BILD
BUILDING A GREATER GTA
Building Industry and Land Development Association

Ontario Home Builders' Association

August 14, 2017

Ken Petersen
Ministry of Municipal Affairs and Housing
777 Bay Street, 13th Floor
Toronto, Ontario M5G 2E5

Re: EBR Registry Number: 013-0590 - Bill 139 (Schedule 3)

The Building Industry and Land Development Association (BILD) and the Ontario Home Builders' Association (OHBA) are pleased to provide the provincial government with the attached submission responding to the EBR 013-0590 posting regarding Bill 139, the proposed *Building Better Communities and Conserving Watersheds Act, 2017*. The bill proposes to introduce new legislation to replace the Ontario Municipal Board (OMB) with the Local Planning Appeal Tribunal (LPAT). The attached submission was prepared by BILD and OHBA solicitor David Bronskill, Goodmans LLP.

BILD and OHBA previously provided the province with recommendations regarding the OMB in August and December 2016. Since 2003, this review marks the fourth time the Province has proposed substantive amendments to the scope, powers and function of the OMB. We continue to support the essential role of the OMB as an impartial, evidence-based, administrative tribunal that is responsible for handling appeals of land use planning disputes. In this administrative authority, the OMB has served to ensure that provincial land use policies and objectives are achieved, and that municipalities employ consistency in the application and implementation of the *Planning Act*, the *Development Charges Act*, the *Provincial Policy Statement* and other related land use legislation. BILD and OHBA do not believe that the stated goals of the provincial government for the proposed legislation will be achieved through Bill 139 and the LPAT, as currently proposed.

The PPS and Growth Plan focus on optimizing Ontario's economic opportunities and existing infrastructure to create vibrant, livable communities. However, we continue to believe that this proposed OMB framework will challenge the ability to achieve optimization, and result in adverse effects on the economic stability of the development industry, as well as the local municipalities that the industry operates in. BILD and OHBA are very concerned that this proposed framework will empower local councils to override conformity with the PPS, Provincial Plans and enable decision-making that is not vested in the long-term public good, but rather re-election. This type of approach to land use planning in Ontario will result in even greater pressures on housing supply and prices.

A recent Post article (attached) encapsulated these concerns, by illustrating the story of an anti-development Toronto Council decision from June 2016. In this article, Toronto City Council made a political decision to reject an application for townhomes at a major intersection due to neighbourhood opposition. This decision was made despite the fact that professional city planning staff recommending approval of the application (013 198702 NNY 25 OZ). The development application was appealed to the OMB (PL 160704). The development was amended and after successful mediation, it was approved. In these situations, municipalities are required to hire outside planning and legal staff to refute municipal planning staff opinions. We would characterize this as a "NIMBY council decision". The reality is that Ontario is projected to continue to grow and an evidence-based planning

approvals framework will be necessary to keep businesses moving and maintain the ever-growing challenge of housing affordability.

BILD and OHBA believe that the OMB provides considerable value to the public good because decisions made by the OMB are an important counterbalance to the local political pressures of municipal councils. In other words, the local interest is not always the public interest. The OMB ensures the appropriate implementation of provincial policy and that decisions ultimately must be based on evidence and "good planning" rather than short-term political sentiments. We have concerns that many of the proposed procedural reforms are not only untested and problematic but also will have unintended negative consequences.

BILD and OHBA strongly recommend that further consultation be required before the enactment of Bill 139, as the provisions would negatively impact provincial policy and there are structural complications with the Bill that will fail to protect the provincial interest. BILD and OHBA appreciate the opportunity for consultation and look forward to continued dialogue with the government to significantly amend the proposed legislation to improve Ontario's land use planning and appeals system. Our recommendations responding to the legislative proposals are enclosed.

