill 139 is enacted.

Sections 40 and 41 of Schedule 1 enable the LPAT to add parties or other participants in *Planning Act* appeals. Given the public interest nature of many land use disputes, CELA agrees that the LPAT should have the discretion to allow additional persons to become involved in LPAT hearings as parties or participants. However, CELA has a number of concerns about how sections 40 and 41 will work in practice, particularly since these provisions do not currently exist in the OMBA.

For example, section 40 requires prospective intervenors to serve and file written submissions to outline their position on the merits of the appeal (e.g. is the decision/non-decision consistent with the PPS or in conformity with a provincial plan or official plan?).³² These submissions must be filed no later than 30 days before the mandatory case management conference required under section 39, although it is unclear how or when non-parties will receive notice of the case management conference, which presumably must be issued at least 45 or 60 days prior to the conference in order to give non-parties sufficient time to prepare and file submissions. It is also unclear whether persons who file written submissions are also entitled to attend and participate in the case management conference, or whether their intervention requests will be decided solely on the basis of written submissions.

Moreover, at this early stage of the proceedings, CELA submits that a person's view of the merits of the appeal is not particularly relevant to the LPAT's determination of whether he/she should be added as a party or participant. In our view, it would behoove the LPAT not to reach any preliminary conclusions about the appeal prior to the hearing, nor to use the appeal merits as a mechanism for screening out additional parties or participants. In CELA's view, if it appears that a person is interested in, or potentially affected by, the decision under appeal, or if it appears that the person can make a useful contribution to the appeal hearing and assist the LPAT in understanding of the issues in dispute, then he/she should be permitted to intervene in the appeal, irrespective of his/her position on whether the appeal should be allowed or dismissed.

CELA further notes that section 40 generally applies to appeals filed under subsections 17(24) and 36 [official plans], 22(7) [official plan amendments] and 34(11) and (19) [zoning by-laws] of the *Planning Act*.³³ In comparison, section 41 applies only to appeals filed under subsection 17(40) [non-decision on official plans] and subsection 51(34) [non-decision on subdivision plans]. However, section 41 does not specify the timing of the required written submissions, and omits the requirement to address the issues of PPS consistency or provincial/official plan conformity. Similarly, there appears to be no mention of appeals filed under subsection 51(39) [subdivision plans].

³² Schedule 1, subsections 40(1) and (3).

³³ Schedule 1, subsection 38(1).

In any event, the public policy basis for the differential (if not byzantine) treatment of interventions under sections 40 and 41 are unclear to CELA, particularly since we have been involved in consolidated OMB hearings where appeals have been filed in relation to decisions/non-decisions regarding official plan amendments, re-zoning-by-laws, and subdivision plans. Accordingly, instead of prescribing dual and potentially confusing routes for interventions in LPAT hearings (depending on the type of appeal), CELA submits that the legislation (or LPAT rules) should set out a clear, consistent and single procedure for intervention requests in *Planning Act* appeals.

Section 42 of Bill 139 is arguably one of the most objectionable aspects of Bill 139 for several reasons. For example, subsections 42(1) and (2) dictate who can become involved as a party or participant “if” an oral hearing is held by the LPAT. This wording clearly leaves the door open for the LPAT to not hold an oral hearing for *Planning Act* appeals (and not allow intervenors), but Bill 139 provides no criteria or guidance as to when – or under what circumstances – written hearings should be held instead of oral hearings. However, it is our understanding that the Ontario government anticipates that most *Planning Act* appeals will be subject to written hearings only under Bill 139, which would seem to make the intervention provisions in section 42 inapplicable and effectively exclude interested persons from the written appeal process. In our view, this new restrictive approach is contrary to current practice before the OMB, ERT and other administrative tribunals that are deciding matters of public interest.

We hasten to add that CELA has no objection to disposing of certain interlocutory matters (e.g. motions) on the basis of written submissions where appropriate. However, for the purposes of ensuring fairness, transparency and credibility of LPAT decisions, CELA submits that the merits of *Planning Act* appeals must continue to be adjudicated in traditional oral hearings, with the usual procedural safeguards in place (e.g. testimony under oath, cross-examination by parties, etc.). In our experience, oral hearings offer the highest and most effective form of public participation in the decision-making process, and they should not be sacrificed for reasons of political expediency or under the guise of administrative “efficiency.”

Furthermore, it appears that in oral hearings under subsection 38(1), only parties may take part in the proceeding, and there is no apparent role for participants.³⁴ In contrast, in oral hearings under subsection 38(2), both parties and participants may take part in the proceeding. Given that subsection 38(1) hearings deal with matters of profound public importance (e.g. official plans and zoning by-laws), it is unclear why participant status cannot be accorded to those persons who wish to make a presentation to the LPAT, but who, for financial or other reasons, cannot assume the role and responsibility of a full-time party. Based on our experience in OMB hearings, CELA observes that it has been very useful (if not essential) for the panel member(s) to receive presentations directly from participants, who typically are unrepresented residents with considerable local knowledge and valuable perspectives on the issues in dispute. Accordingly, CELA cannot support the apparent attempt in subsection 42(1) to limit LPAT hearings to parties and to otherwise exclude participants.

Third, and perhaps most alarmingly of all, subsection 42(3) states that even if an oral hearing is held under subsection 38(1) or (2), “no party or person may adduce evidence or call or examine

³⁴ Schedule 1, subsection 42(1).

witnesses.” Instead, all that parties and persons can do in oral hearings (if held) is to make “oral submissions,” provided that they do not exceed “the time provided under the regulations.” It goes without saying that the proposed time limits on oral submissions are unknown at the present time since draft regulations have not yet been disclosed to date by the Ontario government. For the reasons stated above, CELA is opposed to prescribing arbitrary time limits by regulations made by the Minister on a generic basis.³⁵ Instead, on a case-by-case basis, the LPAT, in conjunction with the parties, should set appropriate timeframes for the delivery of final argument, as is currently done in most OMB hearings involving multiple parties.

More fundamentally, CELA strongly objects to Bill 139’s attempt to transform OMB’s current *de novo* hearings into a far less robust type of appellate review. Similarly, we object to the Bill 139 proposal to tightly circumscribe the nature of the OMB’s current jurisdiction and order-making powers in relation to *Planning Act* appeals.

