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

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To: Ken Petersen,
Manager, Ministry of Municipal Affairs and Housing
Local Government and Planning Policy Division
Provincial Planning Policy Branch
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By Email: OMBReview@ontario.ca

Dear Mr. Petersen,

Please find below our responses to the public consultation document's questions.

Regards,

Paul Johanis

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Co-chair

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.

Theme 1: OMB's jurisdiction and powers

Q1. What is your perspective on the changes being considered to limit appeals on matters of public interest?

A1: Limiting appeals of certain parts of an Official Plan as proposed cannot be supported: To use the examples cited, a decision may purport to preserve farmland, promote orderly development or implement provincial plans, but does it? Whether the claim is valid may be open to legitimate dispute.

Q2. What is your perspective on the changes being considered to restrict appeals of development that supports the use of transit?

A2: Again, it would be wrong to restrict appeals simply based on the claim that the decision supports transit. *How* the OP or proposed development does that could be a bad decision, for reasons of substance or process.

Q3. What is your perspective on the changes being considered to give communities a stronger voice?

A3:

- Appeals of a new secondary plan should be allowed but once the appeals are disposed of, no amendments should be allowed for five years. This preserves the ability to appeal while also bringing stability to the planning rules of neighbourhoods.

- No appeal of an interim control by-law is supported -- it will give municipalities time to do the necessary comprehensive studies.

- Ottawa has no local appeal body, nor would we support its creation in general, but consideration could be given to compelling cities over a certain size to establish a local board for appeals of Committee of Adjustment decisions, seeing that they take up about half of the Board's case load. However, first, as we wrote in August, "[t]he Province should conduct an analysis of the reasons for appeals from Committee of Adjustment 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."

- Site plan disputes on micro matters would be better resolved through mandatory mediation.

- **Section 17(50.1) of the *Planning Act*, where the words "dealt with" appear, needs to be amended.** Even though *Hobo Entrepreneurs Inc. v. Sunnidale Estates Ltd.*, 2013 (CarswellOnt 946, 2013 ONSC 715) has clarified that "dealt with" refers to what Council has decided, not more broadly what it had considered, a recent OMB Decision by Member C. Conti (June 17, 2016, Case Nos. PL 101449 & 140495) concluded that the Board had jurisdiction to change a village's boundaries even though Council had rejected proposed changes. Such interpretation opens the door to the Board harking back to anything that has been presented to Council, regardless of how Council decided the matter.

- **Requiring that the Board send significant new information back to Council is strongly supported.** The permissive "may" in section 16(44.4) of the *Planning Act* is rarely acted upon, even though a hearing typically produces mountains of new information.

Q4. What is your view on whether the OMB should continue to conduct de novo hearings?
Q5. If the OMB were to move away from de novo hearings, what do you believe is the most appropriate approach and why?

A4/5: **The OMB should not be in the business of *de novo* hearings.** It should act more like a judicial review or appeal court: Did the decision meet a standard of reasonableness? Was due process followed? Is it in accord with local or provincial laws, regulations and policies? It should not rehash the evidence and superimpose its own decision.

I.e., the role of the OMB should be to provide binding guidance to interpretation of policy, including process policy, and then send the matter back to Council for resolution.

An end to *de novo* or quasi-*de novo* hearings would, from a large city perspective, eliminate the major cause of dysfunction in the province's land use planning. As we wrote in August: "...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" because the Board can modify anything Council has done, and has, thus disempowering the community and undermining the democratic process.

The underlying premise of strongly supporting an end to the role of the OMB as a trial court is that there is satisfactory public engagement and democratic deliberation at the municipal level. Speaking of the City of Ottawa, this is frequently not the case and the province could do much to improve matters. But this is outside the scope of this consultation. Clearly, however, putting the power of what constitutes "good planning" in the hands of an unelected Board is not the answer.

Q6. 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 decision for applications before 2007?

A6: Both proposals are supported. If a pre-2007 application has not been implemented by 2016 and the planning regime has changed since, the project should not be held bound to outdated rules.

Still, to respect due process in the protection of property rights, projects that are in the process of being realized could be exempted.

However, there should be no exemption for decisions related to environmental protection. E.g., at all times the most up to date species at risk status should prevail.

