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PROVINCIAL POLICY, LOCAL DECISION-MAKING AND THE PUBLIC INTEREST: REFORMING THE ONTARIO MUNICIPAL BOARD

Submissions of the Canadian Environmental Law Association to the Ministry of Municipal Affairs and the Ministry of the Attorney General Regarding the Review of the Ontario Municipal Board (Environmental Registry No. 012-7196)

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(Environmental Registry No. 012-7196)

By
Richard D. Lindgren[1] and Monica Poremba[2]

Abstract: *The Ontario government is currently soliciting public comments on the role, structure and efficacy of the Ontario Municipal Board in the province's land use planning system. At the present time, the Board holds public hearings and renders legally binding decisions in relation to appeals brought against various municipal or provincial planning decisions. In this brief, the authors review why the Board should continue to exercise its current appellate jurisdiction over most planning appeals, but suggest a number of reforms which will assist in making the Board's hearing procedure and decision-making process more effective, efficient and equitable.*

PART I – INTRODUCTION

The Canadian Environmental Law Association (CELA) welcomes this opportunity to provide submissions to the Ministry of Municipal Affairs (MMA) and the Ministry of the Attorney General (MAG) in relation to the province's review of the Ontario Municipal Board (OMB).

CELA is a public interest law group founded in 1970 for the purposes of using and enhancing environmental laws to protect the environment and safeguard human health. Funded as a specialty legal aid clinic, CELA lawyers represent low-income and vulnerable communities in the courts and before tribunals on a wide variety of environmental issues.

Over the past four decades, CELA's casework, law reform and public outreach activities have increasingly focused on land use planning matters at the provincial, regional and local levels in Ontario. For example, CELA lawyers represent clients involved in OMB appeals under the *Planning Act* in relation to Official Plans, zoning by-laws, subdivision plans and other planning instruments. In some cases, CELA clients are the appellants, while in other cases, CELA clients are added by the OMB as parties in response to appeals brought by other persons or corporations.

In general terms, CELA's OMB cases tend to occur outside of the Greater Toronto Area, and typically involve new or expanded residential, commercial or industrial development in eastern, western and central Ontario. The overall objectives of CELA's clients in these OMB hearings include: conserving water resources; protecting ecosystem functions; preserving prime agricultural lands; safeguarding public health and safety; and otherwise ensuring good land use planning across Ontario.

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In some of CELA's quarry cases, the public hearing before the OMB also includes matters under the *Aggregate Resources Act* upon referral by the Ministry of Natural Resources and Forestry. Similarly, CELA has represented clients in landfill hearings before the Joint Board, consisting of members of the OMB and the Environmental Review Tribunal (ERT) pursuant to the *Consolidated Hearings Act*.

In addition to the above-noted OMB casework, CELA continues to participate in broader provincial planning initiatives, such as the periodic review and updating of the Provincial Policy Statement (PPS) issued under the *Planning Act*.[3] CELA also filed submissions during the MMA's Development Charges System Review in 2013-14, and appeared before the Standing Committee on General Government in relation to the review of the *Aggregate Resources Act*.

Similarly, CELA recently co-authored and submitted detailed comments during the Coordinated Land Use Planning Review of the major provincial land use plans (Niagara Escarpment Plan, Oak Ridges Moraine Conservation Plan, Greenbelt Plan, and Growth Plan for the Greater Golden Horseshoe). Moreover, as a founding member of the Coalition on the Niagara Escarpment, CELA has a lengthy history of involvement in proceedings under the *Niagara Escarpment Planning and Development Act*, including representing clients in appeal hearings held by the Niagara Escarpment Hearing Office.

PART II – CELA'S GENERAL COMMENTS ON OMB REFORM

From our public interest perspective, CELA has carefully considered the key themes and numerous questions raised in the province's consultation document on the OMB Review.[4] In addition, CELA staff participated at the town hall meeting held by the MMA in Toronto on November 15, 2016. On the basis of our OMB experience over the years, CELA has reached five general conclusions about the OMB's appellate function, public hearing procedure, and decision-making process.

First, CELA views the issue of OMB reform as a matter of access to justice. In principle, any Ontarian interested in, or potentially affected by, land use planning decisions must have a meaningful opportunity to fully participate in the decision-making process, particularly where such decisions are appealed to the OMB since it effectively serves as the final arbiter of planning disputes.[5] In this regard, we concur with the OMB Review Consultation Document that the overall goal of the review exercise is to ensure that "different views about land use can be resolved fairly at less cost and in an accessible manner."[6] Accordingly, any potential changes to the OMB (or the *Planning Act*) which are inconsistent with this overarching objective should not be considered or implemented.

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[3] CELA's numerous briefs, submissions and backgrounders on land use planning in Ontario are available on the CELA website: http://www.cela.ca/collections/land/land-use-planning-ontario

[4] MMA and MAG, *Review of the Ontario Municipal Board: Public Consultation Document (October 2016)* [OMB Review Consultation Document].

[5] While OMB decisions are subject to appeal to the Ontario Divisional Court, such appeals are limited to questions of law, and leave to appeal must be obtained from the Court by the prospective appellant: see *Ontario Municipal Board Act*, section 96.

[6] OMB Review Consultation Document, page 2.

Second, CELA endorses the guiding principles that are intended to generally frame the OMB Review: protect long-term public interests; provide transparency in hearing processes and decision-making; maintain or enhance access to dispute resolution; and minimize impacts on the court system.[7] On this latter point, CELA submits that it is far preferable to have planning appeals adjudicated by a specialized administrative tribunal rather than a reviewing court, particularly in light of the cost, complexity and time-consuming nature of judicial proceedings.

Third, CELA agrees with the OMB Review Consultation Document that the OMB plays a fundamentally important role in Ontario's land use planning system.[8] Accordingly, CELA strongly submits that the OMB should continue to serve as an independent quasi-judicial tribunal that is empowered to hear and decide disputes arising under the *Planning Act* and related statutes. In this regard, CELA does <u>not</u> support the arguments sometimes made by other stakeholders that the OMB should be abolished in its entirety.

Fourth, CELA submits that the OMB's jurisdiction must continue to geographically extend to all parts of Ontario where *Planning Act* decisions are being made by public officials. On this point, we are aware that some commentators[9] have suggested that all land use planning decisions by larger municipalities (e.g. Toronto) should no longer be subject to OMB oversight.[10] Proponents of this position generally argue that these municipalities are mature, sophisticated, and have dedicated in-house planning staff, and therefore no longer require OMB supervision.

As discussed below, Ontario municipalities[11] (including Toronto[12]) are already empowered to establish local bodies that can hear and decide appeals relating to minor variances and consents, but it appears that no municipality has elected to do so yet. While CELA has no objection to the creation of local appeal bodies for minor planning disputes, CELA is opposed to any wholesale removal of the OMB's appellate jurisdiction over municipal decisions pertaining to official plans, zoning by-laws, plans of subdivision or other significant planning instruments.

In CELA's view, there is no persuasive evidence that a bigger municipality necessarily makes better planning decisions, or properly interprets and applies provincial planning policies in every case. In addition, insulating certain municipalities' planning decisions from OMB appeal will undoubtedly result in aggrieved parties turning to the courts for relief, which is contrary to the above-noted principle of minimizing impacts on the judicial system. Moreover, if Toronto is exempted from OMB's appellate jurisdiction, it is reasonable to anticipate that many other large or medium-sized municipalities across Ontario will seek similar exemptions. In these circumstances, it is unclear to CELA which criteria or benchmarks will be used to determine whether a particular municipality is sufficiently large or urbanized enough to have all of its planning decisions escape the expert scrutiny of the OMB. Accordingly, CELA concludes that

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[7] *Ibid*, page 5.
[8] *Ibid*, pages 3 to 4.
[9] See, for example, Martin R. Cohn, "Time to rein in OMB", *Toronto Star*, November 17, 2016, page A14.
[10] Many Ontario municipalities (including Toronto and Ottawa) have established Committees of Adjustment to deal with applications for minor variances and consents: see *Planning Act*, section 45. However, appeals from committee decisions are heard and decided by the OMB.
[11] *Planning Act*, section 8.1.
[12] *City of Toronto Act, 2006*, section 115.

there is no compelling public policy justification for fragmenting Ontario into a patchwork of two different tiers: municipalities in which OMB appeals are possible, and municipalities in which OMB appeals are no longer available as a matter of law. In CELA's view, the OMB should retain its province-wide jurisdiction.

Fifth, it is our submission that the OMB should continue to hold *de novo* hearings on most matters that are currently appealable under the *Planning Act*, as discussed below in more detail. At the same time, CELA is not advocating in favour of lengthy and costly OMB hearings, which can quickly drain the limited resources of CELA's clients. To the contrary, CELA submits that the OMB Review should systematically evaluate procedural and/or substantive changes which will help make the current OMB hearing process more effective, efficient and equitable. However, achieving this outcome will require more than mere tweaks to the OMB's *Rules of Practice and Procedur*e or expanding the capacity of the Citizen Liaison Office. Instead, CELA concludes that a comprehensive package of appropriate legislative, regulatory, policy and administrative reforms should be developed by the Ontario government with meaningful public participation as soon as possible. Among other things, this reform package must address the daunting economic barriers that continue to impair or preclude meaningful citizen participation in OMB hearings.

Our specific responses to the OMB Review Consultation Document are outlined below in Part III of these submissions.

PART III – CELA'S RESPONSES TO CONSULTATION QUESTIONS

To facilitate public feedback, the OMB Review Consultation Document contains two dozen questions, which have been organized into five main themes. The questions posed under each of these five themes are reproduced below, followed by CELA's findings and recommendations regarding the issues under consideration.

Theme 1: OMB Jurisdiction and Powers

The OMB Review Consultation Document identifies various proposals which are currently being considered under this theme, including:

- protecting public interests for the future by limiting some appeals;
- bringing transit to more people by limiting certain appeals;
- giving communities a stronger voice by limiting certain appeals, expanding the authority of local appeal bodies, clarifying a limitation on the OMB's authority, and identifying obligations for the OMB;
- moving away from *de novo* hearings; and

- determining when new rules should apply to planning matters in progress.[13]

In relation to these proposals, the OMB Review Consultation Document sets out several questions, as discussed below.