First, CELA submits that planning appeals should be decided on their merits, and there should be no presumption by the LPAT that the impugned decisions are always properly reached, unassailable on the facts, or in accordance with the applicable law/policy framework. In short, appeals to the LPAT are not analogous to judicial review applications, where curial deference to a specialized administrative decision-maker may be warranted, and where the principal question is typically whether the decision-maker reached a defensible outcome from a range of reasonable options. Since *Planning Act* appeals usually involve one or more matters of provincial interest and invariably trigger the application of provincial planning policies, it is imperative that the LPAT should remain empowered to make the best planning decision available on the hearing record, rather than determine whether the impugned decision was merely “reasonable” or “defensible” on the basis of the documentation placed before the municipality or approval authority.

Second, CELA submits that planning appeals should be decided by the LPAT on the best available evidence, including information, data or opinions that may post-date the decision or approval under appeal. For example, in OMB hearing, the parties often present expert evidence that did not exist prior to the decision under appeal, and that are prepared to supplement, clarify or amend the materials originally placed before the municipal council or approval authority. It also provides the parties with an opportunity to update stale-dated materials, particularly where the appeal is heard some time after the original decision was made, or where site conditions or other circumstances may have materially changed. In our view, this important post-decision evidence should not be excluded, but instead should be considered and given appropriate weight by the LPAT when conducting *de novo* hearings and deciding the merits of *Planning Act* appeals.

Third, we note that the ERT continues to hold *de novo* hearings when it is deciding appeals under the *Environmental Protection Act* and the *Ontario Water Resources Act*.³⁶ From a legal and policy perspective, the environmental appeals heard by the ERT are substantially similar to many of the planning appeals to be heard by the LPAT (e.g. complexity of the issues, number of parties, competing public and private interests, etc.). Given that the OMB (and presumably the LPAT) and ERT are both substantially similar tribunals within the ELTO cluster, CELA is unaware of any

³⁵ Schedule 1, subsection 43(1).

³⁶ *Environmental Protection Act*, section 145.2; *Ontario Water Resources Act*, subsection 110(10).

compelling public interest justification for differentiating how appeal hearings should be held by ELTO bodies.

Fourth, if Bill 139 is enacted, then it will inevitably cause CELA's clients and other public interest representatives to incur additional expenses much earlier in the land use planning system. For example, if the LPAT's appellate review is restricted to the record before the decision-maker, then interested persons and groups will have to retain experts to prepare and submit detailed reports (and respond to other parties' materials) at the earliest stages of the planning process. While developers may be well-positioned to absorb, pass along, or write-off these expenditures, the clients represented by CELA do not have similar financial resources. This is particularly true in the absence of any participant funding program for LPAT hearings (see below). Thus, implementing this change may have the unintended consequence of creating additional financial barriers to citizens or groups who are entitled to play a meaningful role in land use planning system.

Fifth, and perhaps most importantly, it must be noted that when parties are filing documents and making submissions directly to municipal councils or approval authorities, the procedural safeguards under the SPPA are inapplicable. For example, while participating in mandatory public meetings under the *Planning Act*, or while making deputations to municipal councils, residents and groups typically face very short time limits (e.g. 5 to 15 minutes) for their presentations. Moreover, the documentation submitted by developers is not given under oath, there is no opportunity to cross-examine consultants on these materials, and there is no attempt to ensure that the authors of these materials are duly qualified to offer opinion evidence on the issues in dispute. In addition, it has been our experience that smaller or rural municipalities often do not possess the in-house capacity to critically assess planning applications and supporting technical documentation, and they may be reluctant or unwilling to spend their limited resources on retaining outside consultants or counsel.

In effect, these and other shortcomings mean that there is no robust or transparent testing of conflicting evidence or competing opinions before municipal councils or approval authorities make their *Planning Act* decisions. Accordingly, CELA strongly recommends that the LPAT should continue to hold *de novo* oral hearings, featuring evidence under oath and cross-examination of witnesses. In our view, this traditional hearing model is preferable to the unduly constrained appeal process set out in Bill 139. In short, the traditional oral hearing model serves as an important safety valve where *Planning Act* decisions are made on the basis of inadequate, unreliable or inaccurate materials tendered by developers or other players in the land use planning system.

In the alternative, if the LPAT is not going to hold any *de novo* hearings under the *Planning Act*, then Bill 139 should be amended to ensure that environmental planning appeals (e.g. "greenfield" projects involving the natural heritage/healthy communities policies of the PPS) are directed or transferred to the ERT for *de novo* hearings. In our view, the public interest is better served by having a full oral hearing on development proposals that may adversely affect public resources or public health and safety. On this point, we note that other stakeholders have suggested that all

environmental planning appeals should be heard and decided by the ERT instead of the OMB (or its successor LPAT).³⁷

Conclusions on LPAT Hearings

CELA submits that it is in the public interest to have an independent, specialized quasi-judicial tribunal that is empowered to hear and decide disputes arising under the *Planning Act*. In our view, however, these appeals should not be confined to the record that was placed before the decision-makers at first instance. Instead, CELA concludes that there should be a continuation of *de novo* oral hearings on most matters that are currently appealable under the *Planning Act*.

At the same time, CELA hastens to add that we are not in favour of lengthy and costly appeal hearings, which can quickly drain the limited resources of CELA's clients. To the contrary, CELA submits that the province should develop and consult upon appropriate administrative changes which will help make the current *de novo* hearing process more effective, efficient and equitable. Unfortunately, Schedule 1 of Bill 139 goes too far in the opposite direction by curtailing *de novo* hearings, and by imposing other unnecessary and counterproductive constraints on the nature, conduct and outcome of LPAT proceedings.

In CELA's view, the bottom line is that if a municipality or approval authority takes its planning responsibilities seriously, ensures consistency with the PPS, provincial plans and official plan policies, and bases its decision on cogent and complete evidence, then the decision-maker will be well-positioned to convince the LPAT to uphold its planning decision on the merits. Conversely, where a decision-maker has injudiciously used its *Planning Act* powers to approve development applications or planning instruments that are incomplete, questionable or unsupportable under the current law/policy framework, then the LPAT should serve as an important check on such ill-advised exercises of statutory discretion.

