Greenspace Alliance of Canada's Capital
Alliance pour les espaces verts de la capitale du Canada

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August 4, 2016

To: Ministry of Municipal Affairs and Housing

Re: Ontario Municipal Board Review

By Email: OMBReview@ontario.ca

Dear Madam or Sir,

Since 1997, the Greenspace Alliance has worked with community organizations and individuals to preserve and enhance natural areas in the National Capital area, including public and private green spaces, wetlands and waterways. We believe that urban greenness is essential for a community's quality of life, contributing to our personal, social, economic, cultural and spiritual well-being. It also connects us with the natural and cultural history of our region.

As such we have frequently participated in or observed OMB processes. In response to the Ministry's invitation, please find below our responses to your preliminary questions. They repeat or complement comments we submitted on January 8, 2014 as part of the consultation on Land Use Planning and the Appeal System, and in our letter of November 30, 2014 to the Honourable Ted McMeekin in response to his mandate letter.

1. Jurisdiction and powers

a. The role of the Ontario Municipal Board should be significantly modified. In true appeal court fashion, the standard outcome of an appeal should be that the matter is sent back to the municipality, with an appropriate clarification or guidance regarding interpretation. The Board should not act as a trial court. We note that current law (*Planning Act*, s. 24.3ff.) requires the Board to send the dispute back if new information is brought to bear on the matter that Council had not or could not have considered, but this is interpreted very narrowly. The mountain of new evidence that typically is brought forward in preparation of a hearing, arguing one side or the other, is not considered "new information" but should be.

In short, the OMB's role is far too strong. As it is, all parties to discussions at the municipal level forever take into account "what the OMB will do." This hampers dialogue, mutual understanding and consensus seeking at the local level. That mountain of evidence that later appears at the appeal hearing belongs in the community discussion.

b. When a proponent makes use of the "Integration provision" in a municipal Environmental Assessment process, resolution of an *Environmental Assessment Act* matter may provoke a stakeholder

to make a Part II Order request to the Minister of the Environment. This has to be resolved before the OMB may be asked to adjudicate any *Planning Act* aspect.

However, the Part II Order process is not transparent and causes delays. It would be far better to amend the *Consolidated Hearings Act* so that joint boards of the OMB and the Environmental Review Tribunal can adjudicate any appeal, not just an appeal by the proponent as the current law stipulates. Both *Planning Act* and *Environmental Assessment Act* expertise and jurisprudence could then be brought to bear on their task. Similarly, any appeal, even if only under the *Planning Act*, that involves significant environmental matters should, at the request of a Party, be granted access to a consolidated hearing.

c. As part of the current review process, the *Planning Act* should be amended to remove any ambiguity in section 17(50.1)(b) about the meaning of "dealt with." While the Court, confirming an OMB Decision, has spoken clearly in *Hobo Entrepreneurs Inc. v. Sunnidale* Estates Ltd (CarswellOnt 946, 2013 OMSC 715), stating that "dealt with" means amendments approved by Council and nothing else, this has not prevented a recent OMB decision (PL10149 and 140495, issued June 17, 2016, Interim Decision by C. Conti) to claim that the Board has jurisdiction to modify village boundaries even though Council had rejected motions to that effect.

d. The Province should conduct an analysis of the reasons for appeals from Committee of Adjustment (CofA) decisions. This could reveal structural or practice issues that, if resolved, could significantly reduce the case load of the OMB for this type of appeals.

One reason for the large number of appeals may be that CofAs are not adhering to the Divisional Court ruling in *Vincent v. DeGasperis*, (2005) re determination of when a variance is "minor," namely: 1) the four-part test mandated by the *Planning Act* cannot be collapsed into a consideration of impact alone; 2) determination of “desirable” must be objective and address the broader public interest; and 3) need and hardship may apply only if they “reasonably bear” on the application. The Province should take steps to ensure that CofAs adhere to that authoritative ruling.