Question 1: What is your perspective on the changes being considered to limit appeals on matters of public interest?

The OMB Review Consultation Document suggests that certain provincial land use planning decisions should no longer be subject to appeal to the OMB.[14] Examples of such provincial decisions include official plan approvals or amendments, especially those related to provincial land use plans or interests, and amendments to Ministerial zoning orders under the *Planning Act*.

CELA agrees that where the Minister has issued a zoning order, it makes sense that any subsequent requests to amend the order should be reviewed and decided by the Minister, not the OMB. However, CELA has some concern about the proposal to immunize other provincial decisions from OMB appeals.

First, there is a paucity of detail about precisely which parts or aspects of a provincially approved official plan (or amendment) would no longer be subject to OMB appeal. The OMB Review Consultation Document offers only two illustrative examples: (a) farmland preservation; and (b) "orderly development of safe and healthy communities."[15] CELA concurs that these are matters of provincial interest that require careful consideration at both the municipal and provincial levels. However, it remains unclear which other land use matters addressed in provincially approved official plans or amendments would not be appealable. If the intent is to oust OMB appeals on any provincial interest listed in section 2 of the *Planning Act* or addressed in the PPS, then CELA submits that this overbroad limitation cannot be justified since it would effectively make MMA-approved official plans appeal-proof, more or less in their entirety since virtually all official plan policies directly or indirectly address matters of provincial interest.

Second, there should be no automatic assumption that provincial decisions on official plans are inherently protective and sufficiently robust, and therefore require no further scrutiny in a public hearing before the OMB. When making closed-door decisions on official plans, the MMA is not subject to the important procedural safeguards employed at OMB hearings (e.g. right to full/timely disclosure, right to cross-examine on evidence, etc.) in order to reach an informed decision on the merits of the land use planning dispute. Thus, in CELA's view, the continuation of a general right of appeal ensures that aggrieved parties can still take their concerns to the OMB if necessary, especially where such parties maintain that the official plan (or the provincial approval thereof) does not go far enough in terms of addressing or protecting matters of public interest. In short, an OMB appeal serves as an important safety-valve in cases where there are unresolved issues or outstanding concerns about an official plan, even if approved by the province.

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[13] OMB Review Consultation Document, pages 15 to 20.
[14] *Ibid*, page 17.
[15] *Ibid.*

Third, before OMB appeals can be restricted as proposed, the OMB Review exercise should be evidence-based so that an informed decision can be made on whether appeal restrictions are needed to protect the public interest. However, the OMB Review Consultation Document contains no statistical data on the number or nature of official plan appeals that should be limited, nor any analysis of the outcome of such appeals when decided by the OMB. In our view, this kind of detailed analysis should be undertaken by the MMA in order to objectively determine whether certain appeal limitations are warranted, and if so, to systematically identify the precise types of official plan appeals that should no longer be available under the *Planning Act*.

For the foregoing reasons, CELA strongly cautions against implementing a blanket prohibition against appealing provincial decisions on official plans or amendments.

CELA RECOMMENDATION #1: The Ontario government should not generally prohibit all OMB appeals against provincially approved official plans or amendments. If there is a demonstrable need to limit certain types of appeals, then the Ontario government should clearly identify them and solicit further stakeholder input before proceeding with any proposed limitation on public rights of appeal currently available under the *Planning Act*.

By volume, the greatest number of OMB cases involve appeals related to minor variance applications.[16] CELA's clients are generally not involved in such appeals, and CELA has no objection to having minor variance appeals heard and decided by local appeal bodies established by municipalities, as opposed to the OMB. However, as noted by the OMB Review Consultation Document, no municipalities have elected to establish local appeal bodies, despite being empowered to do so since 2007.[17] Accordingly, the province should consider providing technical assistance, guidance materials and/or fiscal support to encourage municipalities to create local appeal bodies, particularly since this mechanism could significantly reduce the sheer number of minor variance appeals currently heard by the OMB.

CELA RECOMMENDATION #2: The Ontario government should consider providing technical assistance, guidance materials and/or fiscal support to encourage municipalities to create local appeal bodies which hear and decide minor variance appeals.

Question 2: What is your perspective on the changes being considered to restrict appeals of development that supports the use of transit?

CELA has long been supportive of compact, sustainable and transit-supportive forms of development across the province. However, we find the wording of the proposed restriction on transit-related appeals to be highly puzzling if not unduly vague.

For example, the OMB Review Consultation Document indicates that Ontario government may "restrict" (not prohibit) appeals of official plans, amendments, and zoning by-laws in relation to "development that supports provincially funded transit infrastructure such as subways and bus

[16] *Ibid*, page 11.
[17] *Ibid*, page 17.

stations."[18] The apparent rationale for such restrictions is to ensure "there are sufficient densities to support transit investments."[19]

CELA agrees that population density is an important planning consideration, but submits that transit-supportive density *per se* does not necessarily mean that a particular development warrants approval without the possibility of OMB oversight. Indeed, it is easy to conceive of situations where the provincial interest in public transit may be confronted by competing provincial interests under other PPS policies. For example, a large, multi-unit subdivision that is proposed at a greenfield location (e.g. prime agricultural land) in close proximity to sensitive natural heritage (e.g. provincially significant wetland) may be conveniently located along a GO train station or bus route. However, the mere fact that the development contains transit-supportive density does not mean that the development should be approved without any prospect of appeal to the OMB, particularly if there is apparent inconsistency with other applicable PPS policies.

Accordingly, CELA submits that the Ontario government should provide further particulars on precisely how (or on what grounds) that transit-related appeals to OMB should be restricted.

CELA RECOMMENDATION #3: The Ontario government should clarify the kinds of restrictions which are being proposed for transit-related appeals to the OMB. Further consideration should be given to situations where the proposed development appears transit-supportive, but may be inconsistent with other relevant policies in the PPS.

Question 3: What is your perspective on the changes being considered to give communities a stronger voice?

The Ontario government is considering various changes in the *Planning Act* regime to ensure that "more" land use decisions can be made locally.[20] CELA has no objection to the following proposals:

- prohibiting appeals, for a two-year period, against municipal refusals to amend a new secondary plan;

- prohibiting appeals against municipal interim control by-laws;

- expanding the authority of local appeal bodies (where established) to hear and decide appeals against site plans; and

- clarifying that in official plan appeals, the OMB is limited to only dealing with the same parts of the official plan that were decided by the municipal council.

However, CELA is greatly concerned about the provincial proposal that if "significant new information" arises at an OMB hearing, then the OMB should be "required" to send the matter

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[18] *Ibid*, page 18. See also *Planning Act*, section 8.1.
[19] *Ibid*.
[20] *Ibid*, pages 18 to 19.

back to the municipal council "for re-evaluation of the original decision."[21] The apparent rationale for this change is to "ensure that the OMB has the benefit of council's perspective on all significant information."[22]

In our view, this proposal is plagued by several intractable problems. First, from a practical perspective, it is unclear what is caught by the ambiguous term "significant new information," which is supposed to serve as the trigger for pausing the OMB proceedings and referring the matter back to the municipality. For example, does "new" and "significant" mean every document, map, report or expert opinion generated after the municipal decision (or non-decision), or is it limited to just highly probative information only? Does the OMB make the determination of what is sufficiently "new" or "significant"; if so, on what basis, and can this determination be made on the OMB's own initiative or upon motion by the parties? In light of these and other unresolved questions, CELA submits that this provincial proposal appears impractical and uncertain.

Second, in our experience, it is not unusual for the OMB hearing process to generate new evidence, perspectives and expert opinions which were not considered by the municipality before it made (or refused to make) the land use planning decision under appeal. Indeed, this is one of the benefits of the hearing process, insofar the parties generally present the OMB with more extensive documentation than what may have existed at the municipal level. Given the quasi-judicial nature of OMB hearings (which must comply with the *Statutory Powers Procedure Act* (SPPA)), CELA submits that the OMB is far better placed than the municipality to decide what weight, if any, should be accorded to any new information tendered by the parties.

Third, sending the matter back for reconsideration by the municipality is inconsistent with the *de novo* hearing model currently used by the OMB and supported by CELA, as discussed below. In short, the OMB should not be confined to the record that was placed before the municipal council. Instead, it should be free to receive, assess and act upon all relevant evidence presented at the public hearing, irrespective of whether the evidence was considered by the municipality at first instance.

Fourth, if the intent of the provincial proposal is to ensure that the OMB receives the municipality's perspective on new information, then CELA notes that in most instances, municipalities are (or should be) already involved in the OMB hearing. Accordingly, if "new" and "significant" information is presented at the hearing, then municipalities can readily provide its "perspective" to the OMB through evidence and argument. Put another way, there is no practical utility or value-added benefit to be gained in sending a matter back to the municipality where the municipality is (or could become) a party in the OMB proceedings.

Fifth, stopping the OMB hearing and sending the matter back to the municipality appears clearly inconsistent with stated provincial objective of ensuring timely OMB decisions. On this point, CELA notes that the OMB Review Consultation Document does not specify the timeframe in which the municipality should re-evaluate the new information and reconsider its original

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[21] *Ibid*, page 18.
[22] *Ibid*.

decision. Thus, remitting matters back to the municipality appears to be a recipe for further delay and additional cost to the parties.

Sixth, the provincial proposal is unclear as to what is supposed to happen at the municipal level if a matter is reconsidered upon remittance from the OMB. Is the municipality supposed to hold another public meeting under the *Planning Act*, or is the matter to be re-evaluated *in camera* behind closed doors? Can hearing parties (or members of the public) make submissions or present further evidence to the council? How and when is the municipality supposed to report the outcome of its further deliberations to the OMB? If the municipality decides to reverse or alter its original decision, will a fresh appeal be required by an aggrieved party, or will the OMB simply "have regard" for the updated municipal position?[23] Unless and until these key procedural questions are satisfactorily answered, it is premature for the province to be considering measures that necessitate mid-hearing stoppages so that municipalities can re-evaluate (or bootstrap) their original decision.

