How Will Bill 139 Affect the Planning Process for Applicants:

A Few Key Questions

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Introduction and Overview of Major Changes

a) Overview of Bill 139

On May 30, 2017 the Minister of Municipal Affairs, Bill Mauro and the Attorney General, Yasir Naqvi, introduced Bill 139, the *Building Better Communities and Conserving Watersheds Act, 2017* (the "**Act**"). Bill 139 will result in fundamental changes to the province's land use planning appeals system and, in particular, the *Planning Act* and the Ontario Municipal Board. Bill 139 consists of 5 Schedules as follows:

Schedule 1 – *Local Planning and Appeal Tribunal Act, 2017* (the "**LPAT Act**")

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

Schedule 3 - Amendments to the *Planning Act*, the *City of Toronto Act, 2006* and the *Development Act, 1994*

Schedule 4 – Amendments to the *Conservation Authorities Act*

Schedule 5 – Amendments to Various Acts Consequential to the Enactments of the *Local Planning Appeal Tribunal Act 2017*

Bill 139 received Royal Assent on December 12, 2017, thereby bringing the Act into force. Despite the enactment, the changes will not be implemented immediately as the Schedules, which contain the legislative amendments to the *Planning Act*, will only come into force on a date to be named by proclamation of the Lieutenant Governor. While no such date has been decided upon at this time, the Ministry of Municipal Affairs has indicated that proclamation will likely occur in the spring of 2018, which is when the province intends to have the rules and regulations applicable to the new Local Planning Appeals Tribunal (the "**Tribunal**") finalized.

Bill 139 creates sweeping and fundamental changes that significantly restrict the land use planning matters that can be appealed, the standard for review, and how hearings will be conducted. The following is a very brief overview of the major changes to the land use planning appeals system under Bill 139:

- The Tribunal will replace the Ontario Municipal Board [LPAT Act s. 2(1)].

- The numerous amendments to the *Planning Act* and the introduction of the LPAT Act eliminate "*de novo*" hearings for the majority of land use planning appeals so the Tribunal would function as an appeal body only.

- An appeal of a decision to adopt or approve an official plan or an official plan amendment, can only be made if the decision is inconsistent with a provincial policy statement, fails to conform with or conflicts with a provincial plan, or fails to conform with the upper-tier municipality's official plan [*Planning Act* s. 17(24.0.1), 17(36.0.1)].

- An appeal of a decision to pass a zoning by-law can only be made if the decision is inconsistent with a policy statement, fails to conform with or conflicts with a provincial plan, or fails to conform with an applicable official plan [*Planning Act* s.34(19.0.1)].

- An appeal of a council refusal or a non-decision on an official plan amendment can only be made if the existing part or parts are inconsistent with a provincial policy, fail to conform or conflict with a provincial plan, or fail to conform with the upper-tier municipality's official plan and the requested amendment is consistent with provincial policy statements, conforms with or does not conflict with provincial plans and conforms with the upper-tier municipality's official plan [*Planning Act* s. 22(7.0.0.1)].

- An appeal of a council refusal or non-decision on a zoning by-law amendment can only be made if the existing part or parts of the by-law affected by the subject amendment are inconsistent with a provincial policy statement, fail to conform with or conflict with a provincial plan or fail to conform with an applicable official plan and the requested amendment is consistent with provincial policy statements, conforms with or does not conflict with provincial plans and conforms with applicable official plans. [*Planning Act* s. 34 (11.0.0.0.2)]

- The Tribunal, after an appeal hearing with respect to official plan and/or zoning amendments, will provide notice when it overturns a municipal council's decision and must return the matter back to the municipality. The municipality is allowed 90 days to make a new decision. The Tribunal would retain the authority to make a final decision on the matter only after a second appeal, and only if the municipality's subsequent decision still fails to be consistent with provincial policies or fails to conform to provincial plans and municipal official plans.

- The Tribunal is required to conduct mandatory case management for the majority of cases in order to narrow the issues and encourage case settlement [LPAT s. 33(1)].

- The Tribunal will create new rules regarding the conduct of hearings that limit evidence to written materials, if the Tribunal holds an oral hearing any oral submissions cannot exceed the time limits provided and no party or person may adduce evidence or call or examine witnesses [LPAT Act s. 42].

- Bill 139 includes measures to exempt a broader range of major municipal land use planning decisions from appeal. For example, no appeals will be allowed for provincially approved official plans and official plan updates and no appeals are allowed of Minister Orders.