Theme 2: Citizen participation and local perspective

Q7. If you have had experience with the Citizen Liaison Office, describe what it was like – did it meet your expectations?

A7: N/A

Q8. Was there information you needed, but were unable to get?

A9: N/A

Q9. Would the changes outlined on page 22 of the public consultation document support greater citizen participation at the OMB?

A9: We understand that current staffing of the Community Liaison Office to be so minimal as to be of little use. Part-time or "fly-in" positions should be created in all major centres. Alternatively, video-conferencing could be practiced. The advice should be limited to process and general information. This requires planners with legal and procedural expertise. Beyond an advisory role, provision of in-house planning experts and lawyers is not supported. It would be better to provide community appellants with the necessary funds to hire its own experts and lawyers. **The CLO could be helpful in maintaining a list of experts and lawyers who would consider assisting community groups.**

Q10. 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 processes would help citizens to participate in mediations and hearings?

A10: The OMB's processes need to be made less formal and brought into the 21st century! Then the task of advising potential appellants will become much easier. Refer to Theme 4.

The CLO could maintain a catalogue and synthesis of previous Board and Court decisions, indexed to subject matters or issues. Typically, lawyers present the Board with a Book of Authorities. Self-representing community appellants typically do not have the resources to compile such information and are therefore put at a disadvantage.

Q11. Are there funding tools the province could explore to enable citizens to retain their own planning experts and lawyers?
Q12. What kind of financial or other eligibility criteria need to be considered when increasing access to subject matter experts like planners and lawyers?

A11/12: **There should be intervenor funding for eligible not-for-profit organizations and individuals.** We suggest the following eligibility criteria:

1) prior determination that the appeal is not frivolous, vexatious or only for the purpose of delay;
2) the appellant should not have a pecuniary interest in the outcome;
3) the requested funding should pass a test of reasonableness, based on published criteria, with disputes to be settled by the Board or other independent third party.
4) the appeal should be based on matters of provincial interest as listed in section 2 of the *Planning Act*. or otherwise have the public interest at heart, with eligibility to be determined by the Board or other independent third party.

Theme 3: Clear and predictable decision-making

Q13. Qualifications for adjudicators are identified in the job description posted on the OMB website. What additional qualifications and experiences are important for an OMB member?

A13: The general perception is that Board appointments are based on patronage. The process described on page 24 of the consultation document is not transparent and open. Qualifications should include a demonstrated ability to be fair in judgement. The "Member Position" document on the ELTO web site (page 4) states that Members must have "Experience in interpreting and applying legislation with specific knowledge of the laws, regulations, policies, procedures and rules that are relevant to the tribunal(s) to which they are appointed." This does not appear to prevent Members being appointed who ignore court decisions with impunity, as the example cited above shows. New members should receive more training than on decision writing and the administrative justice system. They should also be informed about the current state of the law and higher court decisions. All members should engage in refresher training.

Should the Board continue to act like a trial court (with *de novo* hearings), then a presiding Board member should have local knowledge.

Q14. Do you believe that multi-member panels would increase consistency of decision-making? What should be the make-up of these panels?

A14: For complex, multi-faceted matters, multi-member panels could be advisable. See also response to Q24 below. Multi-member panels should hear the case together, not segmented.

Q15. Are there any types of cases that would not need a multi-member panel?

A15: Most certainly. However, if the standard became, say 2-member panels, then experience in other administrative tribunals suggests that fairness, and perceived fairness, would increase.

Q16. How can OMB decisions be made easier to understand and be better relayed to the public?

A16: The format of OMB decisions should be drastically changed. The front page, in addition to date of issuance, should show the "name" of the case, the date of the hearing, key words, the sections of law discussed in the decision (not just under what section of the *Planning Act* the appeal has been launched!) and the name of the Member(s). Names of Parties and Property descriptions should be relegated to the following pages.

The decision should be written in plain language and always include a rationale.

Further, decisions often refer to Exhibits. These should accompany the Decision. Without them, the rationale for the decision can often not be understood.

Search results for E-decisions should yield far more useful results than at present. Even if one specifies a Case Number and a Date, large numbers of irrelevant decisions are returned and the teaser lines are not informative. There is no need to duplicate decisions in Word and PDF format; the latter alone (in universally accessible format) should suffice.