For the above-noted reasons, CELA does not support the provincial proposal to require the OMB to step aside and send the subject matter of the appeal back to the municipality for "re-evaluation." In our view, once the OMB is seized with jurisdiction over a *Planning Act* appeal, it is the OMB that should continue to hear and ultimately decide the matter, not the municipality whose decision (or non-decision) prompted the appeal in the first place. Therefore, after the municipality receives a complete application under the *Planning Act* and renders its statutory decision on the application, CELA submits that the municipality is essentially *functus* in terms of decision-making authority, and any subsequent appeals from the municipal decision must be solely determined by the OMB. However, any adjournments that may be appropriate in light of newly generated information should remain at the OMB's discretion, as opposed to becoming a mandatory requirement in every case.

CELA RECOMMENDATION #4: The OMB should not be legally required to refer a matter back to the municipality for re-evaluation if new significant information is presented at the OMB hearing.

Question 4: What is your view on whether the OMB should continue to conduct de novo hearings?

The OMB Review Document indicates that the Ontario government is considering "moving the OMB away from *de novo* hearings" in order to "give more weight to municipal and provincial decisions."[24] Potential legal options to implement this proposed change include: (a) requiring the OMB to review municipal/provincial decisions on a standard of reasonableness; or (b) authorizing the OMB to only overturn those decisions which are contrary to local or provincial policies.[25]

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[23] *Planning Act*, section 2.1.
[24] OMB Review Consultation Document, page 19.
[25] *Ibid*.

CELA strongly objects to any measures which are intended to transform OMB's *de novo* hearings into a less robust type of appellate review, or which are otherwise intended to tightly circumscribe the nature of the OMB's current jurisdiction over *Planning Act* appeals.

First, CELA submits that planning appeals should be decided on their merits, and there should be no presumption that the impugned municipal or provincial decision was correct. In short, OMB appeals are not analogous to judicial review applications, where curial deference to a specialized administrative decision-maker may be warranted, and where the principal question is typically whether the decision-maker reached a defensible outcome from a range of reasonable options. In our view, since OMB appeals usually involve one or more matters of provincial interest and invariably trigger the application of provincial planning policies, it is imperative that the OMB should remain empowered to make the best planning decision available on the hearing record, rather than determine whether the municipal decision was merely "reasonable" or "valid."[26]

Second, importing the "reasonableness" standard of review from administrative law jurisprudence will do little to prevent OMB appeals from being pursued in the first place. If anything, the same volume of OMB appeals may continue to be experienced, but the grounds of appeal will simply shift to whether the decision was unreasonable. Thus, if the Ontario government is interested in reducing the number of OMB appeals or expediting the OMB hearing process, then changing over to a "reasonableness" standard of review will do little to accomplish these objectives.

Third, despite the leading Supreme Court of Canada decision in *Dunsmuir*,[27] CELA notes that there has been continuing jurisprudential and academic debate over how the courts should apply the reasonableness standard in judicial review proceedings. Thus, it can be anticipated that similar uncertainty, unpredictability and inconsistency will arise in the OMB context if *Planning Act* appeals are to be determined solely on the basis of reasonableness. This is particularly true since the judicial doctrine of *stare decisis* does not apply to OMB decisions, and what may appear to be reasonable in one case may be adjudged to be unreasonable in another case. Accordingly, CELA fails to understand how provincial interests are advanced or safeguarded by attempting to superimpose a subjective "reasonableness" standard when the OMB is deciding appeals under the *Planning Act*.

Fourth, it must be recalled that the reasonableness standard has evolved within administrative law in order to clarify when reviewing courts should – or should not – intervene in specialized administrative decision-making. At the present time, the prevailing judicial trend is for courts to decide true questions of jurisdiction on a correctness standard, and to decide questions of fact, or mixed law and fact, on the reasonableness standard. In our view, this demarcation line may make sense in the judicial review context, but it has little or no applicability when the OMB is adjudicating a *Planning Act* appeal. In our view, the appropriate test to be applied by the OMB is not reasonableness, but whether the proposed development is consistent with the PPS and official plan policies, and whether it otherwise constitutes good land use planning.

[26] *Ibid*.
[27] *Dunsmuir v. New Brunswick*, 2008 SCC 9.

Fifth, CELA submits that OMB appeals should be decided on the best available evidence, including information, data or opinions that post-date the decision or approval under appeal. For example, as noted above, it is not uncommon for OMB hearing parties to present expert evidence that was not in existence prior to the municipal or provincial decision under appeal. In our view, this important evidence should not be excluded, but instead should be considered and given appropriate weight by the OMB when conducting *de novo* hearings and deciding the merits of *Planning Act* appeals.

Sixth, we note that the ERT continues to hold *de novo* hearings when it is deciding appeals under the *Environmental Protection Act* and the *Ontario Water Resources Act*.[28] From a law and policy perspective, the environmental appeals heard by the ERT are substantially similar to the planning appeals heard by the OMB (e.g. complexity of the issues, number of parties, competing public and private interests, etc.). Given that the OMB and ERT are both key components of the Environment and Lands Tribunal Ontario (ELTO), CELA is unaware of any compelling public interest justification for differentiating how appeal hearings should be held by ELTO bodies.

Seventh, if the Ontario government proceeds with this proposed change, then it will inevitably cause CELA's clients and other public interest representatives to incur additional expenses in the pre-hearing phase. For example, if the OMB's review is restricted to the record before the decision-maker, then interested persons and groups will have to retain experts to prepare and submit detailed reports at the earliest stages of the planning process. However, if there is a subsequent appeal to the OMB, then the same experts will have to be retained to prepare and present the same opinion evidence to the OMB at the public hearing. While developers may be well-positioned to absorb, pass along, or write-off these extra expenditures, the clients represented by CELA do not have the financial resources to pay twice to present their side of a land use dispute. This is particularly true in the absence of any participant funding program for OMB hearings (see below). Thus, implementing this change may have the unintended consequence of creating additional financial barriers to citizens or groups who want to play a meaningful role in land use planning system.

For these reasons, CELA submits that the OMB should continue to hold *de novo* hearings under the *Planning Act*. In addition, CELA does not support any attempt to change the current language of the *Planning Act*, which directs the OMB to "have regard" for the municipal decision regarding the planning instrument under appeal.[29] CELA submits that this provision is both reasonable and workable since it requires the OMB to carefully consider the municipal decision, but, at the same time, the Board is not slavishly bound by the municipal decision. In our view, this approach strikes an appropriate balance between local decision-making and independent oversight by the OMB.

Some stakeholders have expressed concern that the *Planning Act* empowers unelected OMB members to overturn decisions made by democratically elected municipal councils, which are presumed to be more closely attuned to community views on land use planning. However, CELA maintains that such concerns are misplaced and overstated, and are reminiscent of similar (and

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[28] *Environmental Protection Act*, section 145.2; *Ontario Water Resources Act*, subsection 110(10).
[29] *Planning Act*, subsection 2.1(2).

equally unpersuasive) arguments that unelected judges should not set aside laws, regulations or statutory decisions made by duly elected legislatures or Ministers of the Crown if they violate the *Charter of Rights and Freedoms*.

Moreover, such arguments overlook the fact that there are *Planning Act* appeals where OMB members have regard for municipal decisions under appeal, and ultimately uphold the decisions against attacks by prospective developers.[30] However, in other cases where a municipal approval of proposed development appears to be inconsistent with the PPS, contravenes official plan policies, or otherwise does not constitute good planning, then the OMB must "have regard" for the municipal decision, but there should be no legitimate expectation or legal requirement that the impugned decision will be upheld by the OMB. In such cases, municipalities are free to appear at the OMB to defend their decisions if appealed by local residents, but the municipal decision *per se* should not be legally binding on the OMB nor dispositive of the appeal.

In CELA's view, the bottom line is that if a municipality takes its planning responsibilities seriously, ensures consistency with the PPS and official plan policies, and bases its decision on cogent and complete evidence, then the municipality will be well-positioned to convince the OMB to uphold its planning decision on the merits. Conversely, where a municipality has injudiciously used its *Planning Act* powers to approve development applications that are incomplete, questionable or unsupportable under the current law/policy framework, then the OMB serves as an important check on such ill-advised exercises of municipal discretion. Put another way, CELA would be highly concerned about what some municipalities may be tempted to do or decide under the *Planning Act* if the possibility of an appeal to a *de novo* OMB hearing were to be removed. In our view, *de novo* hearings provide an important element of legal accountability, and ensure that the best planning decision is made on the best available information.

CELA RECOMMENDATION #5: The OMB should continue to hold *de novo* hearings under the *Planning Act*, and should continue to have regard for the municipal decision or approval under appeal.

Question 5: If the OMB were to move away from de novo hearings, what do you believe is the most appropriate approach and why?

As noted above, CELA does not agree that the OMB should move away from *de novo* hearings.

Question 6: From your perspective, should the government be looking at changes related to transition and the new planning rules? If so:

- *what is your perspective on basing planning decisions on municipal policies in effect 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?*

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[30] See, for example, *Miller Paving Ltd. v. McNab/Braeside (Township)*, 2015 CanLII 70369, where the municipal council refused to approve rezoning that would have enabled the construction of a hot mix asphalt plant near a rural residential area. The municipality's refusal was upheld by the OMB, and leave to appeal the OMB decision to the Divisional Court was refused: 2016 ONSC 6570.

The OMB Review Consultation Document notes that there are two competing views on when new or updated planning rules should apply to "in the mill" applications: (a) planning decisions should be based on the most up-to-date planning documents; or (b) planning decisions should only be based on planning documents in existence at the time when an application is filed.[31]

CELA strongly submits that all planning decisions should be made in accordance with the most current version of the relevant planning rules, rather than the rules that were previously in effect when applications are first filed by proponents. While advocates of the latter position argue that "fairness" requires decisions to be limited to the existing rules when the application was filed, CELA maintains that proponents who require planning approvals have no vested development rights, and therefore common law fairness considerations are irrelevant to the merits of the planning application. In our view, all planning applications should be subject to the rules that are in effect by the time that *Planning Act* decisions are being made, whether at the municipal, provincial or OMB level.

