Report to: Development Services Committee Report Date: June 26, 2017

SUBJECT: Comments on Bill 139, The *Building Better Communities and Conserving Watersheds Act*

FILE: ZA 17 164737

PREPARED BY: Andrea Wilson-Peebles, Assistant City Solicitor
Tom Villella, Manager, Zoning and Special Projects

REVIEWED BY: Biju Karumanchery, Director, Planning and Urban Design

RECOMMENDATION:

1) That the report entitled "Comments on Bill 139, The *Building Better Communities and Conserving Watersheds Act*", be received;

2) That Council endorse this Staff report and submit it to the Province, along with the Council resolution, as the City of Markham's comments on Schedule 3 of Bill 139;

3) That Staff be directed to participate in any public hearings regarding Bill 139 by providing feedback to the Province in accordance with the comments set out in this Report;

4) THAT Staff report back to Development Services Committee once Bill 139 receives Royal Assent.

PURPOSE:

The purpose of this report is to provide Development Services Committee with information respecting the introduction of Bill 139 in the Provincial Legislature, and to provide comments on Schedule 3 of the Bill, to be submitted to the Province as the City's formal comments. It is recommended that the City participate fully in the public consultation regarding these proposed amendments to ensure that the Province is aware of the City's support of the Bill and to encourage the Province to enact the Bill.

BACKGROUND:

In 2015, the Government of Ontario undertook a formal review of the OMB, with a broad mandate including the scope of matters coming before the Board, and the manner in which the Board operates. In 2016, the objective of the review was narrowed and public input on specific questions was sought. Markham participated in the consultation process, submitting the Report dated December 5, 2016 (attached hereto as Appendix A), and the Resolution dated December 13, 2016 (attached hereto as Appendix B), to the

Province for consideration. The Province's response to the issues identified in this Report will be discussed below.

On May 30, 2017, the *Building Better Communities and Conserving Watersheds Act, 2017* ("Bill 139") received First Reading in the Legislature. Bill 139 would enact two new statutes, the *Local Planning Appeal Tribunal Act, 2017*, and the *Local Planning Appeal Support Centre Act, 2017*, in order to effect replacement of the Ontario Municipal Board (the "OMB") with the *Local Planning Appeal Tribunal* (the "LPAT"). It also introduces significant amendments to the *Planning Act*, the *Conservation Authorities Act*, and various other statutes. This new legislation has the potential to radically change the planning appeal system in Ontario. The full content of Bill 139 may be found at:
http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=4936
A synopsis of the individual amendments to the *Planning Act* is attached as Appendix C.

The Bill is made up of five schedules. This Report summarizes each of the schedules and provides comments to the Province on the recommended planning amendments, in response to the Province's request for public input on Schedule 3 of the Bill.

DISCUSSION:

A) Summary of Bill 139

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

Bill 139 would enact the *Local Planning Appeal Tribunal Act, 2017*. As proposed, the Act repeals the *Ontario Municipal Board Act* and replaces it with the Local Planning Appeal Tribunal. Many of the provisions of the proposed *LPAT Act* are substantively the same as those in the *OMB Act*. The major difference between the OMB and LPAT relate to its jurisdiction and scope of powers, which is implemented through changes to the *Planning Act*, which will be discussed below.

While the OMB had some power to set its own rules, this authority has been expanded for the LPAT. The additional powers include the ability to require that all appeals undergo case-management, which could include case conferences to allow the parties to scope appeals and potentially settle, as well as mediation. The LPAT is also empowered to avoid traditional, adversarial hearings by establishing alternative procedures, and to appoint a person from among the parties to be a "class representative" where the parties have a common interest.

The government has stated that forthcoming regulations associated with Bill 139 will include "*strict presumptive timelines for oral hearings*" and will limit "*evidence to written materials in the majority of cases*." This would represent a significant departure from the manner in which hearings are currently conducted before the OMB. The

Minister's regulations could significantly reduce the length of hearings and alter the character of evidence introduced during a planning appeal.

The *LPAT Act* also provides the Minister with the authority to make regulations which could considerably change the manner in which planning appeals are conducted, including regulations:

a. governing the practices and procedures of the Tribunal, including prescribing the conduct and format of hearings, practices regarding the admission of evidence and the format of decisions;

b. providing for multi-member panels to hear proceedings before the Tribunal and governing the composition of such panels; and

c. prescribing timelines applicable to proceedings on appeal to the Tribunal under the *Planning Act*.

The foregoing is likely to result in significant changes to how hearings are conducted. The Province has produced an illustration of the new hearing process for most appeals of municipal council decisions which is attached as Figure 1.

Schedule 2: *Local Planning Appeal Support Centre Act, 2017*

The *Local Planning Appeal Support Centre Act, 2017* would authorize and establish support centres throughout the province. The mandate of these support centres would be to provide free and independent advice and representation to eligible Ontarians when pursuing land use planning appeals. Criteria for determining eligibility for the centre's support will be detailed in future regulations to be adopted under the Act. The centre would be required to offer the following services:

(i) provide general information on land use planning;
(ii) guide citizens through the LPAT procedures; and
(iii) provide legal and planning advice, including representation in certain instances at case conferences and hearings.

Schedule 3: Amendments to the *Planning Act*

<u>The elimination of "de novo" hearings for certain planning appeals</u>

The OMB currently conducts "de novo" hearings, which permits the OMB to substitute its own decision for a municipal decision whenever it finds that, in its opinion, the municipality did not reach the "best" planning decision. If Bill 139 is enacted, the Tribunal would only have the authority to overturn a municipal decision if the Tribunal is convinced that the original decision is inconsistent with, or does not conform to, provincial policies or municipal plans (e.g. official plans and secondary plans). As well, even if the Tribunal determines that a municipal decision <u>does not</u> follow provincial policies or municipal plans, it would not substitute its own decision for that of the

municipal council. The Tribunal would be required to return the matter to the municipal council, with written reasons explaining their rationale for overturning the decision. The municipality would then have 90 days to reconsider the application. Only when, on a second appeal, the municipality's subsequent decision still fails to follow provincial policies or municipal plans, would the Tribunal have the authority to substitute its own order for a decision of municipal council.

Matters of Provincial interest

It is important to note that Bill 139 also permits the Minister of Municipal Affairs to identify an appeal to the Tribunal as being a matter of "provincial interest". If the Minister advises the Tribunal of such an interest, the Tribunal would have the authority to overturn a decision and substitute its own.

Limits on the scope of planning appeals that the LPAT can hear

The proposed legislation exempts a broad range of municipal land use planning decisions from appeal, which were previously appealable to the OMB. Bill 139 proposes to:

i) prohibit appeals to provincial approvals of official plans and official plan updates, in cases where the Minister is the approval authority;
ii) prohibit applications to amend new secondary plans for two years, unless permitted by municipal council;
iii) limit the ability to appeal an interim control by-law when first passed for a period of up to one year;
iv) provide the upper-tier municipality (in our case, York Region) with the authority to identify protected areas for existing or planned higher order transit (TTC, VIVA, GO) in the municipality's official plans. If the municipality identifies an area as being protected for higher order transit, the municipality would also be required to adopt by-laws to identify: (a) the minimum number of residents and jobs to be accommodated in the protected transit area, (b) the uses of land in the protect transit area, and (c) the minimum densities that are authorized with respect to buildings and structures in the protected area. Once an area has been approved as protected for higher order transit, both that designation and the associated by-laws cannot be appealed, except by the Minister.

Climate change to be considered in developing official plans

Section 16 of the *Planning Act* currently sets out the content that must be contained in an official plan. Bill 139 proposes to amend the *Planning Act* such that it requires local councils or approval authorities to consider climate change issues when developing official plans. Specifically, the proposed legislation would amend the *Planning Act* by adding a subsection requiring an official plan to:

"*contain policies that identify goals, objectives and actions to mitigate greenhouse gas emissions and to provide for adaptations to a changing climate, including through increasing resiliency.*"

The goal would be to have development proponents consider climate change mitigation measures, when proposing developments that require an amendment to an official plan.

Local Appeal Body

Currently, the *Planning Act* permits councils to establish local appeal bodies to deal with certain planning matters including minor variance and consent appeals. Bill 139 would expand the powers of a local appeal bodies to include matters such as appeals and motions for direction related to applications for site plan approval and provisional consent. This would mean that at a municipality's option, the following matters could be referred to the Local Appeal Body rather than the LPAT:

- whether a proposal is subject to site plan control;
- a municipality's failure to approve an application for site plan approval within 30 days;
- appeals of conditions of site plan approval imposed by a municipality;
- appeals of Committee of Adjustment decisions on applications for minor variance;
- whether an applicant has met the "complete application" requirements with respect to an application for provisional consent;
- a municipality's failure to make a decision on an application for provisional consent within 90 days;
- appeals of Committee of Adjustment decisions on applications for provisional consent; and
- appeals of changes to conditions of provisional consent approved by the Committee of Adjustment.

Extension of Review Time

Under the *Planning Act,* municipalities have 180 days to make a decision regarding applications for official plan amendment and 120 days for zoning by-law amendments. The proposed changes would extend these deadlines by a further thirty days. Where an application for zoning by-law amendment is accompanied by an application for official plan amendment, the review time is extended to 210 days.

Schedule 4 – Amendments to the Conservation Authorities Act

Bill 139 also contains legislation aimed at modernizing the *Conservation Authorities Act* to guide the conservation of Ontario's watersheds. The Ministry indicates that the legislation would strengthen oversight and accountability, provide clarity for conservation authority roles and responsibilities, encourage public engagement and modernize funding mechanisms. These proposed changes will enable conservation authorities to support future provincial priorities and give them the flexibility to address growing environmental pressures. Other amendments are made to expand the area of jurisdiction of an authority. Additionally, a new section gives the authorities the power to issue permits allowing persons to engage in otherwise prohibited activities and allows authorities to cancel the permits in specified circumstances. Further, authorities are given the power to appoint officers who may enter lands to ensure compliance with the Act, the

regulations and with permit conditions. The officers are also given the power to issue stop orders in specified circumstances. Offences for contraventions of the Act, the regulations, permit conditions and stop orders are set out, and the maximum fines under the Act are increased from $10,000 to $50,000 in the case of an individual and to $1,000,000 in the case of a corporation.

Schedule 5 – Amendments to other acts

Consequential amendments are made to various Acts to change references to the *Ontario Municipal Board Act* so they refer to the *Local Planning Appeal Tribunal Act, 2017* and to change references to the Ontario Municipal Board so they refer to the Local Planning Appeal Tribunal.

B) Response to Council's Comments on the 2016 Consultations Regarding OMB Reform

In general, Bill 139 addresses the intent of all the comments Markham provided in December 2016. The scope and jurisdiction of the LPAT are limited in a manner that will give much more deference to decisions of municipal councils. This is mainly accomplished through the amendments that limit review of municipal decisions to whether they comply with the applicable provincial and municipal policies (instead of holding de novo hearings and permitting the appeal body to substitute its own decision for Council's). The more limited jurisdiction of the LPAT as compared to the OMB could result in outcomes that respect local perspectives, and are more predictable as the LPAT is not permitted to simply substitute its decision for that of Council.

The proposed changes under Bill 139 have the potential to reduce municipalities' costs related to appeals of planning decisions. Eliminating de novo hearings could result in lower costs to defend against appeals, and if regulations are introduced which amend the hearing procedures to rely on written briefs rather than full "in-person" hearings involving witness examination, there could be further savings.

Creation of the appeal support centre should permit the public to participate in the appeal process in a more meaningful way, as does the possibility of avoiding traditional, adversarial hearings.

In its Resolution dated December 13th, 2016, Council submitted two comments in addition to those contained within the Report dated December 5th, 2016. These were:

- "That consistent with the Markham Council resolution dated October 17, 2016, the Province be requested to develop an open and transparent process to review potential minor boundary changes associated with the Greenbelt Plan, with the definition of precise limits of the Greenbelt boundary to be established through the approval process for municipal Secondary Plans, and including potential rights of appeal to the Ontario Municipal Board."

- "That no appeal to a municipality's refusal to amend a new secondary plan be permitted for five years, to recognize the community effort and involvement in developing these plans."

Bill 139 does not address #1 above, and it prohibits appeals of refusals to amend new Secondary Plans within two years of enactment, rather than five years.