Theme 4: Modern procedures and faster decisions

Q17. Are the timelines in the chart (page 26 of the public consultation document) appropriate, given the nature of appeals to the OMB? What would be appropriate timelines?

A17: The targets appear appropriate but they are not being met.

Despite having been involved in several OMB cases since 2008, we have seen no evidence of the OMB's mediation assessment which page 26 states is required. Assessing the potential for mediation without contacting the Parties is bound to be ineffective.

Q18. Would the measures outlined on page 27 of the public consultation document help to modernize OMB hearing procedures and practices? Would they help encourage timely processes and decisions?

A18: We would welcome active adjudication. We look forward to "less complex and more accessible tribunal procedures." More generally, the OMB has to update its procedures and enter the 21st century. **Filing of evidence in electronic format to a shared drive should be standard.** Parties should be required to provide evidence in advance, to the Board, the other Parties and the public.

They should make hard copies available to not-for-profit Parties and the public.

Community appellants need more time to respond to motions than Rules currently prescribe. They also need more time between a pre-hearing conference and the start of a hearing.

Hearings expected to last less than five days are currently not preceded by a pre-hearing conference. As a result, Parties may enter into such hearings without having had any communication. This does not foster efficient conduct. More resource-rich Parties are more able to spring surprises on not-for-profit Parties. **There should be, for all hearings, mandatory pre-consultation between the Parties**, presided over by the Member, where the potential for mediation should be discussed, an issues list determined, the witnesses identified and a date of filing of evidence agreed upon.

Hearings should be accessible in streaming video.

Transcripts, or at least synopsis minutes, should be produced. Currently Parties must self-finance transcripts. This puts not-for-profit parties at a disadvantage. As a minimum, if Parties have transcripts produced, they should provide not-for-profit Parties with a copy.

Q19. What types of cases/situations would be most appropriate to a written hearing?

A19: Straightforward, quasi-administrative issues or follow-ups to earlier findings or decisions.

Theme 5: Alternative dispute resolution and fewer hearings

Q20. Why do you think more OMB cases don't settle at mediation?

A20: More resource-rich Parties see an advantage in proceeding to a hearing. Lawyers convince their clients that they can win at a full-fledged hearing rather than enter into mediation which by definition results in a compromise if successful.

As noted at A17, the current mediation assessment is apparently internal and is therefore not effective.

The Board should be able to require that Parties enter into mediation and should offer to play a helpful role. Alternatively, if a Party refuses to enter into mediation, it could be required to provide an explanation of its refusal based on policy grounds.

Q21. What types of cases/situations have a greater chance of settling at mediation?

A21:
1) Where it becomes apparent that the dispute is due to asymmetrical information;
2) When the Parties have access to a relatively equal amount of resources;
3) Committee of Adjustment cases.

Q22. Should mediation be required, even if it has the potential to lengthen the process?

A22: Yes.

When mediation is being attempted during the appeal period, then the period should be extended, e.g. by a maximum of 80 days, in order to give mediation a chance to succeed and obviate the need for an appeal.

Q23. What role should OMB staff play in mediation, pre-screening applications and in not scheduling cases that are out of the OMB's scope?

A23: As proposed, the Board could more actively promote mediation, require that all appeals be considered by a mediator before scheduling a hearing, and strengthen case management. Most intriguing is the suggestion of "allowing government mediators to be available at all times during an application process, including before an application arrives at municipal council" (page 29). The deliberation process in the City of Ottawa is often such that having such mediators on hand could improve it.

General question:

Q24. 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?
A24:

1) Ministry officials should readily assist the Board through testimony as their expertise may complement what is available at the local level.

2) 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. The Part II Order process is not transparent, causes delays and burdens the Minister.

Far better would it be 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.

3) An inclusive and transparent deliberation process at the local level is essential. The Board should be fully open to sending a decision back to Council if it is demonstrated that no due process has been followed.

4) We attach a report analyzing 23 OMB decisions affecting "greenspace" in Ottawa. The analysis supports several of the suggestions we have made in the responses above, including an end to *de novo* hearings and an obligation to send an issue back to Council if new information is presented.