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

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August 10, 2017

To: Ken Petersen, Manager,
Ministry of Municipal Affairs and Housing,
Local Government and Planning Division,
Provincial Planning Policy Branch,
777 Bay Street, Floor 13,
Toronto ON, M5G 2E5

By Email: ken.petersen@ontario.ca

Dear Mr. Petersen,

Re: Bill 139 - Planning Matters - EBR 013-0590

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.

Having examined Bill 139 in so far as it deals with planning matters, we strongly support

- *the apparent intent to bring the procedures of the new Tribunal into the 21st Century.* We hope that electronic file sharing and videoconferencing (by Skype) will become standard. If paper copies are produced then non-profit participants should be provided with a copy.

- *mandatory case management conferences for all Planning Act appeals.* Gone should be the days that Parties are held in the dark about what other Parties intend to do until the day of the hearing. We also support the process proposed to determine participants in a hearing.

- *the creation and mandate of a Local Planning Support Centre.* We expect this to help even out the playing field between developers and community groups or individuals. We look forward to the draft regulations and would like to see a commitment to adequate resourcing of this Centre. We would also like to see various Ministries actively offer their resources to assist the Centre and its clients. As we have suggested last November, the Centre should, as a start, compile a catalogue of case law, indexed to subject matters or issues.

- *the requirement that henceforth official plans must contain policies about mitigating greenhouse gas emissions and adapting to climate change.*

- *the proposed basis for appeals under sections 17 (OP), 22 (OPA) and 34 (ZBA).* Gone should be the days of the OMB second-guessing Council and determining what is "good planning." All too often the term "good planning" has been used in proponents' arguments and OMB decisions as a cover for circumventing specific planning provisions. Gone, hopefully, will be the days of hearings spanning weeks, months and even years while Council decisions are held in abeyance. However, please see further comment below on a missing ground for appeal.

- *the move to a court-of-appeal type regime, where the municipality is given a second opportunity to conform to the law, plan or policy.* However, see further comment below about the process when there is a settlement.

- *the exclusions from appeal of policies on major transit station areas and secondary plans during the first two years, and the inability to request official plan or zoning amendments regarding major transit station areas.* However, see further comment below regarding the definition of major transit station areas and regarding the option to override such restrictions.

- *the clarification of the meaning of "dealt with" in section 17(50.1(b)) of the Planning Act.* As recently as June 2016, and despite an Appeal Court ruling, a Board Member decided that the Board has jurisdiction to alter a village's boundaries even though Council had decided against any changes. Substituting "dealt with" with "added, amended or revoked" should make that impossible in future.

- *the restriction of appeal of an interim control by-law to the Minister, while maintaining the ability of others to appeal an extension.*

However, we strongly oppose:

- *the proposed inability of a single-tier municipality's Official Plan or Comprehensive OP Amendment to be appealed after it has been approved by the Minister.* This is deeply undemocratic and opens the field for lobbying the Minister during a 210-day window -- an inherently opaque process. Ironically, for these kinds of appeals this brings us, in practice, back to the situation created in the 1949 Planning Act when Cabinet was the ultimate decision maker and therefore the target for much lobbying.

  We fully agree that the land use appeal process of Ontario needs to be fixed. The last two rounds of Comprehensive OP Amendments in Ottawa have amply demonstrated its dysfunction. But doing away with appeals altogether is not the solution. We believe that the other provisions of Bill 139 will suffice to avoid experiences such as the appeals of Ottawa's OPA 76 and OPA 150.

- *the absence of Planning Act grounds as the basis for appeals under sections 17, 22 or 34.* The Minister could intervene in any appeal but he need not have a monopoly over trying to ensure that the provincial interest is appropriately accommodated. Or the municipality may have committed procedural errors. I.e., the Bill should be amended by adding a fourth conformity test to the grounds for appeal, namely conformity to the Planning Act with specific reference to what amounts to its objectives as stated in section 2 of the Act.

Further comments:

- Unlike the OMB, the Local Planning Appeal Tribunal would not be a court of record. Although little used, the ability of the Tribunal to create a record should be maintained. In fact, the current practice -- creation of a transcript at the discretion and expense of parties and for their exclusive use -- puts community groups and individuals at a disadvantage.

- We understand that conflict of interest and annual reporting matters are covered by ss. 6, 7 and 13 of the Adjudicative Tribunals Accountability, Governance and Appointments Act, which references the Public Service of Ontario Act.