C) Comments on Schedule 3 of Bill 139

The content of Bill 139 is generally consistent with the comments of the City of Markham. Staff are especially supportive of the elimination of de novo hearings and limiting the LPAT to reviewing municipal decisions only on the basis of conformity with applicable policies. The amendments that limit matters that can be appealed will be very beneficial to municipalities, and the potential to eliminate long, costly and adversarial hearings is a positive step. Markham recommends that the Minister produce regulations around hearing process as soon as possible following the coming into force of Bill 139.

Staff fully supports the proposed amendments respecting the requirement for municipalities to include climate change policy in Official Plans. Markham has a long track record of environmental stewardship and sustainability initiatives. The City launched its' *Greenprint, Markham's Community Sustainability Plan* in 2011, to improve the natural environment and enhance the quality of life in Markham.

Markham has been working to establish initiatives and programs that promote energy conservation and efficiency, green technology, food security, environmental enhancement, protection of natural species, and waste diversion and recycling. Some of the initiatives that are underway include:

- Compact, mixed-use developments
- Transit-supportive densities and travel demand management
- Sustainable development standards and building features
- High Speed Electric Vehicle Charging Station
- Markham's Battle of the Buildings
- Markham Homegrown Food Programs
- Markham Parks and Multi-Use Pathways
- Markham's Solar Fleet
- Pollinators
- Sustainable Neighbourhood Retrofit Action Plan
- Textile Recycling
- Bird-friendly Guidelines

The proposed amendments to the Planning Act through Bill 139, as outlined in Appendix C, are all supported by Staff as being consistent with good planning, reduction of costs, and Council's resolution of December 13, 2016. However, Staff recommend that the

Province be requested to consider providing more clarity regarding appeals from Council's neglect to make a decision within the timelines provided for in the *Planning Act*. Ensuring that the measures recommended for other appeals apply, such as limiting the LPAT to making recommendations for Council's further consideration at first instance, and replacing costly, adversarial in-person hearings with alternative models, would be beneficial to municipalities as well as the public.

CONCLUSION

If approved, the changes to the planning appeal system in Ontario will be the most significant procedural changes enacted in a generation. Staff will continue to monitor the situation and will share any additional substantive information on the matter with Committee through further reports and/or memos. If the Bill is enacted, Staff will report back with any recommended changes to the development approvals process that might be necessary to implement the amendments to the Planning *Act*.

It is recommended that this Report be sent to the Province as the City's comments on Schedule 3 of Bill 139. It is further recommended that Staff be instructed to attend any public consultation meetings regarding Bill 139, including attendance at Standing Committee, to support enactment of Bill 139.

FINANCIAL CONSIDERATIONS

The proposed amendments respecting Ontario Municipal Board reform may reduce costs for the municipality.

HUMAN RESOURCES CONSIDERATIONS

No significant human resources impacts are expected at this time.

ALIGNMENT WITH STRATEGIC PRIORITIES:

Municipal Governance and Growth Management.

BUSINESS UNITS CONSULTED AND AFFECTED:

Legal and Legislative Department has been consulted in the writing of this report, and their comments have been incorporated.

RECOMMENDED BY:

Jim Baird, MCIP, RPP
Commissioner,
Development Services

Catherine Conrad,
City Solicitor

ATTACHMENTS:
Appendix A – DSC Report dated December 5, 2016
Appendix B – Council Resolution dated December 13, 2016
Appendix C – Synopsis of proposed amendments to the Planning Act through Bill 139

Figure 1 – Flowchart of proposed appeals system under Bill 139

File path: Amanda\File 17 164737\Documents\Recommendation Report

MARKHAM

Report to: Development Services Committee Report Date: December 5, 2016

SUBJECT:	Comments on The Province's 2016 Review of the Ontario Municipal Board
FILES:	PR 16 – 138801
PREPARED BY:	Andrea Wilson-Peebles, Assistant City Solicitor Dave Miller, Manager of Development, West District
REVIEWED BY:	Biju Karumanchery, Director, Planning & Urban Design

RECOMMENDATION:

1) That the Staff report entitled "Comments on The Province's Review of the Ontario Municipal Board", dated December 5th, 2016, be received.

2) That Council endorse the Staff recommendations in this report and submit it to the Province as the City of Markham's comments on the Province's review of the Ontario Municipal Board ("OMB");

3) That Staff report back to Development Services Committee, on any changes made by the Province to the OMB and/or the planning appeal regime, to provide an overview of the changes and to outline potential operational impacts to the Legal Services and Planning and Urban Design Departments, including possible changes to work flow, processes, and resource allocation;

4) And that the Clerk be directed to forward a copy of this report to the Minister of Municipal Affairs, the Attorney General of Ontario, Markham Riding MPP's and the Region of York.

5. And that Staff be authorized and directed to do all things necessary to give effect to this resolution.

EXECUTIVE SUMMARY:

The Province has released a document entitled "Review of the Ontario Municipal Board Public Consultation Document" (the "PCD"). This document provides background on the land use planning system in Ontario to assist stakeholders to make comments. According to the PCD, the Ontario Municipal Board ("OMB") is a public tribunal, to which appeals regarding land use decisions can be made. The OMB makes decisions based on applicable law and policies and the evidence presented at hearings. The OMB has the authority to overturn decisions made by local and regional municipal councils by substituting its own decision. The OMB will also make a decision on a land use application where the Council of the municipality has not done so.

The Provincial Government believes that there is a continuing role for the OMB in the land use planning system. However, to ensure its role is appropriate, open, and fair, the Province is exploring ways to change the OMB. Consequently, in June of 2016, the Province announced that it is reviewing the scope (what it deals with), and effectiveness (how it operates) of the OMB.

To inform its review, the Province has invited comments from individuals, organizations, and businesses about the OMB's role and responsibility within the provincial land use planning system. To guide the discussion, the Province released a public consultation document entitled "Review of the Ontario Municipal Board, Public Consultation Document, October 2016". The deadline for providing feedback on this paper is December 19, 2016. Additional information about the review is available on the Ministry of Municipal Affairs webpage (ontario.ca/ombreview).

The Province has organized the OMB review into five central themes, each with a series of discussion questions. These themes and the discussion questions are discussed in more detail later in this report.

The Five Themes are:

1) the OMB's jurisdiction and powers;
2) citizen participation and local perspective;
3) clear and predictable decision making;
4) modern procedures and faster decisions; and
5) alternative dispute resolutions and fewer hearings.

The Province's consultation document indicates that the Province wants Ontario to have an independent appeal tribunal that can efficiently resolve land use disputes, without relying on the court system.

In addition to the comments on the current proposal to refine the role and responsibility of the OMB, this report reiterates comments that the City provided to the Province on Bill 73. These include, among others, comments about limiting appeals to entire Official Plans and Zoning By-laws, the appropriateness of the ability to appeal a non-decision after 180 days, and expanding the power of local appeal bodies.

City Staff generally supports the Province making changes to refine the OMB's roles and responsibilities in the municipal planning process, and recommends that this report be forwarded to the appropriate Provincial Ministries for consideration.

PURPOSE:

This report identifies issues and comments on the Provincial review of the OMB and its role within the provincial land use planning system.

The report also recommends that, following the implementation of any reforms to the OMB, Staff update Development Services Committee about the changes, including potential operational impacts to the Legal Services and Planning and Urban Design Departments, including possible changes to work flow, processes and resource allocation.

BACKGROUND:

People do not always agree with the land use planning decisions of committees of adjustment and local municipal councils. The OMB is a public tribunal body which operates under the Ontario Municipal Board Act, as well as its own rules of practice and

procedure. The OMB reports administratively to the Ministry of the Attorney General. The Lieutenant Governor in Council appoints the members of the OMB. The members of the OMB have a wide range of professional backgrounds including planners, lawyers, engineers and other public and private sector fields. This tribunal is where appeals of land use decisions can be heard. The OMB makes decisions based on applicable law, provincial and municipal policies, and the evidence presented at hearings of appeals. Currently, the OMB has the authority to confirm, overturn or alter land use planning decisions made by municipalities. The OMB will also make a decision on land use applications where municipalities have not done so. According to the PCD, the OMB process is intended to be faster and less costly than appeals to the courts.

In the spring of 2016, a number of Ontario municipalities, including the City of Markham, requested that the Government of Ontario review the mandate and jurisdiction of the OMB. The City asked for the review to ensure the OMB is required to be respectful of municipal planning policies and local decision making, and that its decisions comply with Provincial Policies. Council also asked that the Provincial review include consideration of the amount of costs that may be awarded to ensure fairness for community participants in the appeal process. An extract from the March 1st, 2016 Council resolution, asking the Province to review the role of the OMB, is attached as Appendix 'A' to this report.

The PCD indicates that the government has heard a range of viewpoints regarding the role of the OMB in the land use planning system and processes. These views include:

1) citizens feel they do not have a meaningful voice in the process;
2) more weight should be given to municipal decisions;
3) OMB decisions are unpredictable;
4) hearings cost too much and take too long; and
5) there are too many hearings and more mediation should be pursued.

The provincial government believes that there is a continuing role for the OMB in the land use planning system, and are now exploring opportunities to make changes to the OMB's role. Consequently, the Province announced, in June of 2016, that they are reviewing the scope (what it deals with) and effectiveness (how it operates) of the OMB, to ultimately implement refinements to improve the role of the OMB, within the provincial land use planning system.

In October 2016, the Province invited comments from individuals, organizations and businesses to inform their review of the OMB's role within the provincial land use planning system. To support the review, the Province released a public consultation paper entitled, "Review of the Ontario Municipal Board, Public Consultation Document". This paper outlines the roles and responsibilities of the OMB and poses a number of questions about the OMB's role in the land use planning system. The Province has set a deadline of December 19, 2016 for providing feedback. Additional information about the review is available on the Ministry of Municipal Affairs webpage (ontario.ca/ombreview).

To frame their review of the OMB, the Province established four (4) guiding principles.

1) protect long-term public interests;
2) maintain or enhance access to dispute resolution;
3) provide transparency in hearing processes and decision-making; and
4) minimize impacts on the court system.

The Province is exploring whether the OMB's role could be improved by:

1) enabling more meaningful, affordable resident participation;
2) giving more weight to local and provincial decisions;
3) bringing fewer municipal and provincial decisions to the OMB, by promoting alternative ways of settling disputes; and
4) supporting clearer, more predictable decision making.

DISCUSSION:
The Province's review of the OMB is organized into five themes.

1) the OMB's jurisdiction and powers;
2) citizen participation and local perspective;
3) clear and predictable decision making;
4) modern procedures and faster decisions; and
5) alternative dispute resolutions and fewer hearings.

The discussion below provides an overview of the changes that the Province is proposing, and Staff's responses to questions posed by the Province which are applicable to a municipality.

Theme 1: The OMB's jurisdiction and powers
The Province has heard that the scope of issues dealt with by the OMB is too broad, meaning too many matters are appealed to the OMB, which is time consuming and costly. They have also heard that the OMB deals with too many local matters without giving enough weight or consideration to the decisions made by municipal councils. It has also been suggested that "de novo" hearings (hearings that start anew, with evidence being provided that may not have been before Council when making its decision) should be eliminated, as they do not respect the decisions of municipal councils, and they duplicate the decision making process of municipal councils.

The Province has also heard that the OMB is needed to provide decisions based on planning evidence when a municipal council makes a decision based on local concerns that may not reflect the broader public interest.

Protecting Public Interests
According to the PCD, the Province is considering limiting appeals on land use decisions related to broader public interest, such as protecting drinking water and directing development away from flood-prone areas, so that:

a) parts of official plans would not be subject to appeal, perhaps relating to matters such as the preservation of farmland and what the PCD refers to as the orderly development of safe and healthy communities;
b) new official plans or proposed official plan amendments that are required to implement Provincial Plans, would not be subject to appeal;
c) only the Minister would have the authority to make a final decision on requests to amend Minister's Zoning Orders.

Discussion Question

Q 1. What is your perspective on the changes being considered to limit appeals on matters of public interest?

City response

The City generally supports changes to the OMB that will limit appeals on those matters of broad public interest, and looks to the Province to provide clarity on which matters won't be subject to appeal. Further, when a Municipal Official Plan is appealed or when an application to amend a Municipal Official Plan is refused by Council, the Province or, the upper tier Municipality should execute a screening process, having regard for the public interest, to determine whether a potential appeal is valid. Including a screening mechanism to determine whether a matter is appealable, will provide greater certainty to municipalities and residents regarding the long term policy direction of their communities.