Put another way, CELA remains highly concerned about what some municipalities may be tempted to do or decide under the *Planning Act* if the possibility of an appeal to a *de novo* LPAT hearing were to be removed under Bill 139. In our view, *de novo* hearings offer the best guarantee of legal accountability, and help ensure that the best planning decision is made on the best available information.

CELA's further submissions on Bill 139's sweeping changes to appeal hearings under the *Planning Act* are set out below in relation to Schedule 3 of the Bill.

(b) Schedule 2: Creating the LPASC

The OMB Review Consultation Document identified various proposals to enhance public participation, education and outreach, including:

³⁷ <http://environmentaldefence.ca/2017/04/05/building-better-communities-starts-fixing-ontario-municipal-board/>

- increasing public education opportunities on OMB practices and procedures, and creating a new user-friendly website; and
- implementing options to encourage citizen participation and to generally improve the OMB experience to ensure that local perspectives are heard, such as expanding and/or reconfiguring the Citizen Liaison Office, and exploring funding tools to help citizens retain their own planning experts and/or lawyers.³⁸

However, Schedule 2 of Bill 139 proposes to replace the existing Citizen Liaison Office (housed under the auspices of the ELTO) with the stand-alone LPASC, which is intended to be a non-share corporation that is independent from, but accountable to, the Ontario government.³⁹ More alarmingly, Bill 139 does not create any new funding tools to enable citizens (or citizens' groups) to retain the legal, technical and planning assistance that is often needed to meaningfully participate in the land use planning system, particularly at the appeal stage. CELA has a number of comments and concerns about these problematic aspects of the Bill.

LPASC Support Services

There is considerable uncertainty about the nature and extent of the “support services” that would be provided by LPASC staff. For example, the term “support services” is not specifically defined, but Schedule 2 lists illustrative examples of the types of services to be delivered by the LPASC:

- information on land use planning;
- guidance on LPAT procedures;
- advice or representation; and
- other matters as may be prescribed by regulation.⁴⁰

CELA agrees that there is an ongoing need for public education and outreach regarding land use planning system in general, and the appeal process in particular. Accordingly, CELA has no objection in principle to the creation of the LPASC so that it may serve as a clearinghouse of planning-related “information” and “guidance.” Indeed, if the primary function of the LPASC is to provide concise and accurate information to Ontarians on how to meaningfully participate in the land use planning system, then this proposal seems to be a potentially useful initiative, provided that sufficient provincial funding is provided to the LPASC for this purpose.

On the other hand, it is unclear exactly what type of “advice” or “representation” that LPASC will actually be able to provide to persons across Ontario. For example, it is unknown whether the LPASC will have a full roster of in-house planners, lawyers and technical experts (e.g. engineers, agrologists, hydrogeologists, biologists, ecologists, etc.) who are professionally certified and sufficiently experienced to provide informed “advice” or effective “representation.”

³⁸ OMB Review Consultation Document, pages 21 to 23.

³⁹ Schedule 2, section 2.

⁴⁰ Schedule 2, section 4.

Moreover, since any in-house legal staff would be directly employed by the LPSAC, it may be problematic for them to then enter into formal solicitor-client relationships with persons who contact the LPASC for assistance. In such cases, appropriate measures (e.g. written and verbal disclaimers) would have to be undertaken to ensure that members of the public do not mistakenly perceive that LPASC legal staff are acting as their counsel of record, representing their interests, conducting research, or otherwise providing legal opinions.

It is equally unclear when – or at what stage – that LPSAC staff would be willing and able to “represent” persons within the land use planning system. For example, subject to the above-noted caveats regarding legal retainers, it is at least conceivable that “representation” could occur at LPAT appeal hearings. However, since such hearings would be restricted to considering the record placed before decision-makers, then the more opportune time for LPSAC “representation” would be at the earliest possible stages of the planning process, well before municipal councils or approval authorities make decisions on planning proposals.

For example, in order to hopefully influence municipal decision-making, LPSAC “representatives” would have to take instructions, gather information, prepare documentation, and make submissions at the mandatory public meetings under the *Planning Act*. However, given the province-wide coverage of the LPSAC,⁴¹ it appears highly unlikely that the entity will be sufficiently well-resourced to dispatch teams of planners, lawyers or technical experts throughout Ontario upon request by residents engaged in land use disputes at the local level.

It therefore appears to CELA that the legal, technical and planning staff of the LPSAC would not be routinely retained by individuals or groups to provide case- or hearing-specific advice or representation. Instead, we anticipate that in most instances, the LPASC would only be providing general, over-the-counter information and/or referrals to other qualified, non-LPSAC professionals who may be available to assist individuals or groups involved in the land use planning system.

Accordingly, if only generic information or summary advice is to be provided by LPASC, then we see no compelling legal need to relocate the LPASC outside of the ELTO cluster. In fact, by keeping this entity under the auspices of the ELTO, then its role could be expanded to assist the public in relation to appeals, applications or disputes heard by other tribunals within the cluster (e.g. ERT, Assessment Review Board, Conservation Review Board, and Board of Negotiation).

CELA further notes that Schedule 2 of Bill 139 further proposes that an as-yet unknown eligibility test will be imposed upon Ontarians who want to avail themselves of the LPASC’s support services.⁴² CELA submits that eligibility criteria (based on either financial eligibility or the type of matter) are unnecessary and inappropriate, particularly since the LPASC would not be directly providing “judi-care” (e.g. subsidized legal or expert services) upon request by all individuals and groups that contact the LPASC, as discussed above.

⁴¹ Schedule 2, section 6.

⁴² Schedule 2, section 5.

In addition, it has been our general experience that parties who have sufficient financial resources often retain private bar counsel and experts to represent their interests at OMB hearings. These are not the persons who are likely to contact the LPSAC for information, advice or representation, which provides a further reason why a financial eligibility test for LPSAC's support services is inappropriate and unnecessary. If the essential purpose of eligible criteria is to "screen out" well-resourced persons, then the criteria are redundant since this already occurs in practice.