Another reason for the large number of appeals could be that not enough resources are devoted to the CofA decision making process. The province should require that municipal planning staff be available to assist the applicants, intervenors and the Committee. Planning staff's involvement should be coordinated with any other applications being considered for the same property.

e. Local appeal bodies would reduce the OMB's workload but we are not in favour of creating such bodies. Most disputes arise over interpretation of and adherence to provincial policy, the official plan or zoning by-law, or about about the adequacy of the evidence considered. A "local" board would stand too close to the decision making body (Council) to instill confidence that it would perform an objective adjudicative role.

2. Meaningful citizen participation and local perspective

a. Appeals to the Board should remain accessible without having to engage counsel. We have heard of a case where the Board member did not counter aggressive argument by a respondent against participation of a community group as a Party without counsel and the group was forced to become a mere Participant. Board members should more pro-actively seek to accommodate community groups.

b. The Board should adopt a protocol, and be given the resources, for intervenor funding. Community groups are at a huge disadvantage when it comes to ability to bring forward expert evidence compared to other Parties, be they a proponent or the municipality.

c. Ministry officials should more pro-actively appear as witnesses in hearings as their expertise may complement what is available at the local level.

d. The Board should adopt a more nuanced view of the meaning of "expert" knowledge or opinion. In certain cases local knowledge by persons with direct experience may be at least as valuable as that of subject experts accredited by a professional organization. The Board should be open to weighing such evidence in its decisions.

3. Clear/predictable decision making

a. Implementation of the *Planning Act,* and by extension, adjudication by the OMB, is in overwhelming proportion about development -- delivering land for the purpose of putting up buildings. Decisions -- whether at the local or appeal level -- on what constitutes "good planning" are rarely about achieving the balance of objectives set out in the *Act*. We refer in particular to sections 1.1.(a) and 2(a) and (q), objectives and provincial interests that point to a sustainable future.

This suggests that, at a fundamental level, the land use planning system in Ontario does not in fact implement the *Planning Act*, read as a whole, but instead primarily aims to satisfy the demands of the development industry. This is not in the public interest. The Board has a role to play in rectifying that balance.

4. Hearing procedures and practices

a. The Board should produce transcripts of hearings, or at least synopsis Minutes, at all times. The current system, where transcripts are produced at a Party's discretion and at its expense (possibly shared with co-appellants), disadvantages community groups. In the alternative, Parties producing transcripts could be required to share them with not-for-profit Parties.

b. Advance filings should be made available on a shared drive accessible to all Parties and Participants.

c. Response time to Motions should be lengthened. In current practice, community groups cannot always respond in the short time available and are therefore disadvantaged.

d. Hearing rooms should have audiovisual equipment available to witnesses and evidence that is only in electronic form (shared with all Parties) should be acceptable. However, if paper copies are produced, they should be made available to all Parties.

e. We have seen decisions that do not provide reasoned weighing of the evidence heard, instead only list the issues and conclusions -- e.g. PL140495 a.o., issued February 23, 2016, Decision by R.G.M Makuch. This is contrary to administrative justice and unacceptable.

f. Decisions should include Exhibits to which they refer, or at least such Exhibits should be readily available on the OMB web site.

g. Decision formats should be modified to avoid "cluttering up" the first page or more with legal information, obscuring the substantive nature of the case.

h. Indexation of Decisions on the OMB web site should be vastly improved, as should be the search function.

5. Alternative dispute resolution

a. We would support requiring mediation before a hearing is scheduled. In our experience, appeals often arise because, for whatever reason, ineffective dialogue and consensus seeking took place in the process leading up to the decision of Council or Committee. A neutral third party, setting all Appellants and Respondents around the table, could rectify these deficiencies to some extent or at least scope the issues for appeal.

6. Timely processes and decision making

a. There is far too long a gap between a decision of Council or Committee of Adjustment and the scheduling of a hearing. There is far too long a gap between a hearing and the issuance of a decision.

7. Other

a. Appointments to the Board should be made in accord with criteria that are made public. How appointees meet these criteria should be demonstrated.

We look forward to the next stage in this consultation process.

Regards,

Erwin Dreessen
Erwin Dreessen,
Co-chair

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