With regard to limiting appeals on the basis of public interest, a more precise response can be provided when the Province has indicated more clearly which parts of municipal Official Plans would or would not be subject to appeal (e.g. source water protection, special policy areas, forecasts/intensification targets/minimum densities, employment lands protection ...)

Bringing Public Transit to More People

According to the PCD, the Province is considering restricting appeals of municipal official plans, amendments to municipal official plans, and zoning by-laws for development that supports provincially funded transit infrastructure such as subways and bus stations to help ensure that there are sufficient densities to support provincial transit investments.

Discussion Question

Q 2. What is your perspective on the changes being considered to restrict appeals of development that supports the use of transit?

City response

The City generally supports restricting appeals of official plans and zoning by-laws for development within transit corridors that is in compliance with the height and density ranges established in local and regional official plans.

However, where a private development proposal would significantly exceed the height or density provisions of the applicable Official Plan(s), it is reasonable to expect that the current municipal review and approval processes and OMB appeal procedures would continue to apply. It is not clear how the Province intends to restrict appeals (e.g. is the Province intending to eliminate the right to appeal or to scope the extent of the appeal?). It would be preferable if municipalities were given the authority to determine appropriate restrictions on appeals of development that supports public transit. These would be implemented through Official Plan policies.

The Province should also consider eliminating appeals where the City has denied a zoning by-law and/or official plan amendment applications to reduce density in a transit corridor.

Give Communities a Stronger Voice

The Provincial government is exploring changes to the land use planning and appeal system so that more decisions are made locally. These include:

a) no appeal to a municipality's refusal to amend a new secondary plan for two years, to recognize the community effort and involvement in developing these plans.
b) no appeal of interim control by-laws, to give municipalities time to do comprehensive studies to appropriately plan neighborhoods, particularly those experiencing rapid change or those that are in transition.
c) expand the authority of local appeal bodies to include appeals related to site plans. This would allow them to hear disputes on individual properties relating to, for example, architectural control, landscaping, access or lighting;
d) further clarify that the OMB's authority is limited to dealing with matters that are part of Council's decision, meaning the board is only able to deal with the same parts of the Official Plan as those dealt with by Council.
e) require the OMB to send significant new information that arises at a hearing back to Council for re-evaluation to ensure that the OMB has the benefit of Council's perspective.

Discussion Question

Q 3. What is your perspective on the changes being considered to give communities a stronger voice?

City response

The City generally supports refinements to the OMB, such as those outlined above, that will provide communities with a stronger voice in the land use planning process.

Appeals to a municipality's refusal to amend a new secondary plan should not be allowed, in order to be consistent with the provisions of Bill 73 as it applies to appeals to whole Official Plans and Comprehensive Zoning By-laws.

The City agrees with the proposal to eliminate appeals of interim control by-laws. In the event that the Province wishes to provide an appeal mechanism, the only basis to object to these by-laws should be that the requirements of the Planning Act were not met.

The City supports the option of directing site plan appeals to a local appeal body. The City of Toronto provides an example of how this body might work. In Toronto, the local appeal body is made up of locally appointed members making decisions about local planning matters affecting Toronto neighbourhoods. The Chair and members are selected by an impartial citizen-member nominating panel, which makes its recommendations for appointments to City Council.

It is recommended that the parties to such appeals would continue to be limited to the City and the proponent and not open to appeal by the public.

In addition, it is recommended that parties could only be permitted to argue, on appeal, the same sections of the Official Plan that formed the basis of Council's decision.

The City strongly agrees that significant new information that arises for the first time at a Board hearing should be sent back to Council for re-evaluation to ensure that the OMB has the benefit of Council's perspective.

NOTE: This recommendation applies only if de novo hearings regarding municipal decisions are not eliminated. If de novo hearings are eliminated, new information would not be permitted at the OMB.

"De novo" Hearings

The PCD identifies that de novo means 'starting from the beginning', which is how the OMB deals with appeals to municipal land use decisions. Since 2007, the OMB has been required to have regard for municipal council decisions and any other supporting information which lead to the decision. Eliminating "de novo" hearings would mean that the OMB would focus on reasonableness of the actual municipal decision under appeal, instead of imposing an alternative decision based on different facts, supporting materials, expert witnesses and evidence. The decision by Council or the Committee of Adjustment would then be central to the appeal. According to the PCD, this could be achieved by:

a) the OMB ensuring that a decision has been made within a range of defensible outcomes that are within the authority of Council or the Committee of Adjustment. If the decision is found to have been made within that range of outcomes, the OMB would not be able to overturn the decision.
b) only authorizing the OMB to overturn a local decision if the decision does not comply with municipal or provincial policies. (e.g. an Official Plan that does not meet Growth Plan targets or policies.)

Discussion Questions

Q 4. What is your view on whether the OMB should continue to conduct de novo hearings?

City response
City Staff are of the opinion that elimination of de novo hearings has the potential to significantly improve the land use planning system in that it would strengthen local decision-making, focus the OMB's role on adjudicating only those matters and materials that were considered by Council, reduce hearing times improve public participation and speed up decision making.

De novo hearings permit applicants to: submit different development plans to the Board than those reviewed by Council; submit new evidence to the Board based on revised proposals or the testimony of additional expert witnesses; or submit new evidence based on an unrevised development plan. Applicants are often able to do this without public consultation or without the prior consideration by municipal Staff or Council.

Q 5. If the OMB were to move away from de novo hearings, what do you believe is the most appropriate approach and why?

City response
The OMB should function as a true appeal body, and should be limited to reviewing the evidence that was before Council. The OMB should only have the authority to overturn decisions that are unreasonable or non-compliant with provincial or municipal policy based on the same proposal and supporting information that Council had before it. Because the OMB would be limited to considering the development proposal and supporting evidence that was before Council, this would encourage applicants to put their best case forward at the municipal level, and discourage applicants from bringing forward a less desirable alternative to the Board that may have previously been discouraged during the local municipal review. This may have implications for the appeal periods identified below. Applicants should be prevented from appealing before their application has been fully reviewed by municipal Staff, and public input sought.

In the case of an appeal for failure to make decision within the timelines set out in the Planning Act (30 days for site plans, 120 days for zoning by-law amendments and 180 days for official plan amendments), a hearing de novo may be required. However, it is still recommended that in such cases, applicants be prohibited from submitting to the Board new evidence that was not before the municipality before the appeal was filed. One narrow exception to prohibition on new evidence should be recognized. It is unrealistic to expect that residents would expend the resources to contribute expert evidence to Council prior to a decision being made. Therefore, residents groups who file third party appeals or are added to proceedings as parties should be permitted to submit new evidence in the form of testimony and reports from their own experts.

Transition and Use of New Planning Rules

Should planning decisions be made on the most up-to-date planning documents or should planning decisions be based on the planning documents that were in place when the application process was started?

Since 2007, the Planning Act has required that, going forward, land use decisions must reflect provincial policies in place when the decision is made, not when the application is made. The Province is seeking input on whether to expand this to require all decisions to be based not only on provincial legislation and planning documents but also municipal planning documents in effect at the time of the decision.

Discussion Question

Q 6. From your perspective, should the government be looking at changes related to transition and the use of new planning rules? If so:

- What is your perspective on basing planning decisions on municipal policies in place at the time the decision is made?

  City response

  The City generally supports basing decisions on policies in place at the time of the decision. However, for reasons of fairness and certainty, there should be a mechanism in place that would allow a proposal to proceed, at the discretion of Council, if the policy has been developed since the application was submitted. This could be similar to, for example, the Planning Act provisions that allows Council to determine whether further notice is required where a change is made to a proposed by-law after the holding of a public meeting.

  In Staff's view, it would be appropriate for municipalities and the OMB to apply the policies that were approved at the time of the decision. Currently, adopted plans which are not in force at the time of application are to be considered, but this is not done consistently by all Board members. New rules should provide that:

  1) the Board's decisions must comply with municipal and provincial policies which are in force at the time of decision;
  2) that the Board must have regard to policies which are adopted but not yet in force; and,
  3) that their decisions should explain how the adopted, but not in force, policies were taken into account.

- What is your perspective on having updated provincial planning rules apply at the time of decisions for applications before 2007?

  City response

  City Staff generally supports having the planning rules apply to all applications, even those applications submitted before 2007.

Staff also recommend that the Province establish, or enable municipalities to impose, expiry dates for applications that have not been significantly advanced by the proponent.

Theme 2: Citizen Participation and Local Perspective

The Province has heard concerns from individuals about their ability to participate in OMB hearings. The cost to participate frequently discourages participation as it can be very expensive to retain subject matter experts. The OMB has also heard that it needs to be more accessible. For example, having a more user-friendly web site and adopting plain language might increase accessibility. The Province wants to ensure that individuals or groups without legal representation are able to stay involved in the planning process, including the appeal process.

Expanding the OMB's Citizen Liaison Office (CLO)

The government is considering hiring more Staff at the CLO to help the public understand what the OMB does and how to participate in the process. These Staff would include in-house planning experts and lawyers who, subject to eligibility criteria, would be available to the public. The government is also exploring funding tools to help citizens retain their own planning experts/lawyers.

Discussion Questions

Q 7. If you have had any experience with the Citizen Liaison Office, describe what it was like – did it meet your expectations?

City response
Not applicable.

Q 8. Was there information you needed, but were unable to get?

City response
Not applicable.

Q 9. Would the above changes support greater citizen participation at the OMB?

City response
The changes described above could support and encourage greater citizen participation. All efforts by the provincial government to assist the public with their understanding of the role of the OMB, and to assist the public by providing them with access to appropriate resources to present their case at the OMB, are encouraged. The OMB should refer the public to professional organizations, such as the Law Society of Upper Canada or the Ontario Professional Planners Institute where they can obtain lists of subject matter experts.

In addition to the above, the Board should invest in a truly interactive and user

friendly website. This improved website would contain not only general information for the public, but serve as an information portal for hearings. Affidavits, witness statements, exhibits, studies and reports, should all be posted on the site by the Board. This would allow interested parties and members of the public easier access to hearing-related information should they decide to participate in or attend a hearing.

Q 10. Given that it would be inappropriate for the OMB to provide legal advice to any party or participant, what type of information about the OMB's process would help citizens to participate in mediations and hearings?

City response

The Province may want to consider providing these services at arm's length to the OMB, so the perception of conflict of interest is minimized. The OMB could also provide clearer information about the role of the OMB and how hearings are structured, the types of evidence to be submitted, how to prepare a case, etc. Expansion of the services provided by the Province may also provide more opportunities for individuals to give evidence at the OMB without being represented by lawyers

Q 11. Are there funding tools the Province could explore to enable citizens to retain their own planning experts and lawyers?

City response

Prior to any funding being provided to private individuals, groups or corporations, the appeal should be reviewed and certified to ensure that the appeal has merit and is not frivolous, as recommended for all appeals under Question 1. Only if the appeal has merit should funding be considered. Where developers appeal a decision of council, a predetermined amount of money to fund public participation in the process should be considered to assist the opposition. However, if a member of the public files a third party appeal, then they should fund their appeal themselves.

Q 12. What kind of financial or other eligibility criteria need to be considered when increasing access to subject matter experts like planners and lawyers?

City response

It's not clear if the CLO in-house planning experts and lawyers would represent the public at hearings or simply help educate and provide information to the public.

As stated above, all appeals should be reviewed and certified to ensure that the appeal has merit and is not frivolous, including those where funding is being sought.

The City also sees merit in requiring members of the public participating at an OMB hearing to cover a portion of their own costs as a disincentive to frivolous appeals. Staff also note that the March 1, 2016 Markham Council resolution states that "...the

Provincial review include consideration of the amount of costs that may be awarded to ensure fairness for community participants in the appeal process…".

Theme 3: Clear and Predictable Decision Making
The government has heard the OMB members need to be well qualified individuals who have the appropriate background and training to do the job. They need to be able to provide a clearer rationale and use more plain language in their decisions. To accomplish this, the Province is considering:

Increasing the number of adjudicators and their training
The government is considering increasing the number of board members and ensuring that they have the necessary skills. Additional training could include how to deal with parties that have no legal representation.