Moreover, CELA notes that through periodic updates of the PPS, official plans and comprehensive zoning by-laws (which are fully subject to public notice/comment requirements), provincial and municipal decision-makers are striving for continuous improvement and overall strengthening of land use planning rules. Accordingly, it is counterintuitive to allow applications to be decided on the basis of stale-dated rules which have since been superseded or overtaken by recent updates or changes that are more protective of the public interest.

CELA RECOMMENDATION #6: **All planning decisions should be made on the basis of the most up-to-date planning rules, including decisions on applications filed prior to 2007.**

Theme 2: Citizen Participation and Local Perspective

The OMB Review Consultation Document identifies various proposals which are currently being considered under this theme, including:

- increasing public education opportunities on OMB practices and procedures, and proposing a new user-friendly website; and

- implementing options to encourage citizen participation and to generally improve the OMB experience to ensure local perspective is heard, such as expanding and/or reconfiguring the Citizen Liaison Office, and exploring funding tools to help citizens retain their own planning experts and/or lawyers.[32]

In relation to these proposals, the OMB Review Consultation Document sets out several questions, as discussed below.

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[31] OMB Review Consultation Document, page 20.
[32] *Ibid*, pages 21 to 23.

Question 7: If you had experience with the Citizen Liaison Office, describe what it was like – did it meet your expectations?

As a specialty legal aid clinic, CELA provides summary advice and general information upon request to Ontarians interested or involved in the province's land use planning system, including OMB appeals. In addition, CELA provides legal representation to eligible persons or groups who are involved in OMB hearings as appellants or respondents. Accordingly, CELA has not had occasion to contact the Citizen Liaison Office (CLO) of the ELTO.

Nevertheless, CELA can confirm that there is an ongoing need for public education and outreach regarding OMB hearings, and CELA has no objection to the continued operation or expansion of the CLO so that it may serve as a clearinghouse of planning-related information. Similarly, CELA has no objection to the proposed development of a new, user-friendly website, provided that it has improved searchability (especially for mobile devices) and includes additional resources and links.

However, CELA has some concern about the OMB Review Consultation Document's suggestion that the CLO could be relocated outside the ELTO and reconfigured to include land use planners and lawyers who would be available to the public at large.[33] In this regard, it is further proposed that an eligibility test could be imposed upon Ontarians who want to contact these professionals for assistance.[34] CELA submits that eligibility criteria (based on either financial eligibility or the type of inquiry) are unnecessary and inappropriate, particularly since the CLO would not be providing "judi-care" (e.g. subsidized legal or expert services) to individuals and groups.

For example, it seems unlikely that the CLO legal staff would be entering into a formal solicitor-client relationship with persons who contact the CLO for assistance. Similarly, appropriate measures (e.g. written and verbal disclaimers) would have to be undertaken to ensure that members of the public do not mistakenly perceive that the CLO legal staff are acting as their counsel of record, representing their interests, conducting research, or otherwise providing legal opinions.

More fundamentally, it appears to CELA that the legal, technical and planning staff of a reconstituted CLO would not be expressly retained by individuals or groups to provide case- or hearing-specific advice. Instead, the CLO staff should only be providing general information (including a possible "legal toolkit" handbook), and perhaps referrals to other qualified, non-CLO professionals who may be available to assist individuals or groups involved in OMB appeals.

On this latter point, it has been our observation that persons who have sufficient financial resources often retain private bar counsel and experts to represent their interests at OMB hearings. These are not the persons who are likely to contact the CLO for information, which provides a further reason why a financial eligibility test for CLO services is inappropriate and unnecessary.

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[33] *Ibid*, page 22.
[34] *Ibid*.

CELA RECOMMENDATION #7: Consideration should be given to expanding the CLO to include lawyers, planners or other subject matter experts who can provide general information to the public about *Planning Act* appeals and OMB hearings. However, since these CLO staff members cannot provide case-specific professional advice or legal opinions, no eligibility criteria should be established in relation to persons who contact the CLO for general information or referrals.

Question 8: Was there information you needed, but were unable to get?

As noted above, CELA has not contacted the CLO, and therefore cannot comment on the adequacy of the information provided by CLO staff.

Question 9: Would the above changes support greater citizen participation at the OMB?

In CELA's view, expanding public education and outreach activities by the CLO may result in better public understanding of the process used to adjudicate *Planning Act* appeals, but it is unlikely to result in "greater" citizen participation in OMB hearings once appeals have been filed. This is because of the larger systemic issues that militate against meaningful citizen participation, most notably the financial barriers discussed below. Unless and until these issues are satisfactorily resolved, it is unrealistic to expect that CLO reforms alone will have any appreciable impact on citizen participation at OMB hearings.

Question 10: 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?

CELA agrees that it would be inappropriate for the OMB (and, by extension, the CLO) to provide legal advice to any party or participant. However, if this question primarily pertains to the provision of generic procedural information to unrepresented persons, then CELA submits that merely providing such information does not necessarily "help" citizens to participate more effectively in mediation or hearing processes.

For example, aside from being advised that mediation is an option, citizens will often still require legal and expert assistance to safeguard their interests while trying to reach a negotiated settlement with other represented parties in a mediated process. This is also true for citizens who end up at OMB hearings (as parties or participants) if mediation is ultimately unsuccessful at resolving the land use planning dispute. Even where citizens fully understand the dynamics of the OMB pre-hearing and hearing processes, their ability to actively pursue or participate in *Planning Act* appeals (e.g. by presenting/cross-examining evidence, questioning experts' qualifications, objecting to inadmissible testimony, bringing motions, seeking directions, making opening/closing submissions, etc.) will still be unduly constrained if they cannot afford to retain their own lawyers and experts.

Question 11: Are there funding tools the province could explore to enable citizens to retain their own planning experts and lawyers?

In CELA's experience, the single greatest barrier to meaningful public participation in *Planning Act* appeals is the continuing lack of funding tools intended to enable citizens and non-governmental organizations to retain the legal, technical and planning assistance often required by parties in OMB proceedings.

In our view, the absence of public participation funding tools not only impairs the ability of citizens to play a vital role in land use planning disputes, but it also deprives the OMB of relevant perspectives, evidence and opinions from local community members who want to counterbalance or respond to the case put forward by developers and/or public authorities. Thus, CELA submits that providing funding assistance to eligible persons would improve the fairness and quality of OMB decision-making process, and would enhance the soundness and acceptability of the OMB's disposition of *Planning Act* appeals. Conversely, maintaining the status quo by failing to mandate appropriate funding assistance to eligible persons will undoubtedly perpetuate one-sided battles at the OMB between developers and supportive municipalities on the one hand, and unrepresented citizens on the other hand.

At the present time, the *Planning Act* confers a number of participatory rights upon persons who are interested in, or potentially affected by, proposed development and the outcomes of OMB hearings if appeals are launched. CELA submits, however, that these rights are hollow unless they are accompanied by appropriate funding reforms which facilitate public involvement when planning disputes land at the OMB for adjudication. In our view, funding reform is the *sine qua non* of enhanced citizen participation in OMB hearings.

Accordingly, we find it puzzling that while the OMB Review Consultation Document states that the provincial government proposes to "explore funding tools,"[35] no specific mention is made of past or present funding mechanisms used in Ontario to facilitate public participation in administrative decision-making. In light of these funding precedents (e.g. cost awards and intervenor funding), CELA submits that it is not necessary for the provincial government to simply "explore" tools; instead, the provincial government should develop and implement appropriate tools in an expeditious manner.

(i) Using Cost Awards to Facilitate Public Participation

The first potential funding option to facilitate public participation is to substantially adjust and re-orient the exercise of the OMB's current cost powers. As noted by one commentator:

> Generally, the awarding of costs in environmental administrative proceedings can serve different purposes. Costs can be used as a tool to facilitate the participation of groups or interests that might not otherwise have the resources or ability to participate, in order to ensure that all relevant views are included in the proceedings. Awards of costs can also be used to ensure quality participation in administrative proceedings by reimbursing those participants whose involvement made a contribution to the proceedings, regardless of the outcome. Additionally, costs can be used to level the playing field by enabling

[35] *Ibid*, page 22.

> parties with fewer resources to retain expert witnesses and compile necessary scientific or technical evidence to support their positions.[36]

At the present time, the OMB enjoys broad discretion to award costs to or against any party, in an amount that can be fixed or assessed, in relation to the proceedings or steps incidental to it.[37] However, the OMB's *Rules of Practice and Procedure* constrain this broad statutory discretion by stipulating that "the Board may only order costs against a party if the conduct or course of conduct by a party has been unreasonable, frivolous or vexatious, or if the party has acted in bad faith."[38] The OMB Rules then provide a lengthy list of illustrative examples of misconduct that may warrant an adverse cost award against the offending party (e.g. failure to comply with procedural orders, causing unnecessary adjournments, failing to prepare adequately for the hearing, etc.).[39]

In recent years, there has been public concern about how the OMB interprets and applies its existing cost powers. On the one hand, there have been cases where the OMB has denied cost claims made by developers or municipalities, and has affirmed the importance of not deterring citizens from bringing concerns to the OMB due to cost liability concerns. For example, in the Big Bay Point cost decision, the OMB stated this public policy consideration as follows:

> Awards of costs are rare… Potential parties and the public should not be fearful of participating in Board proceedings, a sentiment that has been expressed in decision after decision. Costs should never be used as a threat or as a reason to dissuade public participation.[40]

On the other hand, despite these *obiter* comments, there have also been recent cases where the OMB has awarded sizeable costs against individuals, residents' groups and environmental organizations.[41] While each case of alleged misconduct by a hearing party must be assessed on its own unique set of facts, CELA remains concerned that the OMB's omnipresent ability to make adverse cost awards may inhibit public willingness to get involved in OMB proceedings under the *Planning Act*.