In summary, CELA submits that the LPSAC's education and outreach activities may result in better public understanding of the process used in Ontario to make land use decisions or adjudicate *Planning Act* appeals. However, Schedule 2 of Bill 139 is unlikely to result in "greater" citizen participation before municipal councils or in LPAT appeal hearings. This is because of the abject failure of Bill 139 to address the larger systemic issues that militate against meaningful citizen participation, most notably the financial barriers discussed below. Unless and until these issues are satisfactorily resolved, it is unrealistic to expect that the LPASC alone will have any appreciable impact on citizen participation within the land use planning system in general, or within LPAT hearings in particular.

For example, even where citizens fully understand the dynamics and requirements of the LPAT pre-hearing and hearing processes (including mediation), their ability to actively pursue or participate in *Planning Act* appeals will still be significantly constrained if they cannot afford to retain their own lawyers and experts. This is why CELA does not view the LPASC as an adequate substitute for public participation funding tools in Ontario's land use planning system.

Financial Barriers to Public Participation

CELA submits that the single greatest barrier to meaningful public participation under the *Planning Act* is the continuing lack of funding tools intended to enable citizens and non-governmental organizations to retain the legal, technical and planning assistance often required by parties engaged in the decision-making and/or appeal process.

In our view, the absence of public participation funding tools under Bill 139 not only impairs the ability of citizens to play a vital role in land use planning disputes, but it also deprives decision-makers and the LPAT of relevant perspectives, evidence and opinions from local community members who want to counterbalance or respond to the case put forward by developers and/or public authorities.

CELA therefore submits that the provision of funding assistance to eligible persons would improve the fairness and quality of the land use planning system, and would enhance the soundness and acceptability of the LPAT's disposition of *Planning Act* appeals. Conversely, maintaining the status quo by failing to mandate appropriate funding mechanisms will undoubtedly perpetuate one-sided battles before municipal councils and at LPAT hearings between well-resourced developers and supportive public authorities on the one hand, and unrepresented or under-resourced citizens on the other hand.

At the present time, the *Planning Act* confers a number of participatory rights upon persons who are interested in, or potentially affected by, proposed development and the outcomes of OMB

hearings if appeals are launched. CELA submits, however, that these rights, even if amended by Bill 139, are hollow unless they are accompanied by appropriate funding reforms which facilitate public involvement when planning disputes are being decided or appealed. In our view, funding reform is the *sine qua non* of enhanced citizen participation in the land use planning system.

Accordingly, we find it puzzling that while the OMB Review Consultation Document stated that the provincial government proposes to “explore funding tools,”⁴³ this important matter is conspicuously absent from Bill 139. In light of various funding precedents used in Ontario (e.g. cost awards and intervenor funding), CELA submits that it is necessary and desirable for Bill 139 to establish appropriate funding tools in an expeditious manner.

Using Cost Awards to Facilitate Public Participation

The first potential funding option to facilitate public participation is to substantially adjust and re-orient the exercise of the OMB’s current cost powers. As noted by one commentator:

Generally, the awarding of costs in environmental administrative proceedings can serve different purposes. Costs can be used as a tool to facilitate the participation of groups or interests that might not otherwise have the resources or ability to participate, in order to ensure that all relevant views are included in the proceedings. Awards of costs can also be used to ensure quality participation in administrative proceedings by reimbursing those participants whose involvement made a contribution to the proceedings, regardless of the outcome. Additionally, costs can be used to level the playing field by enabling parties with fewer resources to retain expert witnesses and compile necessary scientific or technical evidence to support their positions.⁴⁴

At the present time, the OMB enjoys broad discretion to award costs to or against any party, in an amount that can be fixed or assessed, in relation to the proceedings or steps incidental to it.⁴⁵ However, the OMB’s *Rules of Practice and Procedure* constrain this broad statutory discretion by stipulating that “the Board may only order costs against a party if the conduct or course of conduct by a party has been unreasonable, frivolous or vexatious, or if the party has acted in bad faith.”⁴⁶ The OMB Rules then provide a lengthy list of illustrative examples of misconduct that may warrant an adverse cost award against the offending party (e.g. failure to comply with procedural orders, causing unnecessary adjournments, failing to prepare adequately for the hearing, etc.).⁴⁷

In recent years, there has been public concern about how the OMB interprets and applies its existing cost powers. On the one hand, there have been cases where the OMB has denied cost claims made by developers or municipalities, and has affirmed the importance of not deterring citizens from bringing concerns to the OMB due to cost liability concerns. For example, in the Big Bay Point cost decision, the OMB stated this public policy consideration as follows:

⁴³ OMB Review Consultation Document, page 22.

⁴⁴ C. Chiasson, “Public Access to Environmental Appeals: A Review and Assessment of Alberta’s Environmental Appeals Board” (2007), 17 JELP 141, at pages 155 to 156.

⁴⁵ *Ontario Municipal Board Act*, section 97.

⁴⁶ OMB, *Rules of Practice and Procedure* (as amended September 3, 2013), Rule 103. See also SPPA, section 17.1.

⁴⁷ OMB, *Rules of Practice and Procedure* (as amended September 3, 2013), Rule 103.

Awards of costs are rare... Potential parties and the public should not be fearful of participating in Board proceedings, a sentiment that has been expressed in decision after decision. Costs should never be used as a threat or as a reason to dissuade public participation.⁴⁸

On the other hand, despite these *obiter* comments, there have also been recent cases where the OMB has awarded sizeable costs against individuals, residents' groups and environmental organizations.⁴⁹ While each case of alleged misconduct by a hearing party must be assessed on its own unique set of facts, CELA remains concerned that the OMB's (or LPAT's) omnipresent ability to make adverse cost awards may inhibit public willingness to get involved in appeal proceedings under Bill 139.

To resolve this lingering uncertainty about adverse cost liability, CELA submits that instead of using cost powers in a negative manner to discourage perceived misconduct by parties, the LPAT, as the OMB's successor, should be legally obliged to use its cost powers in a more positive manner to encourage informed, helpful and reasonable participation by hearing parties. If this more proactive approach is adopted, then it appears to CELA that Bill 139's simplistic cost provision must be significantly re-written.⁵⁰ In addition, an overhaul of the OMB's current cost rules⁵¹ will undoubtedly have to occur while developing the new LPAT rules in order to implement the new statutory direction regarding cost awards.