- We appreciate that oral hearings will no longer be for the purpose of admitting evidence. Yet it must be possible to challenge evidence filed. Without live cross-examination, there is a significant onus on the Tribunal to devise rules that allow an opportunity to challenge evidence, within time frames that recognize the capacity of community groups or individuals to do so. Whether the proposed Support Centre will be of real help is also key.

- Under the current regime, one useful way in which community groups can bring expert evidence to bear is, with permission of the Board, to subpoena government officials. We trust that this option will remain available under the new Tribunal's rules, be it then only in the form of a sworn witness statement by the subpoenaed official.

- As we have suggested last August and last November, Ministry officials should more readily participate in the adjudication process. The legislation could provide for the Tribunal to have the option of requiring a Ministry to do so.

- We wonder how under the new process a settlement that has been reached between Parties will be handled. Under the current regime, the Board typically endorses the settlement and issues an Order. Would the new rules permit the Tribunal to do so? Or would follow-up be left solely in the hands of Council and, if so, under what process rules? Should there be legislative provisions to ensure a timely, fair and open process?

- The definition of "higher order transit" leaves it open to the interpretation that buses using priority lanes qualify. That in turn could extend the interpretation of "protected major transit station areas" to any bus stop along major routes. We suggest that the definitions be tightened to ensure that the "protected areas" are limited to a given distance from stations on rail lines or truly dedicated routes such as Ottawa's transitway.

- We would rather not see Council given the option to override the exclusions from appeal of policies on major transit station areas or secondary plans during the first two years, or to override the inability to request official plan or zoning amendments affecting major transit station areas. When a consensus is achieved on a major policy, it should stand until a 5-year review comes around. There should be no backdoor ability to contravene the plan or policy.

Concluding comments:

- Welcome as most of these provisions are, they will not by themselves cure what ails Ontario's land use planning system. As long as there is an expectation that official plan and zoning policies are there to be amended for higher profit, much dysfunction will remain. The resolution of this planning conundrum must be found in achieving consensus on policies and plans, including secondary plans, at the municipal level. Bill 139 offers no help to realize that goal.

- We submit that the fundamental flaw in Ontario's land use planning system is the absence of a comprehensive process leading to the identification of planning criteria (what is "good planning"). The Provincial Policy Statement sets out certain criteria but gives no guidance in the case of conflict. Section 2 of the Planning Act sets out more criteria but necessarily remains at a high level and is therefore often of limited use in decision making. Again, we submit that the solution lies in a solid and fair process to periodically review planning policies at the municipal level. The experience in Ottawa is that often no serious effort is made to achieve consensus at various planning stages -- indeed, certain practices are designed to avoid dialogue -- leaving stakeholders aggrieved or compelled to appeal to the OMB. Legislative provisions and more active guidance by the Ministry are conceivable that would lead to better outcomes.

- The Bill does nothing to improve equitable funding even though this was a theme of the October 2016 Consultation Document. While creation of the Support Centre will alleviate some of the inequity, much more is needed. We support the submission made by the Canadian Environmental Law Association last December which advocates for a positive use of cost awards and intervenor funding. We recommend the Rules of the Environmental Review Tribunal and an application of the Intervenor Funding Project Act regime (which expired in 1996) to the practices of the new Tribunal.

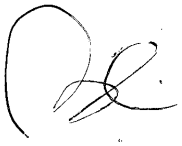
- The Bill also fails to propose that mediation should be mandatory -- a change we suggested both last August and last November. Courts in Toronto, Ottawa and Windsor have adopted procedures for mandatory mediation in civil suits including ways to prevent abuse. We believe that mandatory mediation in land use issues could resolve many appeals, especially when the preceding municipal process of consultation and consensus-seeking has been deficient.

- We have argued before that the Consolidated Hearings Act should be amended 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. Providing for appointments of a Panel from the pool of members within the ELTO family of tribunals would be a reasonable alternative. However, section 3(5) of the proposed LPAT Act seems to preclude that option by stating that panels are chosen from among LPAT members only.

- We repeat our suggestion of last August that the province should undertake an analysis of the reasons for the large number of appeals of decisions of Committees of Adjustment. Now that Toronto has its own Local Appeal Board it will own the problem but the issue remains outstanding for the rest of the Province. Such an analysis could reveal structural or practice issues that, if resolved, could significantly reduce the case load of the LPAT.

We look forward to being notified of any further opportunity to be heard about Bill 139.

Sincerely,



Paul Johanis,
Chair, Greenspace Alliance of Canada's Capital