Review of the Ontario Municipal Board
Response to Public Consultation Document

Submitted by
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The Unionville Residents Association (URA) is pleased to have this opportunity to comment on potential changes to the Ontario Municipal Board. We represent the residents of Ward 3 in Markham, which is arguably one of the most development-intensive wards in any municipality in Ontario. Markham Centre is lies within the boundaries of Ward 3.

Resolving planning disputes is a critical function in Ontario and particularly in Markham. As a party and participant in several OMB hearings the URA has several times witnessed examples of dysfunction in the current planning appeal process.

However, we are somewhat disappointed in that the questions in the Public Consultation Document often hint at but fail to address the core issue regarding the role of the OMB. Currently the board typically substitutes its judgement for that of a local council. (And frankly local councils often like it that way, particularly when their lack of a decision leads to an OMB hearing. They can avoid politically difficult decisions while hiding behind the OMB.)

A true appeals tribunal would judge the process that led to a municipal decision and whether that process led to a reasonable outcome. If it judged that a municipality had failed those tests it would simply send the case back to the local council. This would force councils to confront the political forces in their municipalities while at the same time

keeping decision making local where councils (at least Markham council) tend to claim they would prefer decisions to be made.

The Unionville Residents Association feels strongly that the OMB should be reconstituted as a true appeals tribunal without the power to impose particular planning decisions.

Nonetheless we have in most cases below responded to the questions of the Public Consultation Document assuming that in some form, perhaps reduced, the OMB will retain its current powers to impose planning decisions. But to repeat and emphasise, the URA does not support that outcome.

Theme 1: OMB's Jurisdiction and Powers

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

The URA supports the suggested limits on appeals of provincial land use planning decisions. The Smart Growth for our Communities Act (Bill 73) seems already to have addressed this issue in large part. In fact the URA would suggest that no aspect of an in-force Official Plan that has been approved by the province and is less then 5 years old should be appealable by a private appellant.

However, underlying this position is the need for regular and speedy Official Plan reviews and approvals. Though the City of Markham argues that through regular amendments OPs are typically up to date at all times, this is not the same as a thorough review resulting in a "new" OP. We believe that more thorough reviews are required on a more regular basis. In Markham the current review was years late in starting and, although it is dated 2014, is still under appeal before the OMB. We would hope that the limits on appeals relative to provincial policy, and removal of the right to appeal a whole OP, would help avoid this situation. But more generally, if any limits are to be placed on appeals of OPs it is essential that municipalities thoroughly update their OPs more regularly than is often the case.

We are pleased to see the requirement in Bill 73 that new OPs be developed every 10 years (vs. 5 years). This is more realistic and within the resources of most municipalities. But some OP reviews currently go beyond even 10 years. The province must find the means

to ensure that OPs are kept up to date – and not via appeals of out-of-date OPs to the OMB.

The URA is also pleased that under Bill 73 appellants must include clear reasons for their appeal when they intend to argue that an OP is inconsistent with a Provincial plan. The OMB should have the right to pre-screen appeals and decide whether or not to hear them based on an initial notice of appeal. If the Province has approved an OP it would seem unlikely that the OP would be inconsistent with a Provincial plan. Wasting hearing time to arrive at that conclusion is not productive. And the OMB should have the right to overturn provincial approvals only in exceptional circumstances.

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

The URA supports such restrictions. The Unionville GO/Viva Mobility Hub is being planned within the boundaries of the area represented by the URA. We support the high densities planned for that part of our community. While our members currently live mostly in single-family homes, we are more than aware of the negative traffic and environmental impacts of suburban sprawl and the need to relieve congestion with transit-friendly development.

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

The URA believes that, like an OP, a secondary plan should not be appealable for five years, rather than the suggested two years. A great deal of work can be required to create a strong secondary plan and related municipal decisions should be respected. However, like OPs, secondary plans would need to be reviewed regularly.

Interim control bylaws should not be appealable.

We note that Bill 73 allows for the optional creation of Local Appeal Bodies (LAB) at the upper tier level (i.e. York Region). The URA strongly supports the required creation of local appeal bodies to deal with issues that come before committees of adjustment, including site plans. (The province should also explore the option of replacing the OMB entirely in larger municipalities with such LABs.)

The URA agrees that the OMB should be able to address only the aspects of an OP dealt with by the municipal council. But again, if an OP or secondary plan is less than five years old, a council decision that is within the bounds of those plans should not be appealable.