More specifically, CELA recommends that the LPAT cost rules should more closely resemble the ERT's cost rules that apply when the ERT is hearing matters under the *Environmental Assessment Act* (EA Act). In particular, the EA Act provides that notwithstanding section 17.1 of the SPPA, the ERT may award the costs of a proceeding before it, and may specify to whom or by whom costs are payable, and whether the costs are fixed or to be assessed.⁵²

More importantly, when making a cost award, the EA Act expressly provides that the ERT is not limited to the considerations that govern cost awards in court.⁵³ The traditional cost rule in Ontario courts is that "costs follow the event," which generally means that the losing party will be ordered to pay costs to the winning party. However, an award of costs in an EA Act hearing does not necessarily depend on which party "won" or "lost" in the proceeding, but on a number of other considerations outlined in the ERT's Rules of Practice.

For example, the ERT's cost rules in the EA Act context specifically provide that "costs awards may be ordered to help defray the costs of participation borne by Parties, other than the Proponent,

⁴⁸ *Re Kimvar Enterprises Inc.* (2009), 61 OMBR 293, para. 43 (\$3.2 million cost claim by developer dismissed).

⁴⁹ *Corsica Developments Inc. v. Richmond Hill (Town)* (2015), 85 OMBR 396 (environmental group ordered to pay \$100,000 to developer); *Brown v. North Dumfries (Township)*, 2015 CanLII 7230 (residents' group ordered to pay \$110,000 to proponent); *Campione v. Vaughan*, 2016 CanLII 33681 (two residents ordered to pay two developers \$68,000 and \$16,000 respectively).

⁵⁰ Bill 139 simply provides the LPAT with discretion "to fix the costs of and incidental to any proceeding in accordance with the rules": Schedule 1, subsection 33(4).

⁵¹ OMB, *Rules of Practice and Procedure*, Rules 96 to 104.1.

⁵² EA Act, section 21.

⁵³ *Ibid*, subsection 21(4).

the Director and government decision makers, who make a substantial contribution to the proceeding through responsible participation.”⁵⁴ These rules go on to identify various factors that the ERT will consider when deciding whether – or to what extent – costs should be awarded, including whether the party seeking costs:

- represented a clear and ascertainable interest;
- contributed substantially to a meaningful public Hearing process;
- participated in a responsible and informed manner;
- helped the Tribunal to understand the matters at issue;
- demonstrated the purpose for the expenditure of funds;
- coordinated a number of common interests and concerns by forming a group or coalition;
- cooperated with other Parties and shared experts where possible to efficiently address issues and provide evidence;
- contributed to a more efficient Hearing;
- complied with the Rules, the Hearing schedule, Hearing deadlines and any further Tribunal procedural orders;
- made reasonable and timely efforts to share information with other Parties, resolve or scope issues, discuss potential conditions of approval and explore alternative methods of dispute resolution; and
- succeeded in whole or in part at the Hearing.⁵⁵

These ERT rules allow the following types of fees, disbursements and expenses to be recovered at the applicable rate⁵⁶ through a cost award:

- legal and consulting fees;
- travel and related expenses;
- transcripts, photocopying, facsimile, delivery costs, applicable taxes; and
- other necessary and reasonable disbursements.⁵⁷

However, throughout the hearing process under the EA Act, the ERT still retains its SPPA jurisdiction to make cost awards intended to sanction unreasonable misconduct by hearing parties.⁵⁸

In summary, CELA submits that the forthcoming legislative debate on Bill 139 offers a timely opportunity to reconsider and reframe the LPAT’s cost powers in order to facilitate public participation in *Planning Act* appeals while, at the same time, discouraging unreasonable misconduct by hearing parties. In our view, the ERT’s existing cost powers under the EA Act represent an important precedent that could be modified and adapted for use by the LPAT under the *Planning Act*. In principle, there should be no material difference in the nature and purpose of cost awards by ELTO tribunals under the EA Act or the *Planning Act* since both types of

⁵⁴ ERT, *Rules of Practice and Practice Directions* (September 12, 2016), Rule 223.

⁵⁵ *Ibid*, Rule 224.

⁵⁶ *Ibid*, Rule 229.

⁵⁷ *Ibid*, Rule 228.

⁵⁸ *Ibid*, Rule 225.

proceedings often involve planning matters of considerable public interest and environmental significance.

Using Intervenor Funding to Facilitate Public Participation

In the event that cost reform is not undertaken under the auspices of the Bill 139, then the second option for reducing financial barriers to public participation is the re-establishment of intervenor funding legislation in Ontario. In this regard, CELA notes that Ontario's former *Intervenor Funding Project Act* (IFPA) provides an illustrative example of an effective funding model that would be appropriate for certain LPAT hearings under the *Planning Act*.

While the IFPA was in effect, it applied to public hearings held by the Ontario Energy Board, the EA Board [now the ERT], and Joint Boards established under the *Consolidated Hearings Act*. In general terms, the IFPA required proponents (not the Ontario government at large) to provide funding to eligible public interest intervenors for specific hearing-related purposes. On a case-by-case basis, separate funding panels (not the Board members holding the hearing) would receive and rule upon funding applications from intervenors who had been granted party status during the pre-hearing stage. Where an application for intervenor funding was granted, then the allotted funding would be payable by the funding proponent(s) designated by the panel, and the successful applicant would receive the money in advance of the main hearing. Strict reporting conditions were usually imposed to make intervenors accountable for their expenditure of funds.⁵⁹

It should be noted, however, that funding panels under the IFPA were not free to fund any issue or evidence that a party proposed to pursue at the hearing. Instead, the panels could only award intervenor funding for issues that “affect a significant segment of the public”, and that “affect the public interest and not just private interests.”⁶⁰

Similarly, IFPA panels were required to consider a number of factors in order to determine whether a party should be awarded intervenor funding, including whether:

- the intervenor represents a clearly ascertainable interest that should be represented at the hearing;
- separate and adequate representation of the interest would assist the board and contribute substantially to the hearing;
- the intervenor does not have sufficient financial resources to enable it to adequately represent the interest;
- the intervenor has made reasonable efforts to raise funding from other sources;
- the intervenor has an established record of concern for and commitment to the interest;
- the intervenor has attempted to bring related interests of which it was aware into an umbrella group to represent the related interests at the hearing;
- the intervenor has a clear proposal for its use of any funds which might be awarded; and

⁵⁹ Generally, see EA Advisory Panel, *Improving Environmental Assessment in Ontario: A Framework for Reform (Volume 1)*, (2005), pages 74 to 77.