- Bill 139 restricts applications to amend new secondary plans for 2 years [*Planning Act* s.22(2.1.1)].

- No appeals will be allowed for interim control by-laws when first passed for a period of up to 1 year. [*Planning Act*, s.38(4.1)]

- No appeals are allowed of official plan policies and zoning by-laws identifying major transit stations areas and establishing permitted uses or minimum or maximum densities and heights within 500 metres of a protected major transit station [*Planning Act* s. 17(36.1.4), 34(19.5)].

- Bill 139 creates a Local Planning Appeal Support Centre to provide free and independent advice and representation to citizens on land use planning appeals. [*Local Planning Appeal Tribunal Act*, 2017]

- Local Appeal Bodies ("**LAB**") have authority to hear appeals of not only minor variances and consents but also of site plan appeals. A LAB is an appeal body permitted under the current *Planning Act*, which allows local municipalities to set up their own appeal tribunal, within their local municipality, to hear appeals on minor variance and consent applications only. The only municipality that has established a LAB under the existing legislation is the City of Toronto.

b) Introduction

During debate of Bill 139 before the Standing Committee on Social Policy, the Minister of Municipal Affairs stated:

> "The reforms we are proposing would result in fundamental change. If our reforms pass, there would be fewer and shorter hearings and a more efficient decision-making process. There would be more deference to local land use planning decisions, and there would be a more level playing field for residents wanting to participate."

The Attorney General stated:

> "Our proposed changes would not only result in more effective hearings, but would also support a culture shift to a less adversarial system. The Tribunal will also have the power to ensure hearings are effective and fair by requiring parties to produce evidence or witnesses for examination by the tribunal, where appropriate."

There is little doubt that Minister Mauro is correct in stating that the reforms would result in fundamental changes and I also agree that there will be fewer hearings. However, in reviewing the new legislation it is doubtful that the hearing process will necessarily be shorter. It is difficult to understand how the decision-making process will be more efficient if the Tribunal, after determining that an appeal of an official plan and/or zoning amendment is inconsistent with provincial policy, or not consistent with provincial plans, must provide notice to the municipality to allow it to reconsider its position and then hold a second hearing.

It is also very difficult to fathom how the Attorney General believes that the hearings before the Tribunal will be more effective and fair by merely requiring parties to produce evidence or witnesses for examination by the tribunal only, while precluding parties to hearings to test the veracity of witnesses through cross examination. While the goals outlined in the statements made by the honourable Ministers are laudable, Bill 139 will not achieve the purported goals and will result in a land use planning system that is less accessible and less fair to both applicants and residents.

Marcia Taggart, Deputy City Solicitor for the City of Mississauga and I have agreed to focus our papers on a select few issues with respect to Bill 139 that have been the center of debate by many involved in the land use planning system. Ms. Taggart's paper provides the perspective of the municipality, while my paper will focus on the perspective of applicants.

1. Procedural Fairness?

First and foremost Bill 139 removes important appeal rights from landowners, residents and other interested parties. Eliminating appeal rights unreasonably interferes with the fundamental right to procedural fairness owed to all stakeholders in the land use planning system. The Ontario Municipal Board (the "**Board**") has played an important role in holding all of the participants in the land use planning process accountable, whether they be applicants and their

consultants, municipal councils, municipal staff or residents. An appeal of a municipal council's decision to the Board on the basis that it does not represent good land use planning affords all parties to a hearing an opportunity to test a specific development proposal or a City's official plan or zoning by-law, before an independent tribunal, whose decisions are not based on politics but rather a fulsome test of the basis of the decision.

However, under Bill 139, decisions regarding municipal initiated official plans and zoning by-laws can only be appealed for lack of conformity with official plans and/or lack of conformity/consistency with provincial policies, plans and directions. With respect to private development applications, the applicant's appeal grounds must prove not only that the application is consistent/conforms with provincial policies and plans (and the official plan), but that the in-force municipal instruments do not conform and/or are not consistent with provincial policies and plans (and the official plan). Official plans and zoning by-laws must conform and be consistent with provincial policies and plans in order to be approved. Therefore one can only conclude that the appeal rights are illusionary under the LPAT system.

Secondly and of equal importance, the procedure envisioned in Bill 139 for hearings before the Tribunal appears contrary to the rules governing procedural fairness and the principles of natural justice. Although section 31(2) of the LPAT Act states that the Tribunal is required to adopt any practices and procedures that "offer the best opportunity for a fair, just and expeditious resolution of the merits of the proceedings," it is important to note that section 31(3) of the LPAT Act specifically states that "despite section 32 of the *Statutory Powers Procedure Act*, this Act, regulations made under this Act and the Tribunal's rules prevail over the provisions of that Act with which they conflict".