New information that arises in a hearing should be sent back to council for a re-evaluation of its original decision.

Q4. What is your view on whether the OMB should continue to conduct de novo hearings?

The URA supports the abolition of de novo hearings. They are needlessly expensive and time consuming. And they take no account of the decisions or analyses of democratically elected councils or the work of municipal planning staff who work on their behalf. It is our understanding that this issue has already been addressed, at least in part, in Bill 73 which requires the OMB to have regard for information before a municipal council when hearing appeals, even in situations where the council has failed to make a decision.

However, to refer back to our introductory comments above, the larger issue in question here is whether the OMB should act as a true appeals tribunal which should review only the decision making process of municipal councils and not substitute its own judgement. We strongly support reconstituting the OMB as a true appeals tribunal. (See our response to Q5 below.)

Q5. If the OMB were to move away from de novo hearings, what to you believe is the most appropriate approach and why?

To the degree that there is no commonly accepted definition of "good planning" and that municipal planning apparatuses are much more sophisticated than they once were, the OMB should focus on the validity of a decision and whether it falls within the range of reasonable options, rather than seeking the "best" option. The OMB should limit its review to whether a planning decision falls within properly up-to-date OPs, secondary plans and related provincial laws and policies. It is not clear why the OMB should substitute its judgement for that of a council supported by a professional planning department, if the appropriate processes have been followed. In this sense the role of the OMB should become that of a true appeals

tribunal, judging only the fairness of the decision making process and the reasonableness of the outcome within broad parameters.

In the Public Consultation Document the two options offered as responses to this question are presented in an either/or fashion. We do not see them as mutually exclusive. One test, perhaps among others, of a reasonable decision would be that it falls within the regulatory framework. We feel that this regulatory test is important in so far as determining whether something is "reasonable" is an overly vague test open to manipulation by lawyers and others involved in the business of OMB appeals. The definition of reasonableness might be clarified through case law, but that would take years, and the objective of the OMB is to keep disputes out of the courts.

Without de novo hearings and without the ability of the OMB to impose planning decisions, councils would be compelled to decide on all applications within the statutory time frame. They would no longer be able to duck responsibility by shuffling decision-making to the OMB. This is appropriate in a democracy.

Q6. From your perspective should the government he 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?**

The URA supports application of policies in place at the time of decision, particularly if delays are related to activities of the applicant (e.g. land flipping) or if larger planning processes are already in play at the time of the application.

For example in the eastern precinct of Markham Centre Metrolinx is leading a "Mobility Hub Study". All planning in the area hinges on that study. As a result it is estimated that a final secondary plan will not be complete for 3 to 5 years. If a development application were received today any decision would in theory be based on current policies even if the final decision was not made until the new secondary plan was complete. Basing the decision on policies in place at the time of the application would undermine the planning process.

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?

Our experience with the CLO is mixed. They failed to return a call regarding a procedural matter in a case before the OMB but they also made an excellent presentation to the Markham's association of ratepayer groups, MAGIC. The CLO could certainly do much more to educate the public about the OMB and its processes.

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

No.

Q9. Would the above changes support greater citizen participation at the OMB?

The URA supports efforts to assist citizens to access planning and legal assistance with respect to OMB appeals. (We were once party to an appeal where we estimated that appropriate legal representation would have cost in the neighbourhood of $80,000, not including planning expertise.)

However, please note that in its responses elsewhere in this document the URA supports measures to give greater weight to municipal decisions such that fewer issues should be appealable to the OMB as a true appeals tribunal. However we also support reform of the OMB's formal and adversarial processes if the OMB is not to become a true appeals tribunal. Either change should reduce (though not eliminate) the need to support citizen participation before the OMB.

The URA is also very supportive of the 2015 legislative changes. The Protection of Public Participation Act 2015 will, we hope, provide extra protection to citizen groups from strategic lawsuits against public participation (SLAPP). Bill 73 will hopefully encourage municipalities to better involve residents in planning decisions, (e.g. upper tier advisory committees).

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?

As noted in our response to Q9 above enhanced support for the costs of legal services and expert witnesses is required. An enhancement of the services of the CLO is also welcome.

The OMB might also consider establishing an online social media tool where citizens can share experiences and advice, and ask questions of each other and experts.

Finally, as in other areas of law, we would suggest that paralegals (e.g. appropriately trained planners) be encouraged to take on OMB cases. Colleges might be encouraged to create OMB paralegal training courses, with an appropriate designation and governance by the Law Society of Upper Canada, as with other paralegals. Lists of qualified paralegals should be made available by the OMB and by the Law Society.