⁶⁰ IFPA, subsection 7(1).

- the intervenor has appropriate financial controls to ensure that the funds, if awarded, are spent for the purposes of the award.⁶¹

An award of intervenor funding typically covered legal and expert fees/disbursements and other hearing-related expenses. However, in determining the quantum of the intervenor funding awards, the IFPA panels were subject to the following statutory requirements:

- if the proposal includes the use of lawyers in private practice, assess legal fees at the legal aid rate under the legal aid plan in effect on the day of the award for work necessarily and reasonably performed;
- set a ceiling in respect of disbursements that may be paid as part of the award and such disbursements shall be restricted to “eligible disbursements”;⁶² and
- deduct from the award funds that are reasonably available to the applicant from other sources.⁶³

While the IFPA was in force, three provincial Ministries (e.g. Attorney General, Energy and Environment) commissioned an independent review of the legislation, and the study authors concluded that the intervenor funding regime was both effective and necessary to facilitate informed public participation.⁶⁴ This finding is consistent with a long line of articles, reports and publications which affirm the need for, and the societal benefits of, establishing funding mechanisms to facilitate public participation in environmental decision-making.⁶⁵ However, the IFPA expired in 1996 due to a legislative sunset clause, and it has not been replaced to date.

While the IFPA did not apply to the OMB at the time, CELA submits that the “lessons learned” under the IFPA are readily applicable to LPAT appeal hearings under the *Planning Act*. Indeed, CELA has previously called for the creation of an intervenor funding program in relation to OMB hearings,⁶⁶ and the time has now come to revisit this long overdue reform in the context of Bill 139. In our view, if the LPAT cost powers are not going to be revised, then an appropriate statute-based intervenor funding mechanism should be established in relation to *Planning Act* appeals assigned to the LPAT.

While it is beyond the scope of this brief to provide full particulars for an updated IFPA regime, CELA submits that, at the very least, the Ontario government should commit to the public development of a new intervenor funding model to accompany Bill 139 if enacted. This model could be financed, in part, through proponent contributions and/or the establishment of a special purpose fund into which a portion of land transfer taxes or development charges could be directed.

⁶¹ *Ibid*, subsection 7(2).

⁶² *Ibid*, subsection 7(5).

⁶³ *Ibid*, subsection 7(3).

⁶⁴ W. Bogart and M. Valiante, *Access and Impact: An Evaluation of the Intervenor Funding Project Act* (1992).

⁶⁵ See, for example, R. Anand and I. Scott, “Financing Public Participation in Environmental Decision-Making” (1982), 60 Can. Bar Rev. 81; Canadian Environmental Defence Fund, *Intervenor Funding and the Intervenor Funding Project Act in Ontario* (CEDF, 1991); A. Levy, “A Review of Environmental Assessment in Ontario” (2002), 11 JELP 173, at pages 188, 201, and 239 to 240; J. Sinclair and M. Doelle, “Using Law as a Tool to Ensure Meaningful Public Participation in Environmental Assessment” (2003), 12 JELP 27.

⁶⁶ See, example, CELA, *Comments on OMB Reform, Planning Act Reform and Implementation Tools (EBR Registry No. PF04E0003)* (August 31, 2004), page 6.

Conclusions on LPAT Funding Tools

In making the foregoing submissions, it is not the position of CELA that funding assistance should be universally available to every party engaged in an LPAT appeal hearing. Instead, only those persons who will not financially benefit from the proposed land use or development under appeal, and who meet prescribed criteria, should be entitled to receive funding awards from the LPAT.

Developers, for example, should not be eligible to apply for a funding award from the LPAT. Similarly, municipalities should generally be ineligible to receive funding assistance, particularly since they typically have deeper pockets than CELA's clients, local residents, or non-governmental organizations. However, as a possible exception to this general rule, CELA recognizes that there may be situations where an LPAT hearing involves a smaller or rural municipality which lacks in-house counsel, planners or other experts, and which may require some degree of financial assistance to retain these outside professionals to defend its land use planning decision against developer appeals.⁶⁷

Accordingly, CELA submits that appropriate criteria should be established to determine: (a) who is eligible to receive a funding award; (b) the scale or quantum of the funding award; and (c) the permissible uses or allocations of the funding award. In this regard, CELA regards section 7 of the IFPA (see above) as a good starting point for crafting criteria to govern the awarding of costs (or intervenor funding) to facilitate public participation in LPAT hearings under the *Planning Act*.

If these criteria are adopted and applied in LPAT hearings, then it is clear that not every case will trigger an award of financial assistance. If, for example, affluent citizens or for-profit corporations that initiate (or respond to) an LPAT appeal should be ineligible to receive funding assistance due to the lack of a demonstrable need for such funding.

In summary, CELA submits that regardless of whether the new funding model is implemented via costs (including interim or advance costs) or intervenor funding, the overall objective is to ensure that adequate financial assistance is provided to eligible LPAT parties who are addressing matters of public interest, and who otherwise will not financially benefit from the outcome of the LPAT hearing.

(c) Schedule 3: Amendments to the Planning Act and Other Statutes

Schedule 3 of Bill 139 contains numerous amendments to the *Planning Act*, *City of Toronto Act*, and *Ontario Planning and Development Act, 1994*. However, because CELA's clients are most often involved in proceedings under the *Planning Act* rather than the other two statutes, the following submissions will focus primarily on the *Planning Act* changes proposed by Bill 139.

For the most part, many of the provisions in Schedule 3 are "housekeeping" amendments to the *Planning Act* (e.g. new or expanded definitions, new references to the LPAT rather than the OMB,

⁶⁷ But see section 69 of the *Planning Act*, which allows municipalities to set and collect fees associated with processing land use applications.

etc.) that would be required for implementation purposes if Bill 139 is enacted. As noted above, it is CELA's conclusion that Bill 139 should not be enacted as proposed.