Sincerely,

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August 14, 2017

Our File No.: 173198

Via Email

Ministry of Municipal Affairs and Housing
Local Government and Planning Policy Division
Provincial Planning Policy Branch
777 Bay Street, 13th Floor
Toronto, Ontario M5G 2E5

Attention: Ken Petersen, Manager

Dear Sirs/Mesdames:

Re: EBR Registry Number: 013-0590
Bill 139 (Schedule 3) – Proposed *Building Better Communities and Conserving Watersheds Act, 2017*: Amendments to the *Planning Act*

We are solicitors for the Building, Industry and Land Development Association ("BILD") and the Ontario Home Builders' Association ("OHBA") regarding the consultation process for Bill 139. BILD represents over 1,450 members in the land development, home building and professional renovations industry in the Greater Toronto area. The OHBA represents over 4,000 member companies, organized through a network of 29 local associations (including BILD) across the Province. BILD and OHBA members have built over 700,000 homes in the last ten years in over 500 Ontario communities. Further, in 2016, the residential construction industry employed over 336,000 people, generated $19.8 billion in wages and contributed over $56 billion to the Province's economy.

We are writing to provide our clients' comments regarding the proposed *Building Better Communities and Conserving Watersheds Act, 2017* ("Bill 139"). We recognize that the EBR Registry Number relates to Schedule 3 of Bill 139 but our submission discusses the implications of Bill 139 more generally because it is impossible to limit comments only to Schedule 3 when the proposed changes in other parts of Bill 139 will have implications on matters in Schedule 3.

Please note that both BILD and the OHBA also submitted comments in response to the Environmental Registry 012-7196 posting on December 19, 2016, while the OHBA also provided preliminary industry recommendations to the Province in a letter to the Minister of Municipal Affairs and the Attorney General on August 31, 2016.

Overview

As an overall comment, our clients do not oppose the creation of the Local Planning Appeal Tribunal (the "LPAT"), provided that it is provided with appropriate resources, a broad mandate and sufficient jurisdiction to consider all land use planning matters. Without an effective and independent tribunal that specializes in administrative and planning matters, land use related disputes would end up in the court system. The courts are not a good alternative for reasons well known to the government and stakeholders.

It is important to note that decisions made by the Ontario Municipal Board (the "OMB") have been based on planning evidence, provided by expert witnesses under oath, ensuring that long-term public policy objectives, rather than short-term local political intentions, are upheld. Our clients have always supported the essential role of the OMB as an impartial, evidence-based, administrative tribunal that is responsible for handling appeals of land use planning disputes. Through this administrative authority, the OMB has served to ensure that provincial land use policies and objectives are achieved, and that municipalities employ consistency in the application and implementation of the *Planning Act*, the *Development Charges Act* and other related land use policies, including the Provincial Policy Statement.

We note that, since 2003, this is the fourth Provincial review resulting in proposed substantive amendments to the scope, powers and function of the OMB (Bill 26, Bill 51, Bill 73 and now Bill 139). Some of the stated goals of this review included:

- a desire to place greater weight on the decisions of local communities, while ensuring that development and growth meets provincial objectives;
- increased accessibility to the public; and,
- provision of a faster, fairer and more affordable planning appeal process.

Unfortunately, for many of the reasons outlined below, our clients do not believe that these stated goals will be achieved. Instead, Bill 139's proposed reforms will not reduce the number of appeals, enhance public participation in the planning process or increase the use of mediation. Further, our clients are very concerned that Bill 139 does not focus on achieving the "best" planning decisions and that the LPAT will fail to provide a forum where the principles of fairness, quality, consistency and transparency are fundamental, and the provision of administrative justice is the first order of business.

Discussion

1. Removal of Procedural Fairness and Reduced Accessibility

Recommendation: Reconsider all aspects of Bill 139 that potentially interfere with the common law right to procedural fairness that is now secured in legislation. These are fundamental and long-standing principles of law whose removal would negatively impact all stakeholders, including municipalities, applicants, landowners and residents, while reducing desired accessibility to the appeal process.