Q11. Are there funding tools that province could explore to enable citizens to retain their own planning experts and lawyers?

Matching grants related to the projected length of an appeal and typical costs are one option to consider.

Q12. What kind of financial and other eligibility criteria need to be considered when increasing access to subject matter experts like planners and lawyers?

Unfortunately it is impossible to provide a precise answer to this question. There might be different criteria for individuals, businesses and community groups. The financial capacity of the participants needs to be taken into account. Also citizens and community groups must be encouraged to participate financially to the extent of their own capacity, hence our suggestion above of matching grants. The scope of the appeal in question and the extent of the direct impact on the citizens involved must also be considered. Perhaps a points system could be devised to determine eligibility for funding.

Also there should be incentives for parties with essentially the same position to work together. (In one appeal in which the URA was a party, the municipality, the conservation authority and a coalition of community groups were on the same side of the appeal yet there was no attempt to coordinate efforts and save costs.)

Theme 3: Clear and Predictable Decision Making

Q13. Qualifications for adjudicators are identified in the job description posting on the OMB website (Ontario.ca/cxjf). What additional qualifications and experiences are important for an OMB member?

The URA supports the qualifications for OMB members, Vice Chairs and Associate Chairs as described. To make the qualifications more specific to the OMB (rather than the ELTO in general) we would add requirements regarding in-depth knowledge of the Planning Act, the Provincial Policy Statement and all other relevant legislation and government policy. We are hesitant to limit membership on the board to those with prior planning expertise and experience. Fresh perspectives from other disciplines may be beneficial.

We also note how detailed and complex the list of responsibilities is. We have heard complaints from lawyers who appear before the OMB that members are not as well trained as they once were. We would encourage the creation of a rigorous training program with appropriate assessments, evaluations and practicums, perhaps in conjunction with a university, which would result in a recognised designation.

Establishment of a self-governing professional college (perhaps covering all provincial non-judicial tribunal members) might also be considered, with requirements for on-going professional development and a disciplinary system.

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

The URA supports the use of multi-member panels to improve consistency and to remove any perception of bias on the part of any single member. Panels should always include an odd number of members to prevent deadlocks.

The make up of panels should take into account the particular issues involved in the decision under review. The technical expertise of at least one member of the panel should reflect the issues before it. However it is also important that members bring some independence and fresh perspective to their cases. Therefore it is equally important that some panel members have less background in the issues before them.

We would also suggest that particular members be assigned cases to as to avoid working together too regularly. Members need to keep a professional distance from one another.

Q 15. Are there any types of cases that would not need a multi-member panel?

An appeal of a minor variance decision by a Committee of Adjustment might be considered by a single member. However that member should have some expertise on the relevant issues.

That said, elsewhere in this report the URA supports the hearing of minor variance appeals by local appeal bodies, not the OMB. LABs should be subject to the same rules as the OMB.

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

Decisions should be edited by professional editors before release. They should include bulleted lists, charts, maps and diagrams as necessary to communicate clearly. All decisions should be made available in an easily searchable public database. All printed evidence should be required in digital form and it too should be posted in the database.

If this is not already the case, the government might consider arrangements with legal publishers (e.g. Thomson Reuters) to include all OMB decisions in their offerings, with provisions to make these accessible to the public at a reasonable cost. A citizen should be able to search the database to find decisions and related evidence based on similarities of context etc.

Theme 4: Modern Procedures and Faster Decisions

Q17: Are the timelines in the Chart above appropriate, given the nature of appeals to the OMB? What would be appropriate timelines?

It would be more helpful to track actual decision data according to a range of windows. e.g. 30-40 days, 40-50 days, etc.

The URA agrees that issuance of decisions within 60 days, for OMB hearings, is reasonable.

Obviously the actual statistics relating to scheduling Minor Variance cases are wholly inadequate. Minor Variance hearings should be scheduled within 60 days, or even less, rather than 120 days. (However, elsewhere in this document, the URA supports the establishment of Local Appeals Bodies that would take minor variance appeals out of the jurisdiction of the OMB.)

Other OMB cases should be scheduled within 90 days rather than 180 days.

Please note that by restricting appeals to the OMB and reducing its current caseload, the timelines we suggest above should be reasonable.

Q18: Would the above measures help to modernise OMB hearing procedures and practices? Would they help encourage timely processes and decisions?