Multi-member panels
The government is considering having multi-member panels conduct complex hearings or having multi-member panels conduct all hearings.

Q 13. Qualifications for adjudicators are identified in the job description posted on the OMB website (Ontario.ca/cxjf). What additional qualifications and experiences are important for an OMB member?

City response
The qualification of OMB members varies widely. Decisions vary in terms of quality of writing and substantive content. Further, there is a lack of consistency with respect to quality of analysis and outcomes on similar matters. In order to address these concerns, the Province should consider requiring the Board to be bound by precedent in their decision making. All Board members should have experience working within the Ontario land use planning system. Board member remuneration may need to be increased to attract more qualified and experienced adjudicators to these positions. Additionally, there is a lack of Board members skilled in alternative dispute resolution processes, so more such members should be appointed or trained. Currently, the Board's case management practices are lacking. Members should be trained to implement a rigorous process of dismissing frivolous appeals and scoping issues, prior to scheduling hearing events.

More thought should be given to which members are assigned to which appeals, to ensure the expertise of the members is leveraged.

Q 14. Do you believe that multi-member panels would increase consistency of decision-making? What should be the make-up of these panels?

City response
Multi-member panels will likely improve the quality of decisions. This would be the case particularly if they are used for more complicated appeals about issues that involve a number of competing multi-disciplinary issues and

qualifications of the Board members reflect the issues being adjudicated. The OMB should consider the subject matter of appeals when assigning Board members and ensure that the panel has the necessary expertise to appropriately adjudicate the matter.

Q 15. Are there any types of cases that would not need a multi-member panel?

City response
Multi-member panels are generally supported, but may not be required for Committee of Adjustment Minor Variance and Consent applications (if such appeals continue to be decided by the OMB). Settlement hearings may also not require a multi-member panel. Other applications that may also not require a multi-member panel include site plan applications and site-specific official plan and zoning by-law amendments. This type of panel would be appropriate for official plan appeals that affect multiple properties or an entire municipality.

Q 16. How can OMB decisions be made easier to understand and be better relayed to the public?

City response
All Board members should have demonstrated professional experience in municipal land use matters and be trained to clearly explain their reasoning in their decisions, and these decisions should be written in plain language and follow a standard format. Decisions should also be reviewed thoroughly to ensure that explanations are written in as non-technical way as possible. This would assist with issuance of decisions in a more timely matter, and with ensuring the decisions are well-understood by all parties.

Theme 4: Modern Procedures and Faster Decisions
The government has heard that the rules of practice and procedure, which set out how the OMB deals with appeals, need to be updated and the procedures streamlined to make the system more accessible, and to promote timely decisions. To achieve this, the Province would like to reduce the complexity of the process and to modernize procedures and promote faster decisions. The OMB has publicly posted business plans with timelines for scheduling hearings and issuing decisions as follows:

Chart 1 - OMB Timeline Targets

		Target
Hearings scheduled	Minor variance	Within 120 days of receipt of the complete appeals package
	Other application types	Within 180 days of receipt of the complete appeals package
Decision issued	All application types	Within 60 days of the end of the hearing

Reducing process complexity
The government is considering allowing the OMB to adopt less complex and more accessible procedures by allowing Board members to play a more active role in the

hearing, by for example, explaining rules and procedures, scoping issues and evidence, and questioning witnesses.

Modernizing procedures and promoting faster decisions
The government is considering a number of options, including:

a) setting appropriate timelines for decisions;
b) increasing flexibility for how evidence can be heard;
c) conducting more hearings in writing in appropriate cases;
d) establishing clearer rules for issue lists to ensure that hearings are focused and conducted in the most cost-effective way possible; and
e) introducing maximum days allowed for hearings.

Discussion Questions

Q 17. Are the timelines in the chart above appropriate, given the nature of appeals to the OMB? What would be appropriate timelines?

City Response

There is a concern that the proposed deadlines for setting hearing dates will direct the process towards hearings, and will unfairly prejudice municipalities. Municipal Staff typically report to Council for instructions on most appeals, and in many cases, discussions with appellants/applicants occur to determine if an appeal can be resolved or at least scoped. This opportunity for settlement negotiations, involving Council instructions may be lost or constrained if municipalities were required to prepare for a hearing so quickly. The ability to have scoping or settlement discussions promotes efficient use of Board resources by ensuring that contested hearings are shorter and more focused, or in many cases, avoided altogether.

Q 18. Would the above measures help to modernize OMB hearing procedures and practices? Would they help encourage timely processes and decisions?

City response

Simplifying tribunal procedures and facilitating active mediation could mean less reliance on lawyers and more discussion by subject matter experts. As a result, hearings may be less litigious and more likely to result in consensus and better planning for communities. In addition, prior to a hearing, opportunities for experts to agree on facts that would also help to scope a hearing and may result in shorter hearings.

The Province should permit municipal clerks to determine whether appeals are valid on their face (ie: based on appeal periods, making of submissions during the public process, etc...). The Board itself should conduct initial reviews to determine if there are any substantive planning grounds sufficient for an appeal. This would eliminate the need for preliminary motions brought by the parties on appeals with no merit, and eliminate the expenditure of significant

municipal resources on preparation of appeal packages for appeals that are not valid. The preparation of explicit appeal letters that substantively scope the matters under appeal would also enhance the efficiency of initial reviews.

Q 19. What type of cases/situations would be most appropriate to a written hearing?

City response
Appeals to Committee of Adjustment decisions on Minor Variance and consent applications and minor Zoning By-law amendment applications may be suitable for written hearings. They may also be appropriate where there are a single or a few clear-cut issues. This is particularly true in cases when the decision of the approval authority is consistent and aligns with the recommendations of the subject matter experts employed by the municipality to make recommendations.

The City recommends the Province consider adopting a process similar to certain court levels where parties are required to abide by strict time limits to make their argument based on pre-filed materials. This would promote efficient use of the Board's time and resources.

Theme 5: Alternative Dispute Resolution and Fewer Hearings
The government has heard that there is considerable interest in pursuing alternative ways to work out mutually acceptable solutions to land use planning issues without a formal appeal process. The Province is considering the following:

More actively promote mediation
According to the PCD, requiring all appeals be considered by a mediator before a hearing is scheduled, and by having mediators available at all times during an application process, including before an application arrives at municipal council for a decision.

Strengthen case management at the OMB
To scope issues in dispute and identify areas that can be resolved at pre-hearings.

Creating timelines and targets
To create timelines and targets for scheduling hearing, including mediation.

Discussion Questions
Q 20. Why do you think that OMB cases don't settle at mediation?

City response
Mediation works if the parties involved are willing to compromise and want to reach a solution. It is very difficult to mediate in cases where the positions are polarized, where the parties are not on an equal footing financially and where parties are entrenched in their positions ("winner take all").

Q 21. What types of cases/situations have greater chance of settling at mediation?

City response
Mediation is typically most beneficial to parties who have something to gain from compromise, e.g. saving the cost of a full hearing or if the goals of each party can at least be partially achieved. Elimination of de novo hearings would assist as well, because applicants would not be permitted to submit different proposals or technical information to Council and the Board than what was presented to Council. The current system favours the well funded parties to the detriment of those that are not.

There is a need to have decision makers at the mediation that have the expertise and authority to negotiate on behalf of each party involved in the mediation.

Q 22. Should mediation be required, even if it has the potential to lengthen the process?

City response
If the parties involved aren't willing to negotiate and potentially compromise, then mandatory mediation won't be successful.

Q 23. What role should OMB Staff play in mediation, pre-screening applications and in not scheduling cases that are out of the OMB's scope?

City response
See Q. 18.

General Discussion Question

Q 24. Do you have other comments or points you want to make about the scope and effectiveness of the OMB with regards to its role in land use planning?

City response
The City of Markham also provided a number of comments related to OMB reform when we commented on proposals for Bill 73 in January 2014. The comments not addressed by Bill 73 are as follows:

a) **Appropriateness of ability to appeal a non-decision after 180 days**
The 180-day decision period is unrealistic, due to the complexity of Official Plan and Zoning By-law amendment applications, especially in rapid growth areas such as the GTA. Some developers are using the 180-day timeframe to unrealistically expedite their applications by the threat of moving jurisdiction to the OMB. The time limit for an appeal of a non-decision should be extended to one year. This would allow time for a robust community consultation, without the threat of a quick OMB appeal to sway decision makers. Bill 73 did not change the ability of an applicant

to appeal after 180 days.

b) **Expansion of the powers of local appeal bodies**
The powers of local appeal bodies should be expanded to allow adjudication of site plan approvals and minor zoning amendments. The option to implement a local appeal body should continue to be at the discretion of Council.

In addition to the comments noted earlier in relation to Bill 73, Committee of Adjustment appeals may also be more appropriately dealt with outside of the OMB. These matters tend to be site specific and extremely local. Another avenue to adjudicate disputes over these matters should be considered.

Finally, Staff are of the view that requiring appellants to seek leave to appeal an application to the OMB would permit the OMB to effectively reduce or eliminate frivolous appeals, and to assist residents' groups to articulate valid land use planning objectives when launching appeals. Such a process could be carried out in writing, and would save time and resources for all parties.

Conclusions
Staff of the Legal Services Department and the Development Service Commission are generally supportive of and encouraged by the OMB reforms being considered by the Province. Staff are particularly encouraged by the focus on limiting appeals on matters of public interest and moving away from 'de novo' hearings.

These comments and recommendations should be forwarded to the appropriate Provincial Ministries for consideration.

Staff will report back to Development Services Committee, on any changes made by the Province to the OMB and/or the planning appeal regime, to provide an overview of the changes and to outline potential operational impacts to the Legal Services and Planning and Urban Design Departments, including possible changes to work flow, processes, and resource allocation.

FINANCIAL CONSIDERATIONS:
Not applicable.

HUMAN RESOURCES CONSIDERATIONS:
Not applicable.

ALIGNMENT WITH STRATEGIC PRIORITIES:
Not applicable.

BUSINESS UNITS CONSULTED AND AFFECTED:
The business units primarily affected by these changes are the Planning and Urban Design Department and the Legal Services Department.

RECOMMENDED BY

Jim Baird, MCIP, RPP
Commissioner of Development Services

for Catherine Conrad
City Solicitor

ATTACHMENTS
Appendix A - Extract of the Council Motion asking the Province to review the role of the OMB

Appendix B – OMB Themes/Questions and City Responses

File path: Amanda\File 16 138801\Document\ Recommendation Report

MARKHAM

RESOLUTION OF COUNCIL MEETING DATED MARCH 1, 2016

MOTIONS

(1) REQUEST THE GOVERNMENT OF ONTARIO TO LIMIT THE JURISDICTION OF THE ONTARIO MUNICIPAL BOARD (13.2 & 10.0)

Moved by Councillor Karen Rea
Seconded by Councillor Valerie Burke

1) That the City of Markham request that the Province of Ontario undertake a public review of the mandate and jurisdiction of the Ontario Municipal Board to ensure that the OMB is respectful of municipal planning policies and local decision making and complies with Provincial Policy; and,

2) That the Provincial review include consideration of the amount of costs that may be awarded to ensure fairness for community participants in the appeal process; and,

3) That a copy of this Motion be sent to the Honourable Kathleen Wynne, Premier of Ontario; the Honourable Ted McMeekin, Minister of Municipal Affairs and Housing; the Honourable Patrick Brown, Leader of the Progressive Conservative Party; the Honourable Andrea Horwath, Leader of the New Democratic Party; and all MPPs in the Province of Ontario; and further,

4) That a copy of this Motion be sent to the Association of Municipalities of Ontario (AMO); Federation of Canadian Municipalities (FCM); York Region Council and all Ontario municipalities for their consideration.