Recommendation: Release transition details immediately.

Our clients have concerns that many of the proposed procedural reforms are not only untested and problematic but also will have unintended consequences. At a preliminary level, Bill 139 provides that the new legislation and any regulations, and even any rules created by the LPAT, override the *Statutory Powers Procedure Act* (the "SPPA"). This is an extraordinary reform that would remove basic common law principles of procedural fairness for planning matters that have been enshrined in the SPPA. As an administrative tribunal, the LPAT will still owe a duty of fairness to all persons involved in a hearing and yet the new legislation would elevate regulations and even LPAT rules above the SPPA.

Overall, and paradoxically, Bill 139 would have the most significant impact on procedural fairness for the most complex planning matters. Some of these impacts are listed in the section below.

Moreover, many of the proposed reforms would result in decreased accessibility to the appeal process.

- Case management conferences ("CMCs") are beneficial, although as proposed under Bill 139 would appear no different than the OMB's current and successful practice of holding prehearing conferences and issuing procedural orders. While CMCs (like OMB prehearing conferences) will benefit complex planning matters, Bill 139 would make CMCs mandatory, even for the majority of proceedings that are more minor in nature and that could be resolved by a proceeding of a day or less. As a result, these appeals will become more complex and more expensive.

- Only parties are involved in hearings for more complex matters. The ability to participate in a hearing as a participant – typically used by individuals or residents – has been limited.

- Written submissions may be imposed on matters regardless of whether there is a clear interest or any objection from approval authorities or appellants to the request for party status. This will increase costs to individuals and residents.

- The LPAT would be required to dismiss an appeal that does not disclose that a municipal decision is inconsistent with a policy statement, fails to confirm with or conflicts with a provincial plan or fails to confirm with applicable official plan(s). This reform would deter appeals from non-sophisticated stakeholders who are not able to frame an appeal in the context of lack of conformity/consistency and require them to engage consultants and legal counsel simply to file an appeal.

Finally, despite the potential significance of the reforms being proposed, the government has provided no meaningful details regarding transition. Instead, transition will be provided by regulation at a later date, meaning there is no information currently available to stakeholders and no certainty for existing applications, proceedings and orders.

2. *Important Procedures Unavailable When Considering Complex Planning Matters*

Recommendation: Revise Bill 139 to ensure procedural fairness for all appeals and, in particular, the most complex planning matters.

Our clients have an overall concern with the limitations being placed on the right to procedural fairness. True appellate bodies have a more limited scope of review because an initial trial body has heard, canvassed and thoroughly considered oral evidence, tested in cross-examination, and oral submissions, thereby creating an appeal record that can be the subject of an appeal.

Most notably, many important procedural steps would be unavailable for complex planning matters:

- Limitations on oral hearings – or even their complete elimination – are inappropriate for complex planning appeals.

- The removal of the ability to test opinion evidence through cross-examination is particularly troubling. Materials submitted to a municipality, whether by an applicant, third parties or municipal staff, are not reviewed and tested for accuracy, consistency or credibility. All stakeholders in the planning process are aware of opinion evidence evolving as new facts, previous opinions and alternative interpretations are presented to expert witnesses. This can result in changed opinions or appropriate compromises. Testing an expert opinion is essential to ensuring good planning.

- Time periods for oral hearings would be set out in the regulations, rather than determined case by case on the basis of the matter's complexity, the number of issues or number of parties.

- Calling evidence and hearing from witnesses would be limited, meaning that interested parties (including neighbouring landowners and residents) would be forced to retain

witnesses and provide evidence to the local municipality prior to an initial decision or risk having that evidence not heard by the LPAT.

- Other components of Bill 139 undermine the emerging and highly successful mediation model of the OMB. OMB mediations have a very high success rate (reportedly at approximately 90%), with the largest current constraint being resources to make available experienced OMB mediators. Not only will the proposed procedural reforms limit successful outcomes to mediation but also they will remove incentives for parties even to engage in mediation.