The *Statutory Powers Procedure Act* ("**SPPA**") is the cornerstone legislation ensuring procedural fairness for administrative tribunals in the province. As of the date of writing this paper, the full regulations and the Tribunal's rules have not been released. However, it is clear that the Tribunal's practices and procedures, whether granted by statute, regulations or rules, will prevail over the fundamental protections of procedural fairness enshrined in the SPPA. As well, subsection 32(5) of the LPAT Act protects the LPAT from consequences of failing to comply

with its own rules if such failure to comply does not cause a substantial wrong that affected the final disposition of the matter.

Subsection 42(3) of the LPAT Act stipulates that should the Tribunal permit an oral hearing under subsection 38(1) or (2), each party or person may make an oral submission that does not exceed the time provided under the regulations and "no party or person may adduce evidence or call or examine witnesses". Clearly, as this provision denies a party or person the right to adduce evidence or call or examine witnesses, the only materials before the Tribunal would be the public record that was before the municipality or approval authority at the time of the decision. Although the municipality allows participation from both the applicant and the public during the processing of an application there are many constraints imposed on the level of participation. For example, most municipal councils or committees allow a deputation of only 5 minutes and certainly do not allow either the applicant or the public to cross examine an author of expert reports at its meeting. Where a serious issue of creditability is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing.[1]

Section 61 of the *Planning Act*, while ensuring that council shall afford any person a fair opportunity to make representations, however stipulates that "throughout the course of passing the by-law the council shall be deemed to be performing a legislative and not a judicial function". Ms. Taggart notes that the courts have found that the duty to be fair does not apply to legislative functions while it does apply to administrative and judicial functions. She then concludes "it may be entirely appropriate that the decision-making process under Bill 139 continues to be based on complete applications by developers with all the supporting materials that this requires, as well as public input and professional planning advice, without the right to a full oral hearing or court-type process before either the Tribunal or council."

However, the Tribunal is not performing a legislative function and is an administrative tribunal. The *Advocates for Effective OMB Reform* (the "**Advocates**") made written submissions to the Standing Committee specifically highlighting serious concerns that the new regime would amount to a fundamental denial of natural justice. The Advocates cautioned that the courts will not lightly assume that the legislator intended for procedures to run contrary to fairness even

[1] *Singh v Canada (Minister of Employment & Immigration*), [1985] 1 SCR 177 at para 105, [1985] SCJ No. 11

when express statutory language may oust the common law principles of natural justice.[2] A general right to procedural fairness can arise independent of the operation of a statute, depending on the factual context.[3]

The Supreme Court of Canada in *Knight v Indian Head School Division No. 19* ("**Knight**") reviewed the general right to procedural fairness under the following three factors:

a) Nature of the Decision:
While decisions of a "legislative and general nature" generally do not warrant the duty of fairness, those of a more administrative, specific and final nature do engage it.

b) Nature of the Relationship:
The relationship between the decision maker and the individual generally concerns how "public" in nature it is. A "public" or "statutory" flavor to the nexus between the parties weighs in favour of finding a duty of fairness. If the powers exercised by the LPAT are delegated statutory powers, they should be put only to a legitimate use. As stated in *Knight*, "the public has an interest in the proper use of delegated power by administrative bodies".[4]

c) Importance of the Decision:
Lastly, the impact of the decision on the affected individual relates to the significance and importance of the affected rights and interests. The jurisprudence has generally regarded property rights and the right to the enjoyment of one's property as an important interest that engages the duty of fairness.[5]

Ms. Taggart notes that the process leading up to approval by council is lengthy, with advocacy possible at every stage and if an applicant has a concern regarding the creditability of a professional planning opinion this can be identified in the applicant's representation to council and raised before the Tribunal on appeal. Clearly, there are 2 divergent opinions on whether the approval process envisioned under Bill 139 adheres to fundamental procedural fairness.