Carried by recorded votes

Sincerely,

Kimberley Kitteringham
City Clerk

APPENDIX 'B'
OMB THEMES/QUESTIONS & CITY RESPONSES

Theme 1: The OMB's jurisdiction and powers	
Protecting Public Interests **Discussion Question** **Q 1.** What is your perspective on the changes being considered to limit appeals on matters of public interest?	**City response** The City generally supports changes to the OMB that will limit appeals on those matters of broad public interest, and looks to the Province to provide clarity on which matters won't be subject to appeal. Further, when a Municipal Official Plan is appealed or when an application to amend a Municipal Official Plan is refused by Council, the Province or, the upper tier Municipality should execute a screening process, having regard for the public interest, to determine whether a potential appeal is valid. Including a screening mechanism to determine whether a matter is appealable, will provide greater certainty to municipalities and residents regarding the long term policy direction of their communities. With regard to limiting appeals on the basis of public interest, a more precise response can be provided when the Province has indicated more clearly which parts of municipal Official Plans would or would not be subject to appeal (e.g. source water protection, special policy areas, forecasts/intensification targets/minimum densities, employment lands protection …)
Bringing Public Transit to More People **Discussion Question** **Q 2.** What is your perspective on the changes being considered to restrict appeals of development that supports the use of transit?	**City response** The City generally supports restricting appeals of official plans and zoning by-laws for development within transit corridors that is in compliance with the height and density ranges established in local and regional official plans. However, where a private development proposal would significantly exceed the height or density provisions of the applicable Official Plan(s), it is reasonable to expect that the current municipal review and approval processes and OMB appeal procedures would continue to apply. It is not clear how the Province intends to restrict appeals (e.g. is the Province intending to eliminate the right to appeal or to scope the extent of the appeal?). It would be preferable if municipalities were given the authority to determine appropriate restrictions on appeals of development that supports public transit. These would be implemented through Official Plan policies. The Province should also consider eliminating appeals where the City has denied a zoning by-law and/or official plan amendment applications to reduce density in a transit corridor.

APPENDIX 'B'
OMB THEMES/QUESTIONS & CITY RESPONSES

Give Communities a Stronger Voice **Discussion Question** **Q 3.** What is your perspective on the changes being considered to give communities a stronger voice?	**City response** The City generally supports refinements to the OMB, such as those outlined above, that will provide communities with a stronger voice in the land use planning process. Appeals to a municipality's refusal to amend a new secondary plan should not be allowed, in order to be consistent with the provisions of Bill 73 as it applies to appeals to whole Official Plans and Comprehensive Zoning By-laws. The City agrees with the proposal to eliminate appeals of interim control by-laws. In the event that the Province wishes to provide an appeal mechanism, the only basis to object to these by-laws should be that the requirements of the Planning Act were not met. The City supports the option of directing site plan appeals to a local appeal body. The City of Toronto provides an example of how this body might work. In Toronto, the local appeal body is made up of locally appointed members making decisions about local planning matters affecting Toronto neighbourhoods. The Chair and members are selected by an impartial citizen-member nominating panel, which makes its recommendations for appointments to City Council. It is recommended that the parties to such appeals would continue to be limited to the City and the proponent and not open to appeal by the public. In addition, it is recommended that parties could only be permitted to argue, on appeal, the same sections of the Official Plan that formed the basis of Council's decision. The City strongly agrees that significant new information that arises for the first time at a Board hearing should be sent back to Council for re-evaluation to ensure that the OMB has the benefit of Council's perspective. *NOTE: This recommendation applies only if de novo hearings regarding municipal decisions are not eliminated. If de novo hearings are eliminated, new information would not be permitted at the OMB.*
"De novo" Hearings **Discussion Question** **Q 4.** What is your view on whether the OMB should continue to conduct de novo hearings?	**City response** City Staff are of the opinion that elimination of de novo hearings has the potential to significantly improve the land use planning system in that it would strengthen local decision-making, focus the OMB's role on adjudicating only those matters and materials that were considered by Council, reduce hearing times improve public participation and speed up decision making.

	De novo hearings permit applicants to: submit different development plans to the Board than those reviewed by Council; submit new evidence to the Board based on revised proposals or the testimony of additional expert witnesses; or submit new evidence based on an unrevised development plan. Applicants are often able to do this without public consultation or without the prior consideration by municipal Staff or Council.
Q 5. If the OMB were to move away from de novo hearings, what do you believe is the most appropriate approach and why?	**City response** The OMB should function as a true appeal body, and should be limited to reviewing the evidence that was before Council. The OMB should only have the authority to overturn decisions that are unreasonable or non-compliant with provincial or municipal policy based on the same proposal and supporting information that Council had before it. Because the OMB would be limited to considering the development proposal and supporting evidence that was before Council, this would encourage applicants to put their best case forward at the municipal level, and discourage applicants from bringing forward a less desirable alternative to the Board that may have previously been discouraged during the local municipal review. This may have implications for the appeal periods identified below. Applicants should be prevented from appealing before their application has been fully reviewed by municipal Staff, and public input sought. In the case of an appeal for failure to make decision within the timelines set out in the Planning Act (30 days for site plans, 120 days for zoning by-law amendments and 180 days for official plan amendments), a hearing de novo may be required. However, it is still recommended that in such cases, applicants be prohibited from submitting to the Board new evidence that was not before the municipality before the appeal was filed. One narrow exception to prohibition on new evidence should be recognized. It is unrealistic to expect that residents would expend the resources to contribute expert evidence to Council prior to a decision being made. Therefore, residents groups who file third party appeals or are added to proceedings as parties should be permitted to submit new evidence in the form of testimony and reports from their own experts.

APPENDIX 'B'
OMB THEMES/QUESTIONS & CITY RESPONSES

Transition and Use of New Planning Rules **Discussion Questions** **Q 6.** From your perspective, should the government be looking at changes related to transition and the use of new planning rules? If so: • What is your perspective on basing planning decisions on municipal policies in place at the time the decision is made? • What is your perspective on having updated provincial planning rules apply at the time of decisions for applications before 2007?	**City response** The City generally supports basing decisions on policies in place at the time of the decision. However, for reasons of fairness and certainty, there should be a mechanism in place that would allow a proposal to proceed, at the discretion of Council, if the policy has been developed since the application was submitted. This could be similar to, for example, the Planning Act provisions that allows Council to determine whether further notice is required where a change is made to a proposed by-law after the holding of a public meeting. In Staff's view, it would be appropriate for municipalities and the OMB to apply the policies that were approved at the time of the decision. Currently, adopted plans which are not in force at the time of application are to be considered, but this is not done consistently by all Board members. New rules should provide that: the Board's decisions must comply with municipal and provincial policies which are in force at the time of decision; that the Board must have regard to policies which are adopted but not yet in force; and, that their decisions should explain how the adopted, but not in force, policies were taken into account. **City response** City Staff generally supports having the planning rules apply to all applications, even those applications submitted before 2007. Staff also recommend that the Province establish, or enable municipalities to impose, expiry dates for applications that have not been significantly advanced by the proponent.

APPENDIX 'B'
OMB THEMES/QUESTIONS & CITY RESPONSES

Theme 2: Citizen Participation and Local Perspective	
Expanding the OMB's Citizen Liaison Office (CLO) **Discussion Questions** **Q 7.** If you have had any experience with the Citizen Liaison Office, describe what it was like – did it meet your expectations?	**City response** Not applicable.
Q 8. Was there information you needed, but were unable to get?	**City response** Not applicable.
Q 9. Would the above changes support greater citizen participation at the OMB?	**City response** The changes described above could support and encourage greater citizen participation. All efforts by the provincial government to assist the public with their understanding of the role of the OMB, and to assist the public by providing them with access to appropriate resources to present their case at the OMB, are encouraged. The OMB should refer the public to professional organizations, such as the Law Society of Upper Canada or the Ontario Professional Planners Institute where they can obtain lists of subject matter experts. In addition to the above, the Board should invest in a truly interactive and user friendly website. This improved website would contain not only general information for the public, but serve as an information portal for hearings. Affidavits, witness statements, exhibits, studies and reports, should all be posted on the site by the Board. This would allow interested parties and members of the public easier access to hearing-related information should they decide to participate in or attend a hearing.
Q 10. Given that it would be inappropriate for the OMB to provide legal advice to any party or participant, what type of information about the OMB's process would help citizens to participate in mediations and hearings?	**City response** The Province may want to consider providing these services at arm's length to the OMB, so the perception of conflict of interest is minimized. The OMB could also provide clearer information about the role of the OMB and how hearings are structured, the types of evidence to be submitted, how to prepare a case, etc. Expansion of the services provided by the Province may also provide more opportunities for individuals to give evidence at the OMB without being represented by lawyers.

Q 11. Are there funding tools the Province could explore to enable citizens to retain their own planning experts and lawyers?	**City response** Prior to any funding being provided to private individuals, groups or corporations, the appeal should be reviewed and certified to ensure that the appeal has merit and is not frivolous, as recommended for all appeals under Question 1. Only if the appeal has merit should funding be considered. Where developers appeal a decision of council, a predetermined amount of money to fund public participation in the process should be considered to assist the opposition. However, if a member of the public files a third party appeal, then they should fund their appeal themselves.
Q 12. What kind of financial or other eligibility criteria need to be considered when increasing access to subject matter experts like planners and lawyers?	**City response** It's not clear if the CLO in-house planning experts and lawyers would represent the public at hearings or simply help educate and provide information to the public. As stated above, all appeals should be reviewed and certified to ensure that the appeal has merit and is not frivolous, including those where funding is being sought. The City also sees merit in requiring members of the public participating at an OMB hearing to cover a portion of their own costs as a disincentive to frivolous appeals. Staff also note that the March 1, 2016 Markham Council resolution states that "…the Provincial review include consideration of the amount of costs that may be awarded to ensure fairness for community participants in the appeal process…".

APPENDIX 'B'
OMB THEMES/QUESTIONS & CITY RESPONSES

Theme 3: Clear and Predictable Decision Making	
Increasing the number of adjudicators and their training and Multi-member panels **Q 13.** Qualifications for adjudicators are identified in the job description posted on the OMB website (Ontario.ca/cxjf). What additional qualifications and experiences are important for an OMB member?	**City response** The qualification of OMB members varies widely. Decisions vary in terms of quality of writing and substantive content. Further, there is a lack of consistency with respect to quality of analysis and outcomes on similar matters. In order to address these concerns, the Province should consider requiring the Board to be bound by precedent in their decision making. All Board members should have experience working within the Ontario land use planning system. Board member remuneration may need to be increased to attract more qualified and experienced adjudicators to these positions. Additionally, there is a lack of Board members skilled in alternative dispute resolution processes, so more such members should be appointed or trained. Currently, the Board's case management practices are lacking. Members should be trained to implement a rigorous process of dismissing frivolous appeals and scoping issues, prior to scheduling hearing events. More thought should be given to which members are assigned to which appeals, to ensure the expertise of the members is leveraged.
Q 14. Do you believe that multi-member panels would increase consistency of decision-making? What should be the make-up of these panels?	**City response** Multi-member panels will likely improve the quality of decisions. This would be the case particularly if they are used for more complicated appeals about issues that involve a number of competing multi-disciplinary issues and qualifications of the Board members reflect the issues being adjudicated. The OMB should consider the subject matter of appeals when assigning Board members and ensure that the panel has the necessary expertise to appropriately adjudicate the matter.
Q 15. Are there any types of cases that would not need a multi-member panel?	**City response** Multi-member panels are generally supported, but may not be required for Committee of Adjustment Minor Variance and Consent applications (if such appeals continue to be decided by the OMB). Settlement hearings may also not require a multi-member panel. Other applications that may also not require a multi-member panel include site plan applications and site-specific official plan and zoning by-law amendments. This type of panel would be appropriate for official plan appeals that affect multiple properties or an entire municipality.
Q 16. How can OMB decisions be made easier to understand and be better relayed to the public?	**City response** All Board members should have demonstrated professional experience in municipal land use matters and be trained to clearly explain their reasoning in their decisions, and these decisions should be written in plain language and follow a standard format. Decisions

	should also be reviewed thoroughly to ensure that explanations are written in as non-technical way as possible. This would assist with issuance of decisions in a more timely matter, and with ensuring the decisions are well-understood by all parties.