In addition, there are several provisions that would change the *Planning Act* in a manner that, in CELA's view, is questionable, counter-productive and far less protective of the public interest. For example, Schedule 3 attempts to create new authority upon the Ontario government to issue provincial policy statements that require "an approval or determination" by the Minister and/or other Ministers) "for any of the matters provided for in the policy statement."⁶⁸

However, no explanatory text has been provided in conjunction with Bill 139 to expressly indicate when or how the provincial government intends to use this new power, or to identify the specific sectors or activities to which this new power would apply. Similarly, we have reviewed the OMB Review Consultation Document and can find no discussion about the alleged need for this new power or its intended purpose. Accordingly, CELA remains unclear why the Ontario government wants to create new Ministerial approval powers within a policy statement itself, particularly when land use proposals or development projects already require a variety of approvals under the *Planning Act* and other provincial statutes. In our view, if the provincial government wants to streamline the land use planning system, then adding another new (and ambiguous) layer of Ministerial approval authority seems counterintuitive if not redundant.

Schedule 3 of Bill 139 also proposes to expand the types of planning matters that can be addressed by local appeal bodies, if established by Ontario municipalities.⁶⁹ On this point, CELA notes that Ontario municipalities⁷⁰ (including Toronto⁷¹) are already empowered to establish local bodies that can hear and decide appeals relating to minor variances and consents. Nevertheless, it appears that few municipalities have elected to do so at the present time. CELA does not object to the creation of local appeal bodies to hear and decide minor planning disputes, particularly since this may lead to a reduction in the overall number of appeals going to the LPAT (and would thereby free up LPAT resources to hold *de novo* oral hearings on major planning disputes, as recommended above). Accordingly, the province should consider providing technical assistance, guidance materials and/or fiscal support to encourage more municipalities to create local appeal bodies.

Our concern, however, is that Schedule 3 also provides that where a local appeal body has been created by a municipality, the body has "all the powers and duties" of the LPAT under "the relevant provisions" of Bill 139.⁷² If this is a back-door attempt to recreate or superimpose LPAT's restrictive procedures at the local level (e.g. time limits on oral submissions), then CELA is opposed to this approach, for the reasons discussed above.

In our view, one of the few positive aspects of Bill 139 is the new requirement in Bill 139 for municipal official plans to "contain policies that identify goals, objectives and actions to mitigate greenhouse gas emissions and to provide for adaptation to a changing climate, including through

⁶⁸ Schedule 3, section 3.

⁶⁹ Schedule 3, section 4.

⁷⁰ *Planning Act*, section 8.1.

⁷¹ *City of Toronto Act, 2006*, section 115.

⁷² Schedule 3, subsection 4(2).

increasingly resiliency.”⁷³ However, aside from this single sentence in Schedule 3, there is a dearth of detail in Bill 139 to provide meaningful provincial guidance to municipalities on how this important requirement should be fulfilled.

CELA therefore submits that at the very least, the existing PPS should be reviewed and enhanced to ensure consistency with this new policy direction in Bill 139. Similarly, consideration should be given by the Ontario government to developing further and better implementation manuals and resource materials to assist municipalities in understanding and delivering upon this new climate change requirement. This comment applies, with necessary modifications, to Bill 139’s similar directive to municipalities to identify and protect major transit station areas.⁷⁴

Schedule 3 of Bill 139 goes on to specify that for those matters that may still be appealed to the LPAT, there are only three grounds of appeal that may be advanced by appellants:

- inconsistency with a provincial policy statement;
- non-conformity or conflict with a provincial plan;
- non-conformity with an official plan.⁷⁵

Presumably, this means that no other grounds may be advanced by LPAT appellants, and that if additional grounds are raised (even if based on other appropriate planning considerations), then the LPAT, on its own initiative or upon motion by the parties, may strike the appeal, in whole or in part, without a hearing.⁷⁶ Moreover, Bill 139 expressly directs the LPAT to dismiss an appeal unless it has been demonstrated that the impugned decision is inconsistent with a policy statement, fails to conform to or conflicts with a provincial plan, or fails to conform to an official plan.⁷⁷ In our view, it is inappropriate for Bill 139 to establish that the default remedy is automatic dismissal of *Planning Act* appeals unless the LPAT makes certain determinations.

For example, CELA notes that the current *Planning Act* permits the OMB to dismiss, without a hearing, an appeal that is not based on any apparent land use planning ground.⁷⁸ However, in enacting these current provisions, the Ontario Legislature has properly refrained from trying to micromanage appeals, dictate what constitutes sound land use planning, define what is – or is not – an appropriate land use planning ground, or predetermine the outcome of appeals by specifying default remedies. Thus, under the current land use planning system, it is open to an appellant to raise various planning concerns (e.g. prematurity, land use incompatibility, non-conformity with provincial interests listed in section 2 of the *Planning Act*, non-compliance with statutory prerequisites, conflict with other provincial legislation, etc.) in addition to any specific PPS, provincial plan or official plan issues. In our view, this broader approach should be continued –

⁷³ Schedule 3, section 5.

⁷⁴ *Ibid.*

⁷⁵ Schedule 3, subsections 6(1), 6(9), 8(3), 8(6), 10(1), and 10(5).

⁷⁶ Schedule 3, subsection 6(17), 8(7), and 10(11).

⁷⁷ Schedule 3, subsection 6(20) and 10(4).

⁷⁸ See, for example, *Planning Act*, subsections 17(45) and 34(25).

not abolished – under Bill 139 since it helps ensure that the LPAT’s appeal proceeding will canvass all relevant planning considerations, not just a subset thereof.

Even where an appeal is allowed by the LPAT, Bill 139 inexplicably requires that instead exercising its own specialized expertise, the LPAT is obliged, as a matter of law, to send the matter back to the municipality or approval authority for yet another decision.⁷⁹ If that second decision is still inconsistent or non-conforming despite the LPAT’s ruling, then there is another opportunity to appeal the second decision to the LPAT, and the LPAT may finally determine the matter. The rationale for this circular (and potentially duplicative) approach is unclear to CELA, and it seems to be contrary to the apparent provincial interest in streamlining the appeal process. In our view, if an appeal is allowed, then the LPAT should be empowered to issue a final and enforceable order wholly disposing of the matter, rather than remitting the matter back for another round of decision-making and/or appeal. If anything, this traditional approach should provide a strong incentive to municipalities and approval authorities to get it right the first time and avoid the prospect of an appeal to the LPAT.