To resolve this lingering uncertainty about adverse cost liability, CELA submits that instead of using cost powers in a negative manner to discourage perceived misconduct by parties, the OMB should be obliged, as a matter of law, to start using cost powers in a more positive manner to encourage informed, helpful and reasonable participation by hearing parties. If this more proactive approach is adopted, then it appears to CELA that amendments to section 97 of the *Ontario Municipal Board Act* and section 17.1 of the SPPA will likely be required. In addition,

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[36] C. Chiasson, "Public Access to Environmental Appeals: A Review and Assessment of Alberta's Environmental Appeals Board" (2007), 17 JELP 141, at pages 155 to 156.
[37] *Ontario Municipal Board Act*, section 97.
[38] OMB, *Rules of Practice and Procedure* (as amended September 3, 2013), Rule 103. See also SPPA, section 17.1.
[39] OMB, *Rules of Practice and Procedure* (as amended September 3, 2013), Rule 103.
[40] *Re Kimvar Enterprises Inc.* (2009), 61 OMBR 293, para. 43 ($3.2 million cost claim by developer dismissed).
[41] *Corsica Developments Inc. v. Richmond Hill (Town)* (2015), 85 OMBR 396 (environmental group ordered to pay $100,000 to developer); *Brown v. North Dumfries (Township)*, 2015 CanLII 7230 (residents' group ordered to pay $110,000 to proponent); *Campione v. Vaughan*, 2016 CanLII 33681 (two residents ordered to pay two developers $68,000 and $16,000 respectively).

an overhaul of the OMB's current cost rules[42] will undoubtedly have to be developed to accompany the statutory changes.

In this regard, CELA recommends that the OMB cost rules should be substantially revised to more closely resemble the ERT's cost rules that apply when the ERT is hearing matters under the *Environmental Assessment Act* (EA Act). In particular, the EA Act provides that notwithstanding section 17.1 of the SPPA, the ERT may award the costs of a proceeding before it, and may specify to whom or by whom costs are payable, and whether the costs are fixed or to be assessed.[43]

More importantly, when making a cost award, the EA Act expressly provides that the ERT is not limited to the considerations that govern cost awards in court.[44] The traditional cost rule in Ontario courts is that "costs follow the event," which generally means that the losing party will be ordered to pay costs to the winning party. However, an award of costs in an EA Act hearing does not necessarily depend on which party "won" or "lost" in the proceeding, but on a number of other considerations outlined in the ERT's Rules of Practice.

For example, the ERT's cost rules in the EA Act context specifically provide that "costs awards may be ordered to help defray the costs of participation borne by Parties, other than the Proponent, the Director and government decision makers, who make a substantial contribution to the proceeding through responsible participation."[45] These rules go on to identify various factors that the ERT will consider when deciding whether – or to what extent – costs should be awarded, including whether the party seeking costs:

- represented a clear and ascertainable interest;
- contributed substantially to a meaningful public Hearing process;
- participated in a responsible and informed manner;
- helped the Tribunal to understand the matters at issue;
- demonstrated the purpose for the expenditure of funds;
- coordinated a number of common interests and concerns by forming a group or coalition;
- cooperated with other Parties and shared experts where possible to efficiently address issues and provide evidence;
- contributed to a more efficient Hearing;
- complied with the Rules, the Hearing schedule, Hearing deadlines and any further Tribunal procedural orders;
- made reasonable and timely efforts to share information with other Parties, resolve or scope issues, discuss potential conditions of approval and explore alternative methods of dispute resolution; and
- succeeded in whole or in part at the Hearing.[46]

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[42] OMB, *Rules of Practice and Procedure*, Rules 96 to 104.1.
[43] EA Act, section 21.
[44] *Ibid*, subsection 21(4).
[45] ERT, *Rules of Practice and Practice Directions* (September 12, 2016), Rule 223.
[46] *Ibid*, Rule 224.

These ERT rules allow the following types of fees, disbursements and expenses to be recovered at the applicable rate[47] through a cost award:

- legal and consulting fees;
- travel and related expenses;
- transcripts, photocopying, facsimile, delivery costs, applicable taxes; and
- other necessary and reasonable disbursements.[48]

However, throughout the hearing process under the EA Act, the ERT still retains its SPPA jurisdiction to make cost awards intended to sanction unreasonable misconduct by hearing parties.[49]

In summary, CELA submits that the current OMB Review offers a timely opportunity to reconsider and reframe the OMB's cost powers in order to facilitate public participation in *Planning Act* appeals while, at the same time, discouraging unreasonable misconduct by hearing parties. In our view, the ERT's existing cost powers under the EA Act represent an important precedent that could be modified and adapted for use by the OMB under the *Planning Act*. In principle, there should be no material difference in the nature and purpose of cost awards by ELTO tribunals under EA Act or the *Planning Act* since both types of proceedings often involve matters of considerable public interest and environmental significance.

(ii) Using Intervenor Funding to Facilitate Public Participation

In the event that cost reform is not undertaken as a result of the OMB Review, then the second option for reducing financial barriers to public participation is the re-establishment of intervenor funding legislation in Ontario. In this regard, CELA notes that Ontario's former *Intervenor Funding Project Act* (IFPA) provides an illustrative example of an effective funding model that would be appropriate for certain OMB hearings under the *Planning Act*.

While the IFPA was in effect, it applied to public hearings held by the Ontario Energy Board, the EA Board [now the ERT], and Joint Boards established under the *Consolidated Hearings Act*. In general terms, the IFPA required proponents (not the Ontario government at large) to provide funding to eligible public interest intervenors for specific hearing-related purposes. On a case-by-case basis, separate funding panels (not the Board members holding the hearing) would receive and rule upon funding applications from intervenors who had been granted party status during the pre-hearing stage. Where an application for intervenor funding was granted, then the allotted funding would be payable by the funding proponent(s) designated by the panel, and the successful applicant would receive the money in advance of the main hearing. Strict reporting conditions were usually imposed to make intervenors accountable for their expenditure of funds.[50]

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[47] *Ibid*, Rule 229.
[48] *Ibid*, Rule 228.
[49] *Ibid*, Rule 225.
[50] Generally, see EA Advisory Panel, *Improving Environmental Assessment in Ontario: A Framework for Reform (Volume 1)*, (2005), pages 74 to 77.

It should be noted, however, that funding panels under the IFPA were not free to fund any issue or evidence that a party proposed to pursue at the hearing. Instead, the panels could only award intervenor funding for issues that "affect a significant segment of the public", and that "affect the public interest and not just private interests."[51]

Similarly, IFPA panels were required to consider a number of factors in order to determine whether a party should be awarded intervenor funding, including whether:

- the intervenor represents a clearly ascertainable interest that should be represented at the hearing;
- separate and adequate representation of the interest would assist the board and contribute substantially to the hearing;
- the intervenor does not have sufficient financial resources to enable it to adequately represent the interest;
- the intervenor has made reasonable efforts to raise funding from other sources;
- the intervenor has an established record of concern for and commitment to the interest;
- the intervenor has attempted to bring related interests of which it was aware into an umbrella group to represent the related interests at the hearing;
- the intervenor has a clear proposal for its use of any funds which might be awarded; and
- the intervenor has appropriate financial controls to ensure that the funds, if awarded, are spent for the purposes of the award.[52]

An award of intervenor funding typically covered legal and expert fees/disbursements and other hearing-related expenses. However, in determining the quantum of the intervenor funding awards, the IFPA panels were subject to the following statutory requirements:

- if the proposal includes the use of lawyers in private practice, assess legal fees at the legal aid rate under the legal aid plan in effect on the day of the award for work necessarily and reasonably performed;
- set a ceiling in respect of disbursements that may be paid as part of the award and such disbursements shall be restricted to "eligible disbursements";[53] and
- deduct from the award funds that are reasonably available to the applicant from other sources.[54]

While the IFPA was in force, three provincial Ministries (e.g. Attorney General, Energy and Environment) commissioned an independent review of the legislation, and the study authors concluded that the intervenor funding regime was both effective and necessary to facilitate informed public participation.[55] This finding is consistent with a long line of articles, reports and publications which affirm the need for, and the societal benefits of, establishing funding

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[51] IFPA, subsection 7(1).
[52] *Ibid*, subsection 7(2).
[53] *Ibid*, subsection 7(5).
[54] *Ibid*, subsection 7(3).
[55] W. Bogart and M. Valiante, *Access and Impact: An Evaluation of the Intervenor Funding Project Act* (1992).

mechanisms to facilitate public participation in environmental decision-making.[56] However, the IFPA expired in 1996 due to a legislative sunset clause, and has not been replaced to date.

While the IFPA did not apply to the OMB at the time, CELA submits that the "lessons learned" under the IFPA are readily applicable to OMB hearings currently held under the *Planning Act*. Indeed, CELA has previously called for the creation of an intervenor funding program in relation to OMB hearings,[57] and the time has now come to revisit this long overdue reform. In our view, if OMB cost powers are not going to be revised, then an appropriate statute-based intervenor funding mechanism should be established in relation to *Planning Act* appeals.

While it is beyond the scope of this brief to address the full set of implementation details needed within a new IFPA regime, CELA submits that, at the very least, the Ontario government should commit to the public development of a new intervenor funding model. This model could be financed, in part, through proponent contributions and/or the establishment of a special purpose fund into which a portion of land transfer taxes or development charges could be directed.

CELA RECOMMENDATION #8: To help facilitate public participation in OMB proceedings under the *Planning Act*, the Ontario government should immediately establish an appropriate funding model. This model could be based on a fundamental restructuring of the OMB's existing cost powers under the *Ontario Municipal Board Act*, or, in the alternative, the model could consist of an updated version of Ontario's previous *Intervenor Funding Project Act*.

Question 12: What kind of financial or other eligibility criteria need to be considered when increasing access to subject matter experts like planners and lawyers?