As noted above, Bill would 139 would limit procedural fairness overall, but most dramatically for the most complex planning appeals, while continuing to allow full hearings for less involved matters.

It seems counterintuitive that certain procedural limitations do not apply to most less complicated appeals, meaning the greatest impact on procedural fairness would be on the most complex matters. This also means that those less complicated appeals would continue to be processed in a less efficient manner.

3. Negative Impact on Alternative Dispute Resolution

Recommendation: Further consultation is required before enactment of Bill 139 because its provisions would negatively impact the highly successful mediation program of the Ontario Municipal Board.

As noted above, OMB mediations have a very high success rate, with the largest current constraint being resources to make available experienced OMB mediators. There are many reasons for this success, including the OMB's inclusivity during mediation (even involving participants and not just parties) and opportunities for all stakeholders (including residents) to engage meaningfully on a complex planning matter for the first time. Most of all, mediation is based on achieving compromise as a better alternative to a contested hearing.

Of course, this means that the option of a contested hearing must act as an incentive for parties to engage meaningfully in mediation and in good faith. The hearing process proposed by Bill 139 does not act as such an incentive. Not only will Bill 139's proposed procedural reforms limit successful outcomes to mediation but also they will remove incentives for parties even to engage in mediation.

4. *Negative Impacts on Public Participation*

Recommendation: Review the municipal decision-making process or provide the LPAT with greater ability to hear evidence and make decisions.

Bill 139 is premised on the concept that LPAT will be an appellate body considering a "record" from a lower body that has reviewed, tested and considered evidence and submissions in a fair and meaningful way. This is a fundamental flaw. Absent significant reforms to the planning process at the municipal level, which are not proposed in Bill 139 and unlikely to occur subsequently, there is simply no complete and accurate "record" for the LPAT to consider as conceived in Bill 139.

The process mandated by the *Planning Act* prior to adoption neither requires municipalities to conduct a rigorous review of submitted materials nor provides a genuine opportunity to test the appropriateness of proposed amendments to planning instruments. Municipal councils are only required to hold public meetings, not public hearings. Such meetings provide no allowance for a meaningful debate or examination of issues.

Indeed, the current planning process under the *Planning Act* features community meetings and statutory public meetings. A community meeting is the opportunity for the public to learn about an application and provide preliminary feedback. A statutory public meeting provides for limited (i.e. timed) deputations for even the most complex planning matters. Neither type of meeting offers the opportunity for detailed consideration of the proposed planning instruments, submission materials, community feedback or municipal staff responses, all of which is instead achieved before the OMB. As noted above, the OMB's mediation model meaningfully engages all stakeholders (including residents) on a complex planning matter, while any public hearing (if required) enables a detailed consideration of all relevant planning matters, including matters that may have been overlooked by the municipality in the first instance.

Unfortunately, Bill 139's proposed narrow tests for appeals would exclude such detailed consideration of site-specific interests that may not engage high level policy matters. These detailed interests – such as height, urban design, traffic, shadows, landscaping, etc. – are at the foundation of both successful mediation and OMB public hearings but are not necessarily engaged through consideration of provincial interests or official plan conformity.

This kind of engagement and analysis is not mandated during the initial municipal process under *Planning Act*. Not only does Bill 139 not address existing issues with the municipal process but also it amplifies these current deficiencies through the proposed more limited appeal process.

5. *Less Efficient Process*

Recommendation: Appeals based on the failure of a municipality to make a decision should proceed directly to a full hearing. For all appeals, LPAT should issue a final and binding decision.

Recommendation: Consider options to enable less complex matters to be processed more efficiently by municipalities and to proceed directly to LPAT hearings upon appeal.

It would appear that every appeal to the LPAT under Bill 139 could involve two hearings. This will certainly be a less efficient process and more costly for all stakeholders.