Assuming that the OMB retains its decision-making authority and is not reconstituted as a true appeals tribunal, as we would prefer, the URA supports all the suggestions for procedural change suggested on page 27 of the Public Consultation Document. It is important that the content of appeals remain static once they have been initiated, so that other parties can respond appropriately and are not dealing with a moving target. An appellant should not be able to introduce new or modified issues that do not correspond to its initial appeal. If they choose to do that, the case should be sent back to the local council for consideration.

Again, assuming that the OMB does not become a true appeals body the URA also supports abolition of the adversarial nature of OMB hearings, in favour of mandatory mediation and a more "round table"-style process that reduces the influence of legal tactics in favour of discussion. Active adjudication would be an essential part of a revised process.

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

The URA supports written hearings where issues are purely technical without environmental or community impact implications. For example, issues of structural and mechanical engineering, which few in a public hearing, other than the related experts, would understand, seem appropriate for written submissions only. Minor variance appeals (if they are to remain with the OMB) might also be candidates for written hearings.

However, any party to a hearing should be able to require that the hearing be held in public if they so choose.

Theme 5. Alternative Dispute Resolution and Fewer Hearings

The URA supports the changes suggested on page 29 of the Public Consultation Document and those included in Bill 73 allowing for ADR at the local level before a case proceeds to the OMB. However this support assumes that the OMB does not become a true appeals tribunal. The URA strongly supports the reconstitution of the OMB as a true appeals tribunal.

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

We can only speculate about other situations. In our own cases the developers or other parties involved clearly felt that they could do better in a hearing than in mediation. Their room for compromise was very narrow.

Also, the board members tasked with chairing the mediation sessions were not in any way active in their search for middle ground. The issues were not presented to them in any detail and they made no

effort to suggest options. Rather they simply chaired the meeting and allowed the parties to trade offers.

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

Mediation will be more successful if the grounds for appeal are narrowed, as suggested elsewhere in this document, and if the power dynamic among the parties becomes more balanced.

Currently the costs of expert advice and legal representation favour larger developers. The wide scope allowed for appeal means that some municipalities are in front of the board in one way or another almost continuously. By reducing the numbers of appeals (narrowing the grounds for appeal) municipalities can apply more reasonable budgets to the appeals they are forced to participate in. And, through provincial support of the costs of their participation, citizens too can enhance their presence at hearings. With an improved balance of power, developers will have less assurance of success in hearings and will be more willing to compromise in mediation.

Also, minor variance appeals may be most easily settled through mediation. In fact there should perhaps be a mediation mechanism required at the level of a Committee of Adjustment, long before a minor variance decision is appealed to either the OMB or a LAB.

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

It would be helpful to understand best practice in this field.

Although some cases will be more time consuming (if failed mediation is followed by a hearing), we believe that on balance there will be time (and cost) savings if a significant number of cases are settled at mediation. Mediation should always be required as a first step either at the local level, as provided for in Bill 73, or at the level of the OMB.

The question should perhaps be whether there is the option of a hearing if mediation fails. If the hearing process becomes more informal, less adversarial and with active adjudication, the line between mediation and hearings could become blurred, leading to questions as to why two processes are required.

Mediation would be inappropriate at the level of the OMB, were it to become a true appeals tribunal. In that case mediation should be required at the local level prior to a case being appealed.

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.

The URA encourages the sorts of processes suggested here, but decisions, supported in writing, should be made or at least approved by board members. We would hesitate to suggest that staff alone take on these tasks. It is important that the OMB be perceived as an open impartial tribunal, with all decisions made public.

More generally an appeal to the OMB should not be an automatic right even where a municipality may have strayed slightly from the appropriate bylaws, policies etc. For example, missed application approval deadlines should not be automatic grounds for appeal, if the municipality can justify the delays as reasonable. The OMB should focus on matters of significant public interest, not minor procedural "errors". OMB staffing should be maintained at a level that prevents it from hearing all appeals.

Q 24. Do you have other comments or points that you want to make about the scope and effectiveness of eh OMB with regards to its role in land use planning.

The URA made a submission to this Review process in September of this year. While our recommendations then covered ground similar to our responses above, we included a number of other recommend-ations. The content of our September submission that was not covered above is included here with minor amendments:

Development Permit System

It is not clear that all development applications need approval from elected councils rather than properly qualified municipal staff who have followed a properly documented and public process, including public consultations. Clearly defined and well-documented processes would avoid the politicisation of decision making in favour of either developers or other parties.