By way of comparison, we note that other portions of Bill 139 do not replicate its peculiar double-decision/double-appeal approach for appeals filed under other statutes. For example, Schedule 5 of Bill 139 stipulates that after the LPAT holds an appeal hearing under the *Ontario Heritage Act*, the LPAT is not obliged to remit the matter back to the municipality for a second decision or a second appeal opportunity. Instead, the LPAT itself renders a final decision.⁸⁰ In our view, this same approach should be undertaken in relation to *Planning Act* appeals.

In short, CELA does not support the Bill 139 proposal to require the LPAT to step aside and send the subject matter of the appeal back to the municipality for a second decision and/or a second appeal. In our view, once the LPAT is seized with jurisdiction over a *Planning Act* appeal, it is the LPAT that should hear and ultimately decide the matter, not the municipality whose decision (or non-decision) prompted the appeal in the first place. Therefore, after the municipality receives a complete application under the *Planning Act* and renders its statutory decision on the application, CELA submits that the municipality is essentially *functus* in terms of decision-making authority, and any subsequent appeals from the municipal decision must be solely determined by the LPAT. Bill 139’s attempt to entrench a judicial review model for *Planning Act* appeal outcomes (e.g. by remitting the matter back to the municipality) is clearly misplaced and highly inappropriate.

CELA is also opposed to Bill 139’s startling proposal that provincially approved official plans (or amendments) will no longer be subject to appeal to the LPAT under the *Planning Act*.⁸¹ Based on our experience in the land use planning system, CELA submits that there should be no automatic assumption that all provincial decisions on official plans are inherently protective and sufficiently robust, and therefore require no further scrutiny in a public hearing before the LPAT.

⁷⁹ Schedule 3, subsection 6(20) and 10(14).

⁸⁰ Schedule 5, subsection 64(2). A similar appeal procedure is outlined in subsection 107(1) in Schedule 5 in relation to the *Retail Business Holidays Act*, where the LPAT is empowered to finally decide the matter, rather than send it back to the municipality for reconsideration or a second decision.

⁸¹ Schedule 3, subsection 6(6).

More specifically, CELA notes that when making closed-door decisions on official plans, the MMA is not subject to the important procedural safeguards currently employed at OMB hearings (e.g. right to full/timely disclosure, right to cross-examine on evidence, etc.) in order to reach an informed decision on the merits of the land use planning dispute. Thus, in CELA's view, the continuation of a general right of appeal ensures that aggrieved parties can still take their concerns to the LPAT if necessary, especially where such parties maintain that the official plan (or the provincial approval thereof) does not go far enough in terms of addressing or protecting matters of public interest. In short, an LPAT appeal serves as an important safety-valve in cases where there are unresolved issues or outstanding concerns about an official plan, even if approved by the province.

(d) Schedule 5: Consequential Amendments to other Provincial Laws

Schedule 5 of Bill 139 proposes a number of consequential amendments to other provincial laws. Again, many of these amendments may be viewed as “housekeeping” matters (e.g. changing statutory references from the OMB to the LPAT in other legislation). In our view, these kinds of amendments are relatively straightforward and clearly needed if Bill 139 is enacted.

However, CELA remains concerned about the attempt in Schedule 5 to significantly alter the *Aggregate Resources Act* (ARA) in relation to outcome of LPAT hearings under this statute. In particular, Schedule 5 provides that if the LPAT directs the Minister to issue an ARA licence subject to specified conditions, the Minister is authorized to refuse such conditions if he/she opines that they are “not consistent” with the purposes of the ARA.⁸²

In our view, this is not a minor or consequential amendment. Instead, it is a substantive change that constitutes an unwarranted departure from current practice under the ARA, particularly since the Schedule 5 proposal would give the Minister unilateral and wide-ranging discretion to refuse conditions that the LPAT itself has found to be necessary after considering evidence and argument from the parties. In our view, the utility, transparency and independence of the LPAT decision-making process under the ARA should not be subject to an open-ended political override (or Ministerial lobbying by disgruntled proponents), as proposed by Schedule 5.

More generally, CELA submits there is still an ongoing public interest need to review and revise the preferential treatment accorded to aggregate resource identification, protection and extraction under the current PPS. Unless and until such policies are changed, it is reasonable to anticipate that the LPAT's aggregate licencing decisions under the ARA and/or *Planning Act* may continue to attract public criticism when, in reality, it is the PPS itself that may be the root cause of the controversy.

⁸² Schedule 5, subsection 3(1). The broad purposes of the ARA include providing “for the management of aggregate resources in Ontario.”

PART IV – CONCLUSIONS AND SUMMARY OF RECOMMENDATIONS

It is clear that the forthcoming legislative debate on Bill 139 -- and the accompanying public, political and media discourse -- offers the province an important and timely opportunity to improve Ontario's land use planning system.

However, for the foregoing reasons, CELA concludes that Bill 139 falls considerably short of the mark, and should not be passed in its present form.

In our view, if the Ontario government is serious about addressing long-standing public concerns about the cost, fairness, timeliness and effectiveness of the land use planning process, then a much more comprehensive reform package, consisting of appropriate statutory, regulatory, policy and administrative changes, should be developed by the Ontario government in conjunction with all interested stakeholders and the public at large.

It further appears to CELA that the necessary reforms cannot be implemented by merely tweaking Bill 139, which, in our view, is fundamentally flawed and cannot be easily salvaged. Instead, a fresh start – and a fresh statute – is required as soon as possible.

CELA's specific recommendations in relation to Bill 139 may be summarized as follows:

CELA RECOMMENDATION #1: Bill 139 should not be enacted as currently proposed. Instead, Bill 139 should be withdrawn by the Ontario government unless the legislative proposals are significantly amended in order to safeguard the public interest, and to ensure that Ontario's land use planning system is fair, robust, participatory, transparent and accountable.

CELA RECOMMENDATION #2: If Bill 139 proceeds to Second Reading, then the Ontario Legislature should refer the Bill to a standing committee for public hearings.

We trust that these recommendations will be taken into account as the Ontario government considers its next steps in relation to Bill 139.

August 14, 2017