Theme 4: Modern Procedures and Faster Decisions	
Reducing process complexity **Modernizing procedures and promoting faster decisions** **Discussion Questions** **Q 17.** Are the timelines in the chart above appropriate, given the nature of appeals to the OMB? What would be appropriate timelines?	**City Response** There is a concern that the proposed deadlines for setting hearing dates will direct the process towards hearings, and will unfairly prejudice municipalities. Municipal Staff typically report to Council for instructions on most appeals, and in many cases, discussions with appellants/applicants occur to determine if an appeal can be resolved or at least scoped. This opportunity for settlement negotiations, involving Council instructions may be lost or constrained if municipalities were required to prepare for a hearing so quickly. The ability to have scoping or settlement discussions promotes efficient use of Board resources by ensuring that contested hearings are shorter and more focused, or in many cases, avoided altogether.
Q 18. Would the above measures help to modernize OMB hearing procedures and practices? Would they help encourage timely processes and decisions?	**City response** Simplifying tribunal procedures and facilitating active mediation could mean less reliance on lawyers and more discussion by subject matter experts. As a result, hearings may be less litigious and more likely to result in consensus and better planning for communities. In addition, prior to a hearing, opportunities for experts to agree on facts that would also help to scope a hearing and may result in shorter hearings. The Province should permit municipal clerks to determine whether appeals are valid on their face (ie: based on appeal periods, making of submissions during the public process, etc…). The Board itself should conduct initial reviews to determine if there are any substantive planning grounds sufficient for an appeal. This would eliminate the need for preliminary motions brought by the parties on appeals with no merit, and eliminate the expenditure of significant municipal resources on preparation of appeal packages for appeals that are not valid. The preparation of explicit appeal letters that substantively scope the matters under appeal would also enhance the efficiency of initial reviews.
Q 19. What type of cases/situations would be most appropriate to a written hearing?	**City response** Appeals to Committee of Adjustment decisions on Minor Variance and consent applications and minor Zoning By-law amendment applications may be suitable for written hearings. They may also be appropriate where there are a single or a few clear-cut

	issues. This is particularly true in cases when the decision of the approval authority is consistent and aligns with the recommendations of the subject matter experts employed by the municipality to make recommendations. The City recommends the Province consider adopting a process similar to certain court levels where parties are required to abide by strict time limits to make their argument based on pre-filed materials. This would promote efficient use of the Board's time and resources.

Theme 5: Alternative Dispute Resolution and Fewer Hearings	
More actively promote mediation, strengthening case management at the OMB and creating timelines and targets **Discussion Questions** **Q 20.** Why do you think that OMB cases don't settle at mediation?	**City response** Mediation works if the parties involved are willing to compromise and want to reach a solution. It is very difficult to mediate in cases where the positions are polarized, where the parties are not on an equal footing financially and where parties are entrenched in their positions ("winner take all").
Q 21. What types of cases/situations have greater chance of settling at mediation?	**City response** Mediation is typically most beneficial to parties who have something to gain from compromise, e.g. saving the cost of a full hearing or if the goals of each party can at least be partially achieved. Elimination of de novo hearings would assist as well, because applicants would not be permitted to submit different proposals or technical information to Council and the Board than what was presented to Council. The current system favours the well funded parties to the detriment of those that are not. There is a need to have decision makers at the mediation that have the expertise and authority to negotiate on behalf of each party involved in the mediation.
Q 22. Should mediation be required, even if it has the potential to lengthen the process?	**City response** If the parties involved aren't willing to negotiate and potentially compromise, then mandatory mediation won't be successful.
Q 23. What role should OMB Staff play in mediation, pre-screening applications and in not scheduling cases that are out of the OMB's scope?	**City response** See Q. 18.

APPENDIX 'B'
OMB THEMES/QUESTIONS & CITY RESPONSES

General Discussion Question	
Q 24. Do you have other comments or points you want to make about the scope and effectiveness of the OMB with regards to its role in land use planning?	**City response** The City of Markham also provided a number of comments related to OMB reform when we commented on proposals for Bill 73 in January 2014. The comments not addressed by Bill 73 are as follows: **a) Appropriateness of ability to appeal a non-decision after 180 days** The 180-day decision period is unrealistic, due to the complexity of Official Plan and Zoning By-law amendment applications, especially in rapid growth areas such as the GTA. Some developers are using the 180-day timeframe to unrealistically expedite their applications by the threat of moving jurisdiction to the OMB. The time limit for an appeal of a non-decision should be extended to one year. This would allow time for a robust community consultation, without the threat of a quick OMB appeal to sway decision makers. Bill 73 did not change the ability of an applicant to appeal after 180 days. **b) Expansion of the powers of local appeal bodies** The powers of local appeal bodies should be expanded to allow adjudication of site plan approvals and minor zoning amendments. The option to implement a local appeal body should continue to be at the discretion of Council. In addition to the comments noted earlier in relation to Bill 73, Committee of Adjustment appeals may also be more appropriately dealt with outside of the OMB. These matters tend to be site specific and extremely local. Another avenue to adjudicate disputes over these matters should be considered. Finally, Staff are of the view that requiring appellants to seek leave to appeal an application to the OMB would permit the OMB to effectively reduce or eliminate frivolous appeals, and to assist residents' groups to articulate valid land use planning objectives when launching appeals. Such a process could be carried out in writing, and would save time and resources for all parties.

MARKHAM

RESOLUTION OF COUNCIL MEETING NO. 19 DATED DECEMBER 13, 2016

REPORT NO. 49 – DEVELOPMENT SERVICES COMMITTEE

(1) COMMENTS ON THE PROVINCE'S 2016 REVIEW OF THE ONTARIO MUNICIPAL BOARD PR 16 – 138801 (10.0)
Report

1) That the Staff report entitled "Comments on The Province's Review of the Ontario Municipal Board", dated December 5th, 2016, be received; and,

2) That Council endorse the Staff recommendations in this report and submit it to the Province as the City of Markham's comments on the Province's review of the Ontario Municipal Board ("OMB") with the following additional clauses:

- "That consistent with the Markham Council resolution dated October 17, 2016, the Province be requested to develop an open and transparent process to review potential minor boundary changes associated with the Greenbelt Plan, with the definition of precise limits of the Greenbelt boundary to be established through the approval process for municipal Secondary Plans, and including potential rights of appeal to the Ontario Municipal Board."

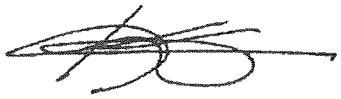
- "That no appeal to a municipality's refusal to amend a new secondary plan be permitted for five years, to recognize the community effort and involvement in developing these plans."; and,

3) That Staff report back to Development Services Committee, on any changes made by the Province to the OMB and/or the planning appeal regime, to provide an overview of the changes and to outline potential operational impacts to the Legal Services and Planning and Urban Design Departments, including possible changes to work flow, processes, and resource allocation; and,

.....2/

4) That the Clerk be directed to forward a copy of this report to the Minister of Municipal Affairs, the Attorney General of Ontario, Markham Riding MPP's and the Region of York; and further,

5) That Staff be authorized and directed to do all things necessary to give effect to this resolution.



Kimberley Kitteringham
City Clerk

Copy to: The Honourable Yasir Naqvi, Attorney General of Ontario
The Honourable Bill Mauro, Minister of Municipal Affairs
The Honourable Michael Chan, MPP, Markham-Unionville
The Honourable Helena Jaczek, MPP – Oak Ridges-Markham
Mr. Denis Kelly, Regional Clerk
Catherine Conrad
Jim Baird
Biju Karumanchery
Andrea Wilson-Peebles
Dave Miller

MARKHAM

December 16, 2016

The Honourable Yasir Naqvi
Attorney General
11th Floor, 720 Bay Street
Toronto, On M7A 2S9
Email: ynaqvi.mpp@liberal.ola.org

RE: COMMENTS ON THE PROVINCE'S 2016 REVIEW OF THE ONTARIO MUNICIPAL BOARD
PR 16 – 138801 (10.0)
Report

Dear Mr. Naqvi:

This will confirm that at a meeting held on December 13, 2016, Council of the City of Markham adopted the following resolution:

"1) That the Staff report entitled "Comments on The Province's Review of the Ontario Municipal Board", dated December 5th, 2016, be received; and,

2) That Council endorse the Staff recommendations in this report and submit it to the Province as the City of Markham's comments on the Province's review of the Ontario Municipal Board ("OMB") with the following additional clauses:

- "That consistent with the Markham Council resolution dated October 17, 2016, the Province be requested to develop an open and transparent process to review potential minor boundary changes associated with the Greenbelt Plan, with the definition of precise limits of the Greenbelt boundary to be established through the approval process for municipal Secondary Plans, and including potential rights of appeal to the Ontario Municipal Board."

- "That no appeal to a municipality's refusal to amend a new secondary plan be permitted for five years, to recognize the community effort and involvement in developing these plans."; and,

.....2/

3) That Staff report back to Development Services Committee, on any changes made by the Province to the OMB and/or the planning appeal regime, to provide an overview of the changes and to outline potential operational impacts to the Legal Services and Planning and Urban Design Departments, including possible changes to work flow, processes, and resource allocation; and,

4) That the Clerk be directed to forward a copy of this report to the Minister of Municipal Affairs, the Attorney General of Ontario, Markham Riding MPP's and the Region of York; and further,

5) That Staff be authorized and directed to do all things necessary to give effect to this resolution.

If you have any questions, please contact David Miller, Manager of Development, at 905-477-7000 ext. 4960.

Yours sincerely,

Kimberley Kitteringham
City Clerk

Copy to: The Honourable Bill Mauro
The Honourable Michael Chan
The Honourable Helena Jaczek
Mr. Denis Kelly, Regional Clerk

SYNOPSIS OF AMENDMENTS TO THE PLANNING ACT THROUGH BILL 139

1(1)
The definition of "provincial plan" in subsection 1 (1) of the *Planning Act* is amended to include certain policies referred to in the *Lake Simcoe Protection Act, 2008*, the *Great Lakes Protection Act, 2015* and the *Clean Water Act, 2006*.

2.1
Section 2.1 of the *Planning Act* currently requires approval authorities and the Ontario Municipal Board, when they make decisions relating to planning matters, to "have regard to" decisions of municipal councils and approval authorities relating to the same planning matter, and to any supporting information and material that was before a municipal council or approval authority relating to the same planning matter. The section is amended to limit its application to specified planning matters relating to official plans, zoning by-laws, interim control by-laws, site plan control, plans of subdivision and consents.

3
Section 3 of the *Planning Act* currently governs the issuance of policy statements on matters relating to municipal planning. The section is amended to authorize policy statements to require approvals or determinations by one or more ministers for any of the matters provided for in the policy statement. The section is also amended to deem policy statements issued under the *Metrolinx Act, 2006*, the *Resource Recovery and Circular Economy Act, 2016* and other prescribed policies or statements to be policy statements issued under section 3 of the *Planning Act*.

8.1
Section 8.1 of the *Planning Act* currently provides for the establishment of a local appeal body which can deal with appeals of certain planning matters. Amendments are made to expand those matters to include appeals and motions for directions related to site plan control and motions for directions related to consents. Amendments are also made to the transitional rules associated with the empowerment of local appeal bodies. Similar amendments are made to section 115 of the *City of Toronto Act, 2006*.

16
Section 16 of the *Planning Act* currently governs the content of official plans. A new subsection 16 (14) requires official plans to contain policies relating to climate change. The section is also amended to allow official plans to include policies relating to development around higher order transit stations and stops. These policies would require approval by an approval authority. Decisions on these policies cannot be appealed except by the Minister and requests to amend the policies can only be made with council approval (see subsections 17 (36.1.4) to (36.1.7) and 22 (2.1.3)). When these policies are in place, zoning by-laws that establish permitted uses, minimum and maximum densities and, except in certain circumstances, minimum and maximum heights cannot be appealed except by the Minister (see subsections 34 (19.5) to (19.8)).

17 (24.0.1) and (36.0.1)

New subsections 17 (24.0.1) and (36.0.1) of the *Planning Act* provide that an appeal concerning the adoption or approval of an official plan is restricted to issues of consistency or conformity with provincial plans and policy statements and, as applicable, conformity with official plan policies of upper-tier municipalities.

17 (49.1) to (49.5)

New subsections 17 (49.1) to (49.5) provide rules concerning the Tribunal's powers in connection with such appeals. The authority of the Tribunal to allow such appeals is limited, but where an appeal is allowed, the municipality has a second opportunity to make a decision. If that decision is appealed and the Tribunal again determines that it did not meet the new standard of review, the Tribunal would make another decision. Similar amendments are made to section 22 with respect to appeals of refusals and non-decisions on requests to amend official plans and to section 34 with respect to appeals related to zoning by-laws. Certain rules in section 17, as they read before being amended by the Schedule, are incorporated by reference in section 28 for the purposes of the process, including the appeal process, related to community improvement plans. Similarly, certain rules in section 34, as they read before being amended by the Schedule, are incorporated by reference in sections 38 and 45 for the purposes of the process, including the appeal process, related to interim control by-laws and by-laws establishing municipal criteria for minor variances.