Municipal Timeline Benchmarks

New appeal approval guidelines should include benchmarks and guidelines, rather than binding deadlines for municipal approvals, against which the board can judge whether to accept or reject appeal applications.

The URA believes that the reforms suggested here would significantly reduce the numbers of board hearings and might also streamline those that do occur. The result would likely be that only the largest and most complex development applications would be brought before the board. We recommend that research be conducted to determine the typical timeframe required by municipalities to review such applications.

Deference to Municipalities and Provincial Policies

In any appeal to the OMB where there are areas of interpretation, deference should be given to municipal decisions in the absence of any evidence of lack of good faith, corruption, undue political interference, or lack of accordance with local or provincial plans, policies, bylaws, laws, regulations and the like. The onus to prove lack of good faith etc. should lie with the appellant.

The OMB should not have the authority to override provincial policies. For example Special Policy Areas, the Green Belt, the Oak Ridges Moraine, the Niagara Escarpment and other protected lands should be immune from OMB decisions that permit intensification. Where there are inconsistencies in policy, the OMB should defer to the province or its delegates (e.g. conservation authorities), not substitute it own decisions. This must be made explicit in the Board's terms of reference. We are pleased that Bill 73 seems to begin to address this concern.

Please note that this recommendation comes from a situation where the Board approved intensification in an SPA despite very clear and relevant statements in the Provincial Policy Statement brought to its attention by the Toronto and Region Conservation Authority.

We also draw attention to the recent and successful court appeal of an OMB decision in Richmond Hill. It is our perception that the OMB steps outside its jurisdiction with some regularity, yet its decisions are rarely

appealed to the courts due to the associated legal costs. A court appeal should not be required in order to limit the OMB's actions.

Committees of Adjustment

Appeals of Committee of Adjustment (COA) decisions should, in the first instance, be handled by local councils or LABs, not the OMB. As with OMB appeals, appeals to local COAs and subsequent appeals of those decisions, should be limited. COAs and councils/LABs should be able to pick those appeals they wish to hear and they should involve only situations where municipal staff have deviated from the relevant bylaws, policies and processes. We support the use of mediation at the level of COA decisions and appeals.

To clarify and limit the work of municipal staff and COAs, a clearer and more consistent definition of "minor variance" is required. We look forward to further direction from the province on this issue as a result of the passage of Bill 73. For example 5% might be the threshold for increased lot coverage. Also an elevated number of minor variances related to one application (more than 3?) should be considered together as a "major" variance beyond the jurisdiction of a COA.

Hearing Procedures: Transcripts

The current hearing process is also flawed in so far as it works like a court, but there is no transcript against which to analyse the final board decision. Some board members even fail to take notes. An audio recording of proceedings, which could be digitally transcribed if needed, seems like a cost-effective compromise to improve the perceived fairness and transparency of the process.

Precedent and Innovation

A greater reliance on precedent should be considered, to ensure greater consistency of decision-making. But it would be a mistake to completely bind board decisions in this way. It would take away the ability of municipalities and developers to innovate and to account for unique local circumstances.

We are pleased that Bill 73 appears to encourage innovation to improve design quality, energy efficiency, sustainability and other provincial objectives.

Site Visits

By default all OMB hearings, particularly those involving brown-field and infill sites, should include a site visit so that the board and all parties have a clear context for the process and the final decision. A site visit should be dispensed with only on agreement of all parties. Lack of site visits brings into question the impartiality and transparency of the process.

Experts

The URA also questions the board's over-reliance on so-called "experts". In our experience planners, in the absence of a commonly agreed definition of "good planning", often tend to drift toward the positions of their clients or employers – be they developers, municipalities or even community associations. Resolutions of differences among the experts then often rely on lawyers trying to pick apart the credibility of opposing experts. A focus on reasonable planning results can be lost in this "game".

Further, the over-reliance on expert opinion, possibly to the point of overriding or ignoring lived experience, tends to denigrate the perspectives of local residents and downplays the contributions of others with relevant expertise, even it they lack the formal academic qualifications. The result can be that the board excludes serious consideration of very real community impacts even though they cannot necessarily be quantified or backed by academic or technical studies. The terms of reference of the OMB must require due consideration of the perspectives of those directly impacted by development. (This parallels in some ways the reliance on indigenous oral history in other contexts.) We are pleased to see some of the changes in this regard in Bill 73. However we remain concerned that OMB hearings will remain a forum dominated by "experts" to the exclusion of other parties with real interests in the outcomes of hearings.