[2] Written submissions to the Standing Committee by Advocates for Effective OMB Reform, August 11, 2017, p. 5
[3] *Ocean Port Hotel Ltd. v british Columbia (General Manager, Liquor Control & Licensing Branch)*, 2011 SCC 52, [2001] 2 SCR 781
[4] *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653 at para 26, [1990] SCJ No.26
[5] *Sara Blake, Administrative Law in Canada, 5th edition* (Markham, Ont.) Lexis Nexis, 2011 see *Itomex Realty & Development Co. v Wyoming (Village)*, [1980] 2 SCR 1011, [1980] SCJ No. 109

2. Two-stage Decision Process

Bill 139 will create a mandatory 2-step appeal process for all appeals of official plans and zoning by-laws. As set out earlier in this paper, appeals of official plans and zoning by-laws are extremely narrow and restricted to issues of consistency and conformity with policy statements, provincial plans and upper tier municipal official plans. Should the Tribunal determine after a written or oral hearing, that a part of a decision of council fails to meet the consistency/conformity test, the Tribunal shall refuse to approve that part of the plan or by-law and shall give the municipality an opportunity to make a further or second decision. The municipality has 90 days in which to prepare and adopt or pass another plan or by-law.

Should council fail to make a new decision within this 90 day period, the Tribunal is to treat this as a non-decision which can be appealed back to the Tribunal. On an appeal of a non-decision or refusal, the Tribunal has broader powers to approve, modify, or refuse all or part of the plan or by-law. On a refusal, the Tribunal must determine that (a) the parts of the existing official plan that are affected by the requested amendment lack consistency/conformity with provincial policies/plan and upper-tier official plans, and (b) the requested amendment achieves consistency/conformity with provincial policies/plans and upper-tier official plans.

Should the council prepare and adopt or pass another plan or by-law, then this new decision may be appealed back to the Tribunal. A second hearing will be held by the Tribunal to determine whether the new decision meets or fails the consistency/conformity test. Should the Tribunal determine that it fails to meet the consistency/conformity test it may require that the plan or by-law be repealed, amended or modified in accordance with the Tribunal's order.

As noted in the introduction to this paper, it is difficult to envision how this 2-step appeal process would meet the intended goal of ensuring "a more efficient decision-making process" as stated by Minister Mauro. It also completely ignores the prejudice of delay to an applicant or resident who had appealed the decision in the first instance. This creates an extremely cumbersome and costly process as parties may be faced with participating in a multiplicity of proceedings.

Should the municipality determine to settle the matter with the appellant and its "new" decision is based on the settlement, it must still proceed back to the Tribunal for a second consideration. The second hearing in a settlement scenario seems unnecessary and anything but efficient.

3. How are appeals for Non-Decisions Dealt with under Bill 139

Under Bill 139 municipalities will be given a longer period of time to make a decision on a development application before an appeal can be filed. Municipalities will have 210 days to consider official plan amendment applications, 150 days to consider zoning amendment applications and, where an application is for both a combined official plan amendment and rezoning application, the 210 day timeline applies.

Where a municipality fails to make a decision within the new proposed timelines an applicant can appeal the non-decision to the Tribunal. Appeals for non-decisions under the current *Planning Act* do not require the appellant to provide any reasons for the appeal other than the municipality has failed to make a decision within the timelines stipulated under the *Planning Act*. Under Bill 139, the appellants must provide an explanation of the basis for the appeal. Specifically, the appellant must explain how the existing part or parts of the official plan or zoning by-law amendment that would be affected by the requested amendment, are inconsistent or do not conform with provincial policies and plans and the upper-tier official plan, and further, how the proposed amendment to the official plan or zoning amendment would be consistent with, or conform to, the provincial policies and plans and upper-tier official plan.

Under Bill 139, an appeal for a non-decision will be treated as a refusal of the application. However, where there is no decision of council there may be a very limited evidentiary record to forward to the Tribunal for consideration.

It is not unusual for municipal councils to make recommendations and decisions on an application after an appeal has been filed. Bill 139 does not provide direction on whether staff reports and decisions of council made after the appeal has been filed, will form part of the appeal record for the Tribunal. As noted by Ms. Taggart in her paper, without further direction, municipalities will be confronted with a dilemma and may bring forward refusal reports to ensure there is a council decision. This would then create a situation where applications that

may have been approved would instead be refused to ensure that the municipality has a decision record to send to the Tribunal.