CELA submits that funding assistance should not be universally available to every party engaged in an OMB hearing. Instead, only those persons who will not financially benefit from the proposed land use or development under appeal, and who meet prescribed eligibility criteria, should be entitled to receive funding awards from the OMB.

Developers, for example, should not be eligible to apply for a funding award from the OMB. Similarly, municipalities should generally be ineligible to receive funding assistance, particularly since they typically have deeper pockets than CELA's clients, local residents, or non-governmental organizations. However, as a possible exception to this general rule, CELA recognizes that there may be situations where an OMB hearing involves a smaller or rural municipality which lacks in-house counsel, planners or other experts, and which may require

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[56] See, for example, R. Anand and I. Scott, "Financing Public Participation in Environmental Decision-Making" (1982), 60 Can. Bar Rev. 81; Canadian Environmental Defence Fund, *Intervenor Funding and the Intervenor Funding Project Act in Ontario* (CEDF, 1991); A. Levy, "A Review of Environmental Assessment in Ontario" (2002), 11 JELP 173, at pages 188, 201, and 239 to 240; J. Sinclair and M. Doelle, "Using Law as a Tool to Ensure Meaningful Public Participation in Environmental Assessment" (2003), 12 JELP 27.

[57] See, example, CELA, *Comments on OMB Reform, Planning Act Reform and Implementation Tools (EBR Registry No. PF04E0003)* (August 31, 2004), page 6.

some degree of financial assistance to retain these outside professionals to defend its land use planning decision against developer appeals.[58]

Accordingly, CELA agrees that appropriate criteria should be established to determine: (a) who is eligible to receive a funding award; (b) the scale or quantum of the funding award; and (c) the permissible uses or allocations of the funding award. In this regard, CELA submits that section 7 of the IFPA (see above) provides a good starting point for crafting criteria to govern the awarding of costs (or intervenor funding) to facilitate public participation in OMB hearings under the *Planning Act*.

If these criteria are adopted and applied in OMB hearings, then it is clear that not every case will trigger an award of financial assistance. If, for example, the OMB continues to adjudicate minor variance appeals, then financial assistance is unlikely to be ordered since those disputes rarely (if ever) raise issues that affect a large segment or the public, or that otherwise affect the overall public interest. Similarly, affluent citizens or for-profit corporations which initiate (or respond to) an appeal to the OMB should be ineligible to receive funding assistance due to the lack of a demonstrable need for such funding.

In summary, CELA submits that regardless of whether the new funding model is implemented via costs (including interim or advance costs) or intervenor funding, the overall objective is to ensure that adequate financial assistance is provided to eligible OMB parties who are addressing matters of public interest, and who otherwise will not financially benefit from the outcome of the OMB hearing.

CELA RECOMMENDATION #9: The eligibility criteria for funding public participation in OMB proceedings should include consideration of the factors set out in section 7 of the previous *Intervenor Funding Project Act*.

<u>Theme 3: Clear and Predictable Decision-Making</u>

The OMB Review Consultation Document identifies various proposals which are currently being considered under this theme, including:

- increasing the number of OMB adjudicators and increasing training for adjudicators to ensure they possess the necessary skills; and

- implementing options for multi-member panels.[59]

In relation to these proposals, the OMB Review Consultation Document sets out several questions, as discussed below.

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[58] But see section 69 of the *Planning Act*, which allows municipalities to set and collect fees associated with processing land use applications.

[59] OMB Review Consultation Document, pages 24 to 25.

Question 13: 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?

The *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009* establishes some general criteria (e.g. experience/training in the relevant issues, aptitude for impartial adjudication, etc.) which should be satisfied before a member is appointed to the OMB, ERT or other prescribed tribunals.[60] CELA has no recommended additions, deletions or modifications of these statutory criteria, nor do we have any comments on how the criteria are applied during the merit-based competition for OMB appointments.

The ELTO website goes on to list some specific skills, qualifications and requirements in the job descriptions for OMB members (e.g. maintain open-mindedness, manage the process in a timely manner, make rulings which ensure "fair, proper, and expeditious" completion of hearings, etc.).[61] Again, CELA has no comments on the current job description for OMB members, or on how the job descriptions are considered or applied during performance evaluations of individual OMB members.

However, CELA has a number of suggestions that may be of assistance once members have been duly appointed as members of the OMB. For example, while new members obtain initial training in decision-writing and related matters, it is unclear from the OMB Review Consultation Document how much ongoing training and professional development is provided to all members by the ELTO on an annual basis, or what particular topics or issues are addressed in through such post-appointment activities. In CELA's view, it is necessary to ensure that all members are well-versed in accessible decision-writing and relevant administrative law developments. However, it is also important to ensure that all members remain current in the diverse technical or scientific matters that may come before the OMB for adjudication (e.g. issues related to contaminant hydrogeology, wetlands ecology, conservation/recovery of species at risk, protection of ambient air quality, climate change mitigation/adaptation, etc.). CELA also agrees with the proposal for member training on appropriate approaches for dealing with self-represented parties at OMB hearings.[62]

CELA further notes that the above-noted statutory criteria and job description requirements also apply to persons who are appointed as members of the ERT. While the Ontario government is considering increasing the number of OMB adjudicators, CELA submits that the Ontario government should also consider cross-appointing more ERT members as OMB members. This practice may assist in better integrating environmental planning and land use planning in OMB appeals, and would also be helpful for adjudicative purposes if the OMB cost rules are revised to reflect ERT cost rules.

CELA RECOMMENDATION #10: The ELTO should ensure that all OMB members receive ongoing training and professional development in relation to procedural and

[60] *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009,* section 14.
[61] See http://elto.gov.on.ca/about-elto/position-descriptions/
[62] OMB Review Consultation Document, page 25.

substantive issues that may arise in OMB hearings. In addition, consideration should be given to cross-appointing more ERT members to the OMB.

Question 14: Do you believe that multi-member panels would increase consistency of decision-making? What should be the make-up of these panels?

Over the past decades, at both the federal and provincial level, CELA has appeared before various administrative hearing panels consisting of one, two or three members. In our experience, there is no particular magic in how many members are assigned to a hearing panel, nor is there any compelling evidence that multi-member panels automatically result in better or more consistent decision-making. Indeed, CELA has been involved in lengthy or complex hearings before the OMB and ERT where a single member has presided over the proceedings, and has rendered an evidence-based decision that is responsive to the issues in dispute.

Nevertheless, CELA is generally supportive of having multi-member panels adjudicate complicated, multi-party land use planning disputes, particularly those involving official plans or rezoning applications affecting a large area or involving a number of public and private interests. Hearing duration could also be used as a benchmark for determining if a multi-member panel is warranted (e.g. hearings lasting 10 or more hearing days). Ideally, if more ERT members were cross-appointed to the OMB, then it may be useful to have a two-member panel (consisting of ERT and OMB members) assigned to adjudicate large-scale and/or controversial development proposals involving matters related to environmental protection, resource conservation or public health and safety.

CELA RECOMMENDATION #11: Consideration should be given to having multi-member OMB panels adjudicate *Planning Act* appeals that: (a) involve multiple parties and participants; (b) raise matters of provincial interest, or issues which are complex or environmentally significant; and (c) are anticipated to result in lengthy or phased hearings. Similarly, if more ERT members are cross-appointed to the OMB, they could be assigned to panels which are scheduled to hear and decide large-scale and/or controversial development proposals involving matters related to environmental protection, resource conservation or public health and safety.

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

CELA does not contend that multi-member panels are necessary to adjudicate all OMB appeals under the *Planning Act*. If, for example, the OMB continues to hear and decide minor variance appeals, then CELA submits that such cases are tailor-made for single member panels. However, in the types of large-scale, multi-party or complex OMB hearings described above, CELA submits that multi-member panels are both reasonable and appropriate.

Question 16: How can OMB decisions be made easier to understand and be better relayed to the public?

From CELA's legal perspective, recent OMB decisions tend to be relatively clear and concise, and we do not make any specific recommendations to make decisions "easier to understand." In

our view, however, it is important to ensure that all members are allotted sufficient decision-writing time so that OMB reasons for decision are comprehensive and complete, particularly in cases involving voluminous exhibits and/or conflicting expert opinions. If OMB members' schedules require continuous travel from hearing to hearing across Ontario without adequate breaks, they may be unable to set aside sufficient time to carefully evaluate evidence and to prepare cogent and reasonably detailed reasons for decision. In order to ensure adequate decision-writing time, it may be prudent to appoint additional OMB members (or cross-appoint ERT members) to spread out public hearing workload, as discussed above.

Once OMB decisions and orders are released, they are generally provided to the hearing parties (or their representatives) in a timely manner. For the public at large who may be interested in OMB decisions and orders, it would be helpful to ensure that they are immediately posted in a free and easily searchable website or database hosted by the ELTO. Accordingly, we would encourage the ELTO to identify opportunities to improve the searchability of its current decision postings, and to otherwise make its website more user-friendly for self-represented parties or members of the public. On this point, CELA notes that since OMB decisions are now available via the CanLII website, it may be advisable for the OMB and/or ELTO home page to include a link to the CanLII database (with brief instructions how to use it) in order to enhance public access to OMB decisions and orders.

CELA RECOMMENDATION #12: OMB members should be allocated adequate time for decision-writing purposes. Once released to the hearing parties, OMB decisions and orders should be posted on an ELTO website or database that is easier for self-represented parties and members of the public to navigate and search.

Theme 4: Modern Procedures and Faster Decisions

The OMB Review Consultation Document identifies various proposals which are currently being considered under this theme, including:

- promoting a less formal and less adversarial culture at OMB hearings by considering changes to allow the OMB to adopt less complex and more accessible tribunal procedures, and allow active adjudication; and

- implementing ways to modernize procedures and promote faster decisions, including:

  (a) setting appropriate timelines for decisions;

  (b) increasing flexibility for how evidence can be heard;

  (c) conducting more hearings in writing in appropriate cases;

  (d) establishing clear rules for issues lists to ensure that hearings are focused and conducted in the most cost-effective and efficient way possible; and

(e) introducing maximum days allowed for hearings.[63]

In relation to these proposals, the OMB Review Consultation Document sets out several questions, as discussed below.