17 (51), 22 (11.1) and 34 (27)

Currently, subsections 17 (51), 22 (11.1) and 34 (27) of the *Planning Act* allow the Minister to advise the Ontario Municipal Board that a matter of provincial interest is, or is likely to be, adversely affected by an official plan or zoning matter appealed to the Board. When the Minister so advises the Board, its decision is not final unless confirmed by the Lieutenant Governor in Council. Currently the Minister must advise the Board not later than 30 days before the hearing of the matter. Amendments are made to require the Minister to advise the Local Planning Appeal Tribunal not later than 30 days after the Tribunal gives notice of a hearing. When the Tribunal is so advised by the Minister, the new limits to the Tribunal's powers on appeal described in the above paragraph would not apply; however, the Tribunal's decision would not be final unless confirmed by the Lieutenant Governor in Council.

17 (36.5) and 21 (3)

New subsections 17 (36.5) and 21 (3) of the *Planning Act* provide that there is no appeal in respect of an official plan or an official plan amendment adopted in accordance with section 26, if the approval authority is the Minister.

Timelines for making decisions related to official plans and zoning by-laws are extended by 30 days (see amendments to sections 17, 22, 34 and 36 of the *Planning Act*). For applications to amend zoning by-laws submitted concurrently with requests to amend a local municipality's official plans, the timeline is extended to 210 days (see subsection 34 (11.0.0.0.1)).

22 (2.1.1)

A new subsection 22 (2.1.1) of the *Planning Act* provides that during the two-year period following the adoption of a new secondary plan, applications for amendment are permitted only with council approval. Subsection 22 (2.1.2) describes a secondary plan as a part of an official

plan added by amendment that provides more detailed policies and land use designations applicable to part of a municipality.

22(11)
Currently, subsection 22 (11) of the *Planning Act* incorporates by reference various rules from section 17 concerning appeals to the Ontario Municipal Board. Amendments are made to remove the incorporation by reference and to add those rules as new subsections 22 (11) to (11.0.7), with the corresponding changes that are made to the rules in section 17.

38 (4)
Currently, under subsection 38 (4) of the *Planning Act*, anyone who is given notice of the passing of an interim control by-law may appeal the by-law within 60 days after the by-law is passed. Amendments are made to allow only the Minister to appeal an interim control by-law when it is first passed. Any person or public body who is given notice of the extension of the by-law can appeal the extension.

41
Section 41 of the *Planning Act* is amended to make technical changes relating to appeals to the Tribunal concerning site plan control, including a requirement that the clerk forward specified things shortly after the notice of appeal is filed.

41(16)
Subsection 41 (16) of the *Planning Act* currently provides that section 41 does not apply to the City of Toronto, except for certain subsections. Subsection 14 (16) is amended to remove the references to those excepted subsections. Section 114 of the *City of Toronto Act, 2006* is amended to reflect the rules that were contained in those excepted subsections.

47
Currently, under section 47 of the *Planning Act*, the Minister may make orders exercising zoning powers or deeming plans of subdivision not to be registered for the purposes of section 50. The rules governing amendments and revocations of such orders are amended. The Minister may refer a request from a person or public body to amend or revoke an order to the Tribunal. If the Tribunal conducts a hearing, the Tribunal must make a written recommendation to the Minister. The Minister may decide to amend or revoke the order and must forward a copy of his or her decision to the specified persons. A new rule also provides that a proponent of an undertaking shall not give notice under the *Consolidated Hearings Act* in respect of a request to amend a Minister's order unless Minister has referred the matter to the Local Planning Appeal Tribunal. A similar rule is added to section 6 of the *Ontario Planning and Development Act, 1994*, which governs the process for amending development plans.

51(52.4)
Subsection 51 (52.4) of the *Planning Act* currently allows the Ontario Municipal Board to consider whether information and material that is presented at a hearing of certain appeals related to plans of subdivision and was not provided to the approval authority could have materially affected the approval authority's decision. If the Board determines that it could have done so, the Board is required to give the approval authority an opportunity to reconsider its decision. The

subsection is repealed and replaced to prevent information and material that was not provided to the approval authority in the first instance from being admitted into evidence if the approval authority requests to be given an opportunity to reconsider its decision and to make a written recommendation.
New section 70.8 of the *Planning Act* authorizes the Minister to make regulations providing for transitional matters.

Various technical amendments are also made to the *Planning Act*.

On May 30, 2017, the *Building Better Communities and Conserving Watersheds Act, 2017* ("Bill 139") received first reading. Bill 139 manifests the Wynne government's stated desire to radically change the planning appeal system in Ontario, as anticipated in recent news releases. Significantly, the Ontario Municipal Board ("OMB") would cease to exist after tenure of over 100 years. While a new tribunal would replace the OMB and continue a number of its appeal, approval and arbitration functions under various statutes, the focus of this bulletin will be on what has changed. The following are some of the highlights of the proposed changes:

- The OMB will be replaced with a Local Planning Appeal Tribunal
- A Local Planning Appeal Support Centre will be created to provide free advice and representation in certain circumstances
- Case management will be mandatory for the majority of cases
- *De novo* hearings will be eliminated for most planning appeals
- The protection of "major transit station areas"
- A 2 year moratorium on Secondary Plan amendments
- A changing of the role of conservation authorities

Sections 38-42 of the *Local Appeal Tribunal Act, 2017* ("LPAT Act") set out rules pertaining to certain appeals pursuant to the *Planning Act*.

Application of these Sections

Section 43(2) of the LPAT Act provides that regulations may be made to address to which proceedings the LPAT Act will apply and to which proceedings the *Ontario Municipal Board Act* will continue to apply on a transitional basis. These regulations have not been released.
Subject to the two exceptions referred to below, sections 38-42 apply to appeals of a decision (or failure to make a decision) by a municipality (or approval authority) in respect of an official plan or zoning by-law: s 38(1) and (2). These sections also apply to an appeal pursuant to section 51(34) of the *Planning Act* of the failure of an approving authority to make a decision in respect of a proposed plan of subdivision: s 38(2). However, they do not apply to an appeal pursuant to section 51(39) of the *Planning Act* of a decision by an approving authority to refuse or approve a proposed plan of subdivision, nor do they apply to appeals pertaining to conditions under sections 51(43) and (48).
The two exceptions referred to above are as follows. Sections 38-42 do not apply to an appeal:

1. From a new decision (or a failure to make a new decision in certain instances) of a municipality (or approval authority) made after the LPAT has determined that a previous decision of the municipality (or approval authority) is: (i) inconsistent with a policy statement within the meaning of section 3(1) of the *Planning Act*; and/or (ii) fails to conform with or conflicts with a provincial plan; and /or (iii) fails to conform to an applicable official plan (collectively the "Permitted Grounds of Appeal"): s 38(1)(a) and (c); or

2. Where the LPAT has received a notice of a Provincial interest (see sections 22(11.1) and 34(27) of the*Planning Act*): s 38(1)(b).

Case Management

Case management is mandatory for all appeals to which sections 38-42 apply: s 39.

Who may be Involved in the Hearing

There are no changes to the provisions of the *Planning Act* stipulating who has a right to appeal decisions pertaining to Official plans, zoning by-laws and subdivision applications.

Sections 17(44.1), 34(24.1) and 51(52.1) of the *Planning Act* currently in force set out circumstances in which persons other than appellants may be added as parties to appeals in respect of official plans, zoning by-laws and plans of subdivision, respectively. None of these sections are amended or repealed.

However, the LPAT Act provides that with regard to appeals of: (i) the approval or refusal of a proposed official plan (whether exempt from approval authority approval or not); (ii) the approval, refusal of, or failure to make a decision in respect of a proposed official plan amendment; and (ii) the approval, refusal or failure to make a decision in respect of a proposed zoning by-law or zoning by-law amendment ("Section 38(1) Appeals") a person other than an appellant that wishes to participate in an appeal to the LPAT must, at least 30 days before the case management conference, make a written submission to the LPAT (and serve in on the relevant municipality or approval authority) respecting whether the decision (or failure to make a decision) appealed from is within the Permitted Grounds of Appeal: s 40(1), (2) and (3).

With regard to appeals arising from a failure to make a decision in respect of a proposed official plan or a proposed plan of subdivision ("Section 38(2) Appeals"), a person other than an appellant that wishes to participate in an appeal to the LPAT must make a written submission to the LPAT. The LPAT Act does not specify what the written submission must contain. The time limit and service requirements for the submission are to be set by the LPAT: s 41(1) and (2).

In both cases the LPAT has discretion to decide whether any person making a submission will be granted party status or the opportunity to otherwise participate in the appeal: s 40(4) and 41(3).

It is not clear how the above requirements relate to the unrepealed sections of the *Planning Act* referred to above.

Oral Hearings

As referred to elsewhere, oral hearings of appeals are no longer as of right. In the event that one does occur then: (i) no person involved in the hearing may adduce evidence. Only oral submissions are permitted; and (ii) oral submissions will be time limited by a regulation, which has not yet been released: s 42(3).

However, only appellants and persons permitted by the LPAT to be involved in Section 38(2) appeals may participate in oral hearings. Persons that the LPAT permits to be involved in Section 38(1) appeals may not participate should an oral hearing of same take place.

As noted above, sections 51(39), (43) and (48) of the *Planning Act* (providing a right to appeal the refusal of a proposed plan of subdivision by an approval authority) have not been amended or repealed by the LPAT Act and are not encompassed within the above provisions. It is therefore unclear what procedures apply to such appeals.

Through the *Local Planning Appeal Support Centre Act* (the "LPASC Act"), the Province proposes to create a Local Planning Appeal Support Centre (the "Centre"). The Centre would provide legal and planning advice to individuals who want to participate in Tribunal appeals. The Centre will provide support services including, general information on land use planning, guidance on Tribunal procedures and representation in certain cases, and other services

prescribed by regulation. These services will be provided to persons who are deemed eligible under the criteria established by the Centre.

The key elements of the *Local Planning Appeal Support Centre Act* are as follows:

- Directs the establishment of criteria for determining persons who are eligible to receive support services from the Centre; such criteria may set out different criteria for different classes of persons.
- Provides immunity for the directors, officers, and employees or agents of the Centre against civil proceedings for undertakings made in good faith.
- Allows for regulations to be made with respect to the following:
    - Prescribing provisions of support services to be provided by the Centre;
    - Governing the eligibility of persons to receive support from the Centre; and,
    - Providing for other matters to carry out the purposes of the LPASC Act.

New Appeal Processes under *Planning Act*

The appeal provisions under Sections 17, 22 and 34 would significantly change if Bill 139 is passed. The overall effect would be a pulling back of the appeal rights currently granted to proponents and objectors. The key changes are described below in respect of official plans (s. 17); similar provisions apply to official plan amendments (s. 22) and zoning by-laws (s. 34). The appeal regime and associated LPAT jurisdiction would turn on three conformity questions in respect of the Council decision and the resulting planning instrument: (i) is it inconsistent with a policy statement issued under ss 3(1); (ii) does it fail to conform with or conflict with a provincial plan; and (iii) in the case of a lower tier official plan, does it fail to conform with the upper tier plan? (the "Conformity Failure Tests").