Further, Bill 139 simply provides no incentive for municipalities to process *Planning Act* applications in a timely fashion. An appeal filed for the failure of a municipality to make a decision within the prescribed statutory period would result only in a threshold hearing, at which the applicant must demonstrate that the existing zoning is out-of-date and that the application meets Provincial and municipal policy. Should an applicant meet this threshold, the appeal is returned to the municipality for another opportunity to make a decision, artificially extending the statutory period for the municipality to make a decision.

Appeals for the failure of a municipality to make a decision should go to a full and binding hearing before the LPAT. This is the most efficient process for all stakeholders and would actually provide an incentive for municipalities to process *Planning Act* applications in a timely fashion and make decisions.

When a municipality does make a decision within the initial prescribed statutory period, subject to the additional tests recommended below, some additional deference could be afforded that decision as an incentive. However, the result of such a hearing should not return to the municipality. If an appellant can establish that a municipal decision does not meet one of the statutory tests (as supplemented through our submissions below), the LPAT should have the jurisdiction to make a final and binding decision.

6. *Successful Planning Involves More than High Level Matters*

Recommendation: LPAT hearings should not be restricted only to consideration of provincial policies, provincial plans and municipal official plans. The statutory tests for review should be expanded to include consideration of the optimization of provincial objectives, as set out in provincial plans/policies and municipal official plans, and compatibility of a development with the surrounding area.

Bill 139 is premised on the notion that municipalities are the sole defenders of the public interest and that the local interest is always the public interest. Simply put, the local interest is not always the public interest. This concern is amplified when Bill 139 would restrict certain

appeals, including the ability of lower-tier municipalities to challenge upper-tier official plan amendments that affect lower-tier planning decisions, the ability of a single- or upper-tier municipality to appeal a decision by the Minister, and the ability of any person (including residents, municipalities and landowners) to appeal any decision of the Minister, including modifications regarding an official plan amendment enacted pursuant to Section 26 of the *Planning Act*.

However, at the same time, broad-based provincial policies and plans are inadequate to address site-specific local issues. In most instances, such policies and plans were not intended to address the multitude of planning issues that can arise in an area-or site-specific context. For example, planning matters such as traffic, servicing, urban built form impacts and parking are not considered in provincial policies and plans. These are legitimate site-specific planning issues that should be considered and resolved, but this will be extremely difficult if the only tests are conformity or consistency with higher level planning documents that may use broad or general language.

Further, Bill 139 would create an impossible threshold test for technical official plan and/or zoning by-law amendments. This is compounded for zoning by-laws because previous *Planning Act* amendments removed the ability to apply for a minor variance for two years after a zoning by-law amendment is approved.

7. *No Incentive to Update Planning Instruments*

Recommendation: As above, appeals based on the failure of a municipality to make a decision should proceed directly to a full hearing.

The OHBA and BILD have consistently stated that municipal zoning by-laws must be modernized to be in conformity with provincial plans, which would allow the planning process to be more effective and predictable, thereby resulting in fewer appeals. Bill 139 does not further this objective.

As an example, and as discussed above, the proposed procedure for an appeal of the failure of a municipality to make a decision is flawed and actually removes any incentive for municipalities to undertake such exercises. If and when an appellant establishes that an existing zoning by-law is out-of-date, the proposed remedy does not allow the LPAT to update that zoning by-law but requires the LPAT to send the matter back to the municipality to make a site-specific decision. Municipalities could even choose not to attend this initial hearing without consequence. Rather than creating an incentive for municipalities to update planning instruments, Bill 139's proposed appeal process actually creates an incentive for municipalities not to update zoning by-laws or even engage with an applicant during the initial submission period.

8. *No Incentive to Promote Density Near Transit Infrastructure*

Recommendation: Impose a timeline for municipalities to implement criteria for density near transit infrastructure. Allow appeals of minimum/maximum heights and densities if such appeals seek to increase the minimum/maximum heights and densities.