Question 17: Are the timelines in the chart appropriate, given the nature of appeals to the OMB? What would be appropriate timelines?

In general terms, CELA has no objection to the setting of performance standards or targets to track how quickly matters are scheduled for a first hearing, or how quickly OMB decisions are rendered after the hearing has ended. This kind of statistical analysis provides useful data to determine whether there are potential trouble spots in the timeliness of OMB activities, and whether further corrective measures (e.g. additional adjudicative resources, improved administrative procedures, etc.) may be required.

However, CELA submits that the timelines chart should be viewed as a set of non-binding benchmarks, rather than rigid rules that must be slavishly met in each and every OMB case. To the contrary, CELA is opposed to any attempt to make these timelines legally binding (see below), particularly since this change may result in decisions that are rushed in order to meet this arbitrary deadline. In our experience, a fast decision is not necessarily the best decision.

For example, while the chart anticipates that an OMB decision should be released within 60 days of the hearing, this one-size-fits-all timeline may not always work for lengthy, complex multi-party hearings. In this regard, CELA has been involved in OMB cases where this performance standard was not met, but this decision delay is often attributable to the extensive evidence and argument presented by parties in lengthy hearings. Other factors (e.g. increased number of appeals, shortage of OMB adjudicators, extensive travel requirements, lengthier public hearings, insufficient decision-writing time, etc.) may also contribute to situations where the 60 day target was not met. If timeline targets are to be revised, then it may be advisable to more precisely distinguish between types of OMB cases, and to establish corresponding targets that are more realistic and achievable for each type of case.

CELA RECOMMENDATION #13: Performance standards for scheduling OMB hearings and releasing decisions should remain as non-binding targets, rather than rigid rules that must be met in every appeal filed under the *Planning Act*.

Question 18: Would the above matters help to modernize OMB hearing procedures and practices? Would they encourage timely processes and decisions?

The OMB Review Consultation Document states that the Ontario government is considering various ways to "modernize procedures and promote faster decisions," including "increasing flexibility for how evidence is heard."[64] No particulars are provided to explain what this "flexibility" would entail, and it is unclear whether the Ontario government is contemplating

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[63] *Ibid*, pages 26 to 27.
[64] *Ibid*, page 27.

changing statutory or common law rules that govern factual or opinion evidence at OMB hearings. However, we presume that this general statement is intended to be responsive to the perception that the current OMB hearing process is too long, adversarial and court-like.[65]

In response, CELA would strongly caution against any sweeping evidentiary reforms which make the OMB considerably less quasi-judicial in nature. In our view, evidence must continue to be given under oath or affirmation, and it must remain subject to cross-examination and testing through other parties' evidence. More generally, the procedural safeguards in the SPPA must continue to fully apply to OMB hearings, which, after all, are formal legal proceedings (not public meetings or town hall events) used to decide important law/policy issues that often affect the public interest. Put another way, removing or reducing these SPPA requirements may impair OMB members' ability to weigh contested facts, evaluate conflicting expert opinions, or assess witness credibility, all of which can only serve to undermine the effectiveness of the OMB hearing process and adversely affect the soundness of OMB decision-making.

Accordingly, while CELA has no objection to increased use of written hearings to determine certain matters (see below), we are opposed to any fundamental changes in how evidence is admitted, assessed or relied upon by OMB members.

CELA RECOMMENDATION #14: While certain interlocutory matters may be adjudicated via written hearings, the OMB should remain as an independent, quasi-judicial tribunal that holds formal public hearings on *Planning Act* appeals in accordance with the procedural safeguards set out in the SPPA.

The OMB Review Consultation Document goes on to indicate that the Ontario government wants to allow "active adjudication", which is defined as enabling OMB members "to play a more active role in the hearing" by explaining rules, scoping issues, and questioning witnesses.[66] In CELA's view, this form of "active adjudication" already exists at the present time, as it has been our experience that OMB members generally do not sit in impassive silence or remain unengaged as the parties adduce evidence during the hearing process. To the contrary, OMB members, on their own initiative, may choose to pose questions to witnesses, direct the parties to narrow or scope the issues in dispute, and otherwise play an active role when managing the hearing process. Since "active adjudication" can already occur under the existing OMB regime, we are unclear what further changes are needed to implement this approach in appeals under the *Planning Act*.

The OMB Review Consultation Document further indicates that another option under consideration is to "introduce maximum days allowed for hearings."[67] However, the consultation document does not actually specify the numerical limits which are being contemplated by the provincial government, nor is there any description of the factors or criteria that may be used to set the maximum hearing days for different types of OMB proceedings under the *Planning Act*.

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[65] *Ibid*.
[66] *Ibid.*
[67] *Ibid*.

In any event, while we support the need for timely and efficient hearings, CELA is strongly opposed to any proposal to establish OMB hearing day limits. First, by way of comparison, CELA notes that in civil and criminal proceedings, judges are not bound by pre-set statutory limits on the number of trial days that are to be used to hear the matters in dispute. In principle, it is unclear why such limits would be placed on a specialized administrative tribunal that is supposed to be independent and quasi-judicial. Moreover, it appears to CELA that legislating time limits on OMB hearing days is inconsistent with the principles of natural justice and fairness, and could prevent the OMB from receiving critical evidence needed to render an appropriate appeal decision.[68]

Second, CELA points out that the ERT is not subject to maximum hearing day limits for the various statutory appeals that it adjudicates under provincial environmental law. We are unaware of any persuasive reasons why hearing day limits should be imposed on the OMB, but not on the ERT or other tribunals within the ELTO. In this regard, it should be noted that when dealing with a renewable energy appeal, the ERT is compelled to complete the hearing and render its decision within the prescribed six-month timeframe, or else the approval decision under appeal is deemed to be confirmed.[69] However, this is a limit on the overall process, not the number of hearing days, and it has proven to be problematic in practice where, for example, new information arises, material changes in the project are proposed, and a "time-out" is needed by the parties. Accordingly, CELA does not support any attempt under the *Planning Act* to deem municipal or provincial decisions as valid if the OMB decision is not rendered within a prescribed timeframe.

Third, in OMB procedural orders that follow pre-hearing conferences, the main hearing dates and duration are established, and parties generally try to complete the hearing within the allotted schedule, thereby avoiding lengthy pauses in the hearing process. However, unanticipated events (e.g. discovery of significant new information) can and do occur despite the parties' intentions, and may create the need to adjourn the hearing or to schedule further hearing days beyond those identified in the original procedural order. In CELA's view, the overarching goal is to ensure that the OMB obtains the best available evidence in order to make an informed decision on the merits of the appeal. If the achievement of this goal requires adjournments or extra hearing days, then that additional time is reasonable and unobjectionable.

CELA RECOMMENDATION #15: There should be no attempt to prescribe the maximum number of OMB hearing days for appeals (or types of appeals) under the *Planning Act*.

Question 19: What types of cases/situations would be most appropriate to a written hearing?

In CELA's experience, the types of matters that are generally amenable to written hearings include: (a) motions regarding jurisdiction; (b) motions for costs (or applications for intervenor funding, if implemented); and (c) motions regarding other pre-hearing matters (e.g. disputes over production/disclosure, consent adjournments, etc.). While CELA envisions that more of these kinds of motions could be adjudicated via written hearings, we would also suggest that the OMB should have residual discretion to hold in-person hearings (or, alternatively, telephone

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[68] Generally, see A. Levy, "Scoping Issues and Imposing Time Limits by Ontario's Environment Minister on Environmental Assessment Hearings: A History and Case Study" (2001), 10 JELP 147.

[69] *Environmental Protection Act*, subsection 145 (2.1)(6); O.Reg. 359/09, section 59.

conference calls) to receive the parties' submissions on these interlocutory matters in an open and publicly accessible manner.

Theme 5: Alternative Dispute Resolution and Fewer Hearings

The OMB Review Consultation Document identifies various proposals which are currently being considered under this theme, including:

- encouraging more land use disputes to be resolved using ADR, including:

  (a) more actively promoting mediation;

  (b) requiring all appeals to be considered by a mediator before scheduling a hearing;

  (c) allowing government mediators to be available at all times during an application process, including before an application arrives at municipal council, in order to help reduce the number of appeals that go to the OMB;

  (d) strengthening case management at the OMB to better scope issues in dispute and identify areas that can be resolved at pre-hearings and to further support OMB members during hearings; and

  (e) creating timelines and targets for scheduling cases, including mediation.[70]

In relation to these proposals, the OMB Review Consultation Document sets out several questions, as discussed below.

Question 20: Why do you think more OMB cases don't settle at mediation?

CELA has been involved in some OMB cases which were resolved, in whole or in part, through formal mediation processes or non-mediated inter-party settlement discussions. However, the majority of our cases usually involve adjudication by Board members.

In our experience, there are at least three main reasons why more OMB cases do not settle at mediation. First, even in mediation proceedings, there is a continuing financial barrier faced by residents or citizens' groups insofar as they often require legal, technical and planning assistance to fully participate in mediation. Given that proponents and municipalities are typically represented by lawyers, planners and other experts during mediation, residents and citizens' groups are at a distinct disadvantage if they attempt to engage in mediation.

Second, during the mediation process, residents and citizens' groups often lack any real leverage vis-à-vis proponents and municipalities. Rightly or wrongly, some proponents and municipalities tend to perceive that they have no real risk of losing on the merits at the OMB hearing, and are therefore prepared to "play hard ball" during mediation. Moreover, aside from the potential

[70] OMB Review Consultation Document, pages 28 to 29.

economic benefit of resolving disputes without public hearings, developers and municipalities in many cases have no direct incentive to agree to changes in the proposal, or to add new conditions or commitments, which may drive up the cost of development, add more time to the development timeline, or otherwise lower profit margins.

Third, in CELA's view, there are just some land use planning disputes which are not amenable to successful mediation, as described below. Accordingly, it may be unrealistic to expect that more OMB cases can or will be resolved through mediation.