- Appeals can only be made on the basis that the decision meets one of the Conformity Failure Tests (s. 17(24.0.1), 17(36.0.1)). The appeal letter must explain how the decision fails the test (s. 17(25)(b), 17(37)(b)), failing which the Tribunal must dismiss the appeal (17(45)2);
- On appeal, the Tribunal shall dismiss the appeal unless it determines that one of the Conformity Failure Tests has been demonstrated. If the Tribunal makes such a determination, it must refuse to approve that part of the plan and the municipality is given an opportunity to make a new decision. The municipality may adopt another plan within 90 days, and a second appeal right is triggered. On that second appeal, the LPAT can modify and approve as modified, or refuse to approve, the second plan where one of the Conformity Failure Tests is determined (17(49.1-49.5));
- Where there was a failure to make a decision, the appeal under s. 17(40) does not appear to be limited to the Conformity Failure Tests, and the LPAT has the traditional approval powers;
- No appeals are permitted in respect of new official plan policies pertaining to protected major transit station areas (s. 17(36.1.4-36.1.6), with exceptions noted below), except by the Minister, and no appeals of the Minister's approval decisions are permitted (17(36.5)). Note that the latter prohibition is not applicable to official plan amendments (“OPA”) unless the amendment was adopted in accordance with section 26 (plan updates) (s. 21(3)).
- Where a municipality refuses or fails to make a decision on an OPA application, an appeal can only be made where a two sided test is met: existing plan that would be affected by the OPA must suffer a Conformity Failure Test, and the requested amendment would rectify such failure(s) (s. 22(7.0.0.1)). Similarly, for the LPAT to send

an OPA back to the municipal council, the two part test must be met (22(11.0.9). The two part test does not apply to limit the second appeal right and process where the municipality fails to adopt a new OPA (s. 22(7.0.0.2) and (11.0.11-12). It is not clear how the opportunity for council to make a new decision and the concomitant power for the municipality to prepare and adopt a new amendment will work in respect of privately initiated OPAs.

- Similar two-part tests apply in respect of zoning by-law amendments (e.g. s. 34(11.0.0.0.2)).

Other Substantial *Planning Act* Changes

Bill 139, if passed, would result in a number of other significant amendments to the *Planning Act*. These include:

Major Transit Station Area Policies

Bill 139 would amend Section 16 of the *Planning Act*, which prescribes the contents of Official Plans, to empower municipalities to designate areas surrounding and including an existing or planned "higher order transit" station or stop as a "protected major transit station area." "Higher order transit" is defined as any form of transit which operates in a dedicated right of way including rail and bus transit. Where a municipality elects to include such policies in an official plan:

- The official plan must also include policies identifying the number of jobs and residents planned to be accommodated, the authorized land uses and the minimum densities authorized with respect to buildings and structures on lands in the area (s. 16 (15));
- Where the municipality is an upper-tier municipality, it must require the official plans of lower-tier municipalities to adopt corresponding policies identifying authorized lands uses and minimum densities in buildings and structures within the area and, to the extent that the lower-tier municipalities fail to do so within one year, the upper-tier municipality is authorized to make the required amendment to the lower tier municipality's official plan (s. 16(16), (17));
- The Minister remains the approval authority with respect to such official plan policies and the ability to obtain an exemption from Ministerial approval pursuant to Subsections 17(9) or (10) does not apply;
- With some exceptions, there is no appeal with respect to major transit station area policies including policies establishing the boundaries of the area, the planned number of residents and jobs, the permitted land uses, the maximum densities authorized or the minimum or maximum building heights (s. 17 (36.1.4) - Note: this section speaks to maximum densities while the corollary Sections 16(15) and (16) speak to minimum densities. This may be a typographical error in Bill 139). One notable exception to this prohibition is that appeals with respect to maximum building height are permitted in circumstances where the maximum authorized height for a building or structure on a particular parcel of land would not satisfy the minimum density authorized for that parcel;
- Similar provisions preclude appeals of zoning by-laws establishing permitted uses, minimum or maximum densities or maximum building heights within major transit areas (s. 34(19.5)) and a similar exception exists for appeals to height limits where the maximum height permitted with respect to a particular parcel would result in a building or structure not satisfying the minimum density requirements;

- Requests for amendments to policies respecting major transit areas are not permitted in the absence of a Council resolution permitting either a specific request or a class of requests (s. 22(2.1.3)

Two Year Moratorium on Secondary Plan Amendments

Bill 139 would extend the two year moratorium on requests for amendments to a new official plan currently contained in Section 22(2.1) of the *Planning Act* to secondary plans, as defined(s. 22 (2.1.1 and 2.1.2)). The new provisions also extend a municipal Council's ability to permit, by adoption of a resolution, specific requests or classes of requests for amendments to secondary plans (s. 22(2.2)).

Deemed Provincial Policy Statements

The current *Planning Act* contains a general description of provincial policy statements issued by the Minister of Municipal Affairs and Housing, or any other provincial minister, "on matters relating to municipal planning that in the opinion of the Minister are of provincial interest." Bill 139 would deem the following to be "policy statements" for the purpose of the *Planning Act*:

- Policy statements issued by the Minister of Transportation under the *Metrolinx Act, 2006* with respect to transportation planning in the "regional transportation area" comprising the cities of Toronto and Hamilton and the Regional Municipalities of Durham, Peel, York and Halton;
- Policy statements issued by the Minister of the Environment and Climate Change under the*Resource Recovery and Circular Economy Act*, 2016 with respect to resource recovery and waste reduction;
- Any other policy prescribed by regulation.

Extended Timelines for Making Decisions

Bill 139 would extend the timelines within which municipalities are required to make decisions with respect to official plans and zoning by-laws as follows:

- For zoning by-law amendments, the timeline is extended from 120 days to 150 days (s. 34(11)), unless the application also requires an official plan amendment, in which case the timeline is 210 days (s. 34(11) and (11.0.0.1));
- For applications to remove holding provisions, the timeline is extended from 120 days to 150 days (s. 36(3));
- For decisions of the approval authority with respect to official plans, from 180 days to 210 days (s. 17(40));
- For decisions of council with respect to an official plan amendment from 180 days to 210 days.

No Appeals with respect to the Passing of Interim Control By-laws

Bill 139 would eliminate appeals with respect to the passing of interim control by-laws by anyone other than the Minister, but all persons entitled to receive notice of passing of an interim control by-law may appeal a by-law to extend the period of time during which the interim control by-law will be in effect (s. 38(4) and (4.1)).

Bill 139 proposes several material changes to the *Conservation Authorities Act* (R.S.O. 1990, c. C.27). The*Conservation Authorities Act* regulates conservation authorities in Ontario, of which there are currently 36.

The amendments would require greater public notice and permit public involvement in the processes of the authorities:

- All meetings of authorities would be open to the public unless the authority adopts a by-law creating an exception (proposed s. 15(3))

- Public notice of a meeting would be required to amalgamate authorities or dissolve an authority, and the public would be permitted to make representations on the issue (proposed subs. 11(1.2)-(1.3) and 13.1(1.1)).
- All of the authority's by-laws, fee schedule, and any memoranda of understanding with a municipality would be required to be made available to the public (proposed subs. 21.1(3)-(3.1), subs. 21.2(6)-(8), and s. 19.1)

The Bill also proposes to redefine the respective role and responsibilities of the conservation authority and the Ministry of Natural Resources:

- The proposed changes set out specific prohibitions against altering a watercourse, interfering with wetlands, or developing within specified sensitive areas, effectively removing this discretion from the authorities (proposed s. 28(1)). Authorities would be able to issue a permit to engage in such prohibited activity, as in the current legislation (proposed s. 28.1).
- The Minister would be given discretion to enact significant regulations, including; mandating programs or services that are required to be provided by authorities (s. 21.1); and, requiring consultations by an authority with respect to programs and services it provides (s. 21.1(6)).
- A conservation authority may charge a fee for a program or service only if it falls within one of the classes of fees listed in a policy document to be published by the Minister (proposed s. 21.2(1)-(4)). A member of the public may apply to the authority to reconsider the charging of a fee which he/she was charged (proposed s. 21.2(11)).

Other proposed changes lend greater flexibility to authorities to govern their own administration (ss. 19.1, 37, 28.3, 30.3).

The municipal role in appointing authority members and paying for the costs of the authority are also impacted:

- The authority would be permitted to enter into a memorandum of understanding with a municipality situated in whole or in part in its jurisdiction to provide programs or services on behalf of the municipality (proposed s. 21.1(3)).
- The Bill proposes to retain a process whereby a municipality may contest the apportionment of a capital cost by the authority. However, the amended language of the Bill does not specifically provide, as the current legislation does, that the Local Planning Appeals Tribunal may consider new evidence on the application, but simply says that the LPAC shall "reconsider" the apportionment (proposed s. 25).

Renewable energy projects receive special consideration. The proposed amendments would prohibit an authority from refusing a permit to engage in development in relation to such a project or imposing conditions thereon unless the authority is of the opinion that it is necessary to do so to control pollution, flooding, erosion or dynamic beaches (proposed s. 28.1(5)); a much narrower discretion than is afforded to the authority in other cases.

Expropriations Act

Bill 139 makes no substantive changes to expropriation proceedings presently adjudicated by the OMB. The only amendment to the *Expropriations Act* is the replacement of references to the "Board" with "Tribunal". The LPAT will presumably adjudicate expropriation cases under the existing statutory framework.

Ontario Heritage Act

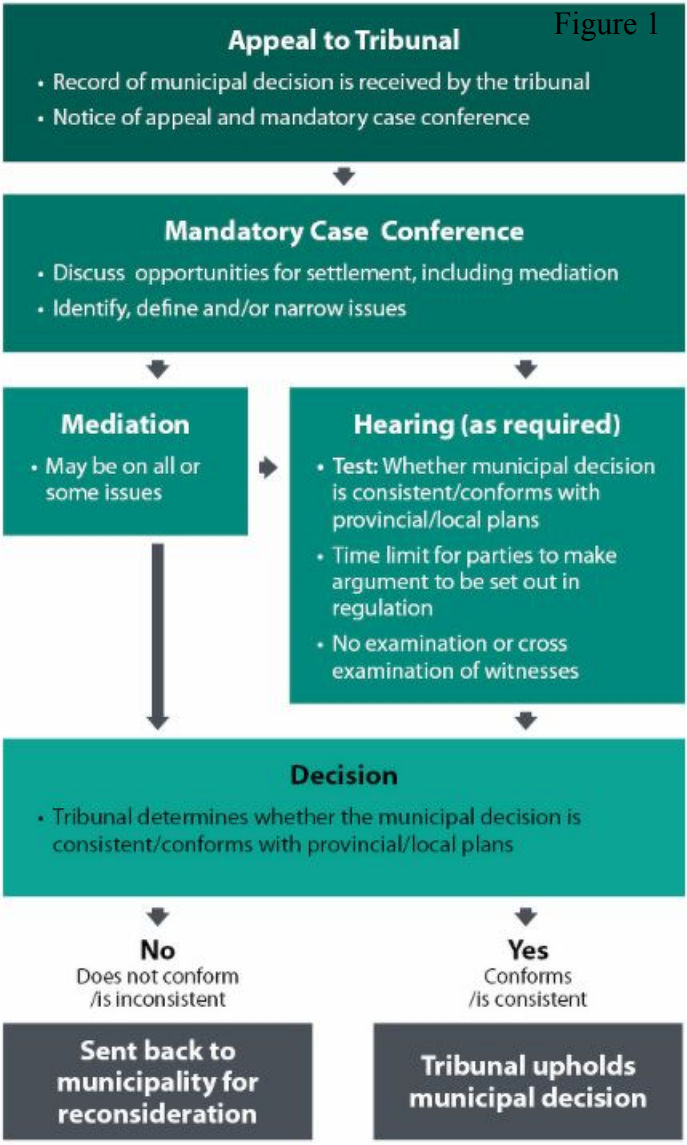
Bill 139 makes no substantive changes to heritage proceedings presently adjudicated by the OMB. The only amendment to the *Ontario Heritage Act* is the replacement of references to the

"Board" with the "Tribunal". The LPAT will presumably adjudicate heritage appeals under the existing statutory framework.

Bill 139 may have an indirect impact on expropriation and heritage proceedings insofar as they are currently governed by provisions of the *Ontario Municipal Board Act* which is to be replaced by the *Local Planning Appeal Tribunal Act, 2017*. The *OMB Rules of Practice and Procedure* also apply to expropriation and heritage proceedings and it remains to be seen if the LPAT rules will differ once adopted.

If approved, the changes to the planning appeal system in Ontario will be the most significant procedural changes that today's participants in the land use planning industry have ever experienced. We expect that Bill 139 will return to the Legislature for second reading after the House resumes sitting following Labour Day. Thereafter, we expect the Bill will proceed to review at committee hearings where stakeholders can present positions and committee members can pursue amendments. The Bill, with possible amendments, would then return to the Legislature for third reading and approval, with proclamation to follow sometime thereafter. All stakeholders will no doubt benefit from the time afforded by the summer legislative break to digest Bill 139 and the complexities therein.

Figure 1



Appeal of Municipal Decision on Official Plan/Zoning
(i.e. conformity/consistency appeals)

Ontario