The proposed reforms regarding policies for major transit station areas are misleading.

- First, Bill 139 does not require municipalities to implement such criteria. While the Growth Plan does have policies related to transit near major transit station areas, the Growth Plan also allows municipalities to blend density over multiple major transit station areas. Further, Bill 139 would limit appeals of conformity exercises, meaning that landowners (and municipalities) could not contest the results of such a conformity exercise.

- Second, there is no justifiable rationale for prohibiting appeals of policies that establish **maximum** heights and densities if the concept is to promote height and density near transit infrastructure. Such appeals must be allowed to ensure implementation of provincial policy.

The appropriate reform is to impose a timeline for municipalities to implement policies promoting height and density near transit infrastructure and allow appeals of minimum/maximum heights and densities if such appeals seek to increase the minimum/maximum heights and densities.

Conclusion

As stated in the Ministry's backgrounder, Bill 139 would represent a departure from the current "standard of review" for land use planning appeals, where the OMB is permitted to overturn a municipal decision based on evidence and applicable policies, with the focus being on achieving the "best" planning decision. For our clients, it is counterintuitive that reforms are being proposed that do not seek to promote the "best" planning decisions.

Ontario's planning system should be about achieving the "best" planning decisions through an efficient, effective and accessible public process with appropriate procedural safeguards to ensure fairness. The OMB has provided considerable value to the public good because decisions made by the OMB are an important counterbalance to the local political pressures of municipal councils. In other words, the local interest is not always the public interest.

Our clients are very concerned that Bill 139 does not focus on achieving the "best" planning decisions and that the LPAT will fail to provide a forum where the principles of fairness, quality, consistency, and transparency are fundamental, and the provision of administrative justice is the first order of business. Further, Bill 139's proposed reforms will not reduce the number of

appeals, enhance public participation in the planning process (particularly at the municipal level) or increase the use of mediation.

On behalf of our clients, BILD and OHBA, we appreciate the opportunity for consultation and look forward to significant revisions to the proposed legislative amendments in Bill 139 through continued dialogue with the government to improve Ontario's land use planning and appeals system.

Yours truly,

Goodmans LLP

David Bronskill
DJB/
cc: Client

6723177

Massive York Mills project heads to OMB

BY JORDAN BOYES

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A rendering of the project

The York Mills–Leslie Residents Association (YMLRA) met on Sept. 28 to discuss fundraising options to help oppose the stacked townhouse development proposed on the corner of York Mills Road and Leslie Road at the upcoming Ontario Municipal Board (OMB) hearing on Jan. 10.

The proposal for 260 townhouses at 740–750 York Mills Rd. was rejected by Toronto City Council in June, and the developer, Minto Group Inc., appealed to the OMB shortly after. Despite being refused by Toronto City Council, the proposal earned a favourable report from city staff. However, local residents have cited concerns pertaining to over-intensification of the site, a loss of green space and mature trees, and an increase of traffic.

The YMLRA has asked its members for contributions of $200 per household to reach the goal of $100,000 in order to hire a planner and legal counsel. Members are also being asked to recruit residents to the group.

According to vice-president of development for Minto Properties Inc., Matthew Kingston, “Minto Properties is continuing to work with the councillor, city staff and local residents to hear their feedback and explore potential options for the vision of this community. As always, our view is to find a mutually acceptable plan for all parties,” he said.

A statement was released by Sherman Brown Barristers & Solicitors, the firm representing Minto, stating the development would reduce the number of units from 260 to only 204 in order to dedicate land for greenery and park space and would also reduce the parking area needed.

YMLRA president Tom Weinberger said the group remains receptive to revisions but will continue to prepare for the hearing.

"[The association will] continue to negotiate with Minto about the size and scope of their proposed project, with a view to potentially downsize it, but leave the option open for opposition at the OMB level," he said.

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