Question 21: What types of cases/situations have a greater chance of settling at mediation?

In CELA's view, the types of OMB cases which are more likely to be resolved through mediation are those situations where: (a) the number of parties are limited; (b) the issues in dispute are not numerous; and (c) the potential off-site impacts of the development proposal are localized, amenable to well-established mitigation measures, and do not involve provincially significant natural heritage or high-quality agricultural lands. In these kinds of cases, it is reasonable to anticipate that mediation has a good prospect of success.

Conversely, where there is a fundamental disagreement between a large number of private and public parties on the principle of the proposed land use, or where the proposed development may adversely affect matters of provincial interest, then the land use planning dispute is not likely to be resolved through mediation. For example, if a proponent needs an official plan amendment and rezoning to establish a new landfill on prime agricultural land, and if the neighbouring landowners are strongly opposed to the proposal, then there is really no middle ground to explore through mediation: either the landfill gets built, or it does not. In such cases, it may be possible to scope or narrow some technical issues in dispute (e.g. through experts' meetings prior to the public hearing), but it is doubtful whether the entire case can be settled through mediation.

Question 22: Should mediation be required, even if it has the potential to lengthen the process?

In appropriate cases, CELA has no objection to mediation, even if it may lengthen the overall process. However, CELA objects to any imposition of mandatory mediation requirements in OMB cases. As noted above, there are certain OMB cases that are unlikely to settle, and forcing parties into unwanted mediation will simply run up the bill for residents or citizens' groups, which are least able to afford another major step in the pre-hearing process. On this point, CELA notes that while the ERT encourages mediation in its appellate proceedings, mediation is not mandatory before ERT hearings are scheduled.

CELA RECOMMENDATION #16: While the OMB should strongly promote and actively facilitate mediation in land use planning disputes, mediation should not be made mandatory in any *Planning Act* appeal (or classes of appeals), and should instead remain at the voluntary discretion of the parties.

Question 23: What role should OMB staff play in mediation, pre-screening applications and in not scheduling cases that are out of the OMB's scope?

For those types of cases which are amenable to mediation, CELA submits that the OMB should maintain or expand its roster of trained mediators, and should make them available upon request to parties involved in land use planning appeals.

The OMB Review Consultation Document goes on to suggest that unnamed "government mediators" could also be "available at all times during an application process, including before an application arrives at municipal council, to help reduce the number of appeals that go to the OMB."[71] CELA presumes that "government mediators" would be those independently appointed by the provincial government,[72] particularly since OMB members who serve as mediators should play no role in the land use decision-making process prior to the commencement of an OMB appeal. However, given the paucity of information explaining how "government mediators" would intervene at the municipal or provincial level as decisions are being made at first instance, CELA does not support this suggestion at this time.

CELA RECOMMENDATION #17: The Ontario government should not proceed with its proposal that "government mediators" should be appointed and made available well before municipal or provincial decisions are even made under the *Planning Act*.

Similarly, it is unclear what is meant by the OMB Review Consultation Document's suggestion that OMB staff should "pre-screen applications".[73] First, we presume that this is intended to refer to OMB appeals, rather than the underlying land use planning applications filed at the municipal level at first instance. Second, the nature, extent or purpose of "pre-screening" appeals has not been specified in the consultation document. CELA has no objection to having OMB caseworkers review incoming appeal documentation for completeness (and ensure compliance with appeal deadlines), or flag cases in which it may be appropriate to suggest to the parties that mediation should be considered.

However, CELA is opposed to having OMB staff opine on the merits of a duly filed appeal, or determine whether an appeal is "out of the OMB's scope."[74] CELA presumes that this phrase refers to appeals which do not appear to be based on land use planning grounds upon which the OMB can act or grant relief. If such cases arise, then we would suggest that this should be pursued by the parties themselves via appropriate motions, rather than by an OMB caseworker on his/her own initiative without the benefit of the parties' submissions on whether the appeal is *ultra vires*.

CELA RECOMMENDATION #18: While OMB staff should continue to undertake case management prior to public hearings, they should not "pre-screen" appeals nor opine on whether an appeal is beyond the OMB's jurisdiction.

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[71] OMB Review Consultation Document, page 29.
[72] Since 2015, municipalities have been expressly empowered to engage in "mediation, conciliation or other dispute resolution techniques" after an appeal has been filed in relation to official plan and zoning matters: see, for example, *Planning Act*, subsections 17(26.1) to (26.4) and 34(20.1) to (20.4). However, the OMB Review Consultation Document provides no statistical information or analysis on how many times municipalities have utilized such powers to partially or wholly resolve appeals to the OMB.
[73] OMB Review Consultation Document, page 29.
[74] *Ibid*.

Question 24: Do you have any 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?

CELA has a number of additional comments that should be addressed by the Ontario government at its earliest convenience, and with meaningful public participation.

First, we note that the OMB Review Consultation Document[75] refers to provincial changes over the past decade which, *inter alia*, have been intended to set out "clearer rules for land use planning," "strengthen policy directions that outline the provincial interest in land use planning", and "provide residents more opportunities for involvement and a greater say in land use decisions in their communities". While CELA has been generally supportive of such changes, it is also clear that that there is still considerable room for improvement in the province's overall land use planning regime. For example, the preferential treatment accorded to aggregate resource identification, protection and extraction under the PPS should be revisited and revised. Unless and until such policies are changed, it is reasonable to anticipate that the OMB and its decisions will continue to attract criticism when, in reality, it is the PPS itself that is often the root cause of the controversy.

CELA RECOMMENDATION #19: The Ontario government should revisit and revise the current aggregate policies in the PPS, and should create a conflict resolution mechanism for addressing situations where the aggregate policies are directly at odds with other applicable PPS policies, particularly those related to natural heritage protection and agricultural land preservation.

Second, CELA submits that it is time to reconsider the effectiveness of, or need for, the MMA's current "one window" approach for provincial review/comment on specific development proposals. In our view, individual ministries (e.g. MOECC, MNRF, OMAFRA, etc.) should be able to independently provide input on proposed development, and should be empowered to pursue unresolved issues or outstanding concerns by filing their own appeals to the OMB (rather than trying to funnel their objections through the MMA). In our experience, allowing provincial ministries to play a greater role in *Planning Act* appeals would enhance the hearing record before the OMB, and would ensure that that the OMB obtains the best possible information needed to make an informed decision in land use planning disputes.

CELA RECOMMENDATION #20: The Ontario government should reconsider its current "one window" approach under the *Planning Act*, and should enable ministries other than the MMA to independently pursue their own appeals to the OMB where appropriate.

Third, CELA is somewhat surprised that there is no discussion in the OMB Review Consultation Document regarding the need to ensure that OMB members are legally accountable for their decisions. However, CELA is satisfied with the current leave-to-appeal test under section 96 of the *Ontario Municipal Board Act*, and we do not recommend any changes to these appeal provisions, nor do we recommend the re-establishment of appeals to Cabinet in certain matters.

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[75] *Ibid*, page 4.

CELA RECOMMENDATION #21: The Ontario government should not amend the current leave-to-appeal test under section 96 of the *Ontario Municipal Board Act*.

PART IV – CONCLUSIONS AND SUMMARY OF RECOMMENDATIONS

For the foregoing reasons, CELA concludes that the OMB Review offers the province an important opportunity to affirm and improve the OMB's appellate role within Ontario's land use planning system.

However, CELA also concludes that in order to address long-standing public concerns about the cost, fairness, timeliness and effectiveness of OMB hearings, a comprehensive reform package, consisting of appropriate statutory, regulatory, policy and administrative changes, should be developed by the Ontario government in conjunction with all interested stakeholders and the public at large.

In our view, the highest and most immediate priority is to take meaningful steps (e.g. cost reform or intervenor funding) to address the financial imbalance in parties' resources when OMB hearings are held. In cases where the MMA has declined to get actively involved under the "one window" approach, it appears that by default, the responsibility for ensuring PPS consistency has been effectively downloaded to concerned citizens and environmental groups that are underfunded to meet this challenge.

CELA's specific recommendations in response to the consultation questions posed in the OMB Review Consultation Document may be summarized as follows:

CELA RECOMMENDATION #1: The Ontario government should not generally prohibit all OMB appeals against provincially approved official plans or amendments. If there is a demonstrable need to limit certain types of appeals, then the Ontario government should clearly identify them and solicit further stakeholder input before proceeding with any proposed limitation on public rights of appeal currently available under the *Planning Act*.

CELA RECOMMENDATION #2: The Ontario government should consider providing technical assistance, guidance materials and/or fiscal support to encourage municipalities to create local appeal bodies which hear and decide minor variance appeals.

CELA RECOMMENDATION #3: The Ontario government should clarify the kinds of restrictions which are being proposed for transit-related appeals to the OMB. Further consideration should be given to situations where the proposed development appears transit-supportive, but may be inconsistent with other relevant policies in the PPS.

CELA RECOMMENDATION #4: The OMB should not be legally required to refer a matter back to the municipality for re-evaluation if new significant information is presented at the OMB hearing.

CELA RECOMMENDATION #5: The OMB should continue to hold *de novo* hearings under the *Planning Act*, and should continue to have regard for the municipal decision or approval under appeal.

CELA RECOMMENDATION #6: All planning decisions should be made on the basis of the most up-to-date planning rules, including decisions on applications filed prior to 2007.

CELA RECOMMENDATION #7: Consideration should be given to expanding the CLO to include lawyers, planners or other subject matter experts who can provide general information to the public about *Planning Act* appeals and OMB hearings. However, since these CLO staff members cannot provide case-specific professional advice or legal opinions, no eligibility criteria should be established in relation to persons who contact the CLO for general information or referrals.

CELA RECOMMENDATION #8: To help facilitate public participation in OMB proceedings under the *Planning Act*, the Ontario government should immediately establish an appropriate funding model. This model could be based on a fundamental restructuring of the OMB's existing cost powers under the *Ontario Municipal Board Act*, or, in