4. Transition Regulations

The province provided for a 45-day public comment period with respect to a few proposed regulations under Bill 139 ("**Regulatory Proposals**") commencing on January 7, 2018. Proposed regulation 17-MMA022 consists of mainly technical updates to existing regulations, whereas proposed regulation 17-MAG011 deals with transitional rules for matters and proceedings that will come to the Tribunal under the *Planning Act.* Proposed regulation 17-MMA021 appears to propose transitional rules for planning matters in process at the time of proclamation of Bill 139 changes to the *Planning Act.*

Should the transitional rules play out as is currently anticipated, the following is a summary of changes to be expected through the transition rules and under the new LPAT system:

a) If a complete application is filed with a municipality prior to Royal Assent, being December 12, 2017 and the appeal to the Board is also filed prior to Royal Assent, then the appeal will be sheltered and the matter will be heard by the Board.

b) If a complete application is filed with a municipality prior to Royal Assent, being December 12, 2017, and the appeal to the Board is also filed prior to Proclamation (anticipated to be the spring of 2018), the appeal will still be sheltered, and the matter will be heard by the Board.

c) If a complete application is filed after Royal Assent, being December 12, 2017, but the appeal is filed prior to Proclamation, the appeal will be heard by the Tribunal.

d) If a complete application is filed after Royal Assent, being December 12, 2017, but the appeal is filed after Proclamation, the appeal will be heard by the Tribunal.

Many in the development industry are pleased to see that applications will generally be considered by the appeal body in power at the time that applications were filed. However, it does not appear that the proposed regulations have given consideration to appeals involving the same development which could potentially fall under different transitional regimes. For example, an applicant may have initiated an official plan amendment application and several

months later filed a rezoning application. Assuming that the official plan application was filed before Royal Assent and the appeal is filed prior to Proclamation, the appeal will be heard by the Board. However, if the rezoning application was filed after Royal Assent but the appeal is filed prior to Proclamation, the appeal will be heard by the Tribunal. It would be unreasonable that part of the application will be heard by the Board while the other part will be heard by the Tribunal.

Consideration should be given for "related" applications to proceed under the same regime, as it does not seem practicable for subsequent appeals, related to the same property, to proceed under different regimes. Under the existing regime, consolidation of related applications has been the norm to avoid duplication of proceedings and inconsistent decisions related to the same property.

Other matters dealt with in proposed regulations relate to timelines for proceedings before the Tribunal. For example the timeline begins "from the date the proceeding is received and validated by the Tribunal". Appeals of a municipality's or approval authority's decision or a municipality's failure to make a decision, in respect of an official plan or zoning by-law, as described in section 38(1) of the LPAT Act, is 10 months. However, an appeal of an approval authority's failure to make a decision in respect of an official plan or plan of subdivision, as described in section 38(2) of the LPAT Act, is 12 months. For any other appeal the proposed timeline is 6 months.

Three issues arise with respect to the timelines proposed. The first concerns whether the timeline applies to when the proceeding is to commence, or to when the proceeding is to be completed. Secondly, there appears to be no rationale for implementing different appeal timelines for different appeals. Thirdly, as there are no timelines with respect to those matters that will be heard by the Board, it is abundantly clear that appeals proceeding before the Tribunal will take precedence. This will likely result in appeals before the Board perpetually being pushed aside to deal with the Tribunal appeals. This should be a serious concern to not only applicants but municipalities as well.

The proposed regulations also impose a maximum time limitation of 75 minutes for a party to make a submission to the Tribunal at an oral hearing of an appeal under subsection 38(1) and (2) of the LPAT Act. The Tribunal would have discretion to increase these limits. As noted in the

written submissions filed on behalf of the *Ontario Bar Association* with respect to the proposed regulations, the time limit "fails to recognize the potential imbalance that would be created where there are a significant number of parties on one side and only one party on the other".[6]

Conclusion….Or Just the Beginning?

As of the date of writing this paper, the rules for the new Tribunal and the full regulations have not been approved and therefore it is impossible to fully understand all the legal implications of Bill 139. There is little doubt that the reforms will result in a fundamental change in the land use planning system in Ontario. There will be fewer hearings as the restrictions on appeals are significant and, frankly, set a bar so high that the ability to appeal may be merely illusionary.

Bill 139 shifts the balance of power into the hands of municipal councils, but will this create a "more level playing field for residents wanting to participate?"[7] It is difficult to contemplate how the hearings before the Tribunal will be more "effective and fair" under a system that appears to deny the fundamental procedural fairness afforded to the majority of administrative tribunals in Ontario. It is also extremely difficult to understand how a proceeding that envisions a 2 stage decision process for certain appeals will be more efficient.

The true impact of Bill 139 will not be known for some time, however, the regime envisioned under the legislation may fall very short of meeting its intended goals.

[6] Written Submission on Proposed Bill 139 Transitional Regulations by the Ontario Bar Association, January 21, 2018

[7] The Honourable Minister of Municipal Affairs, Bill Mauro's, comments to the Standing Committee on Social Policy during consideration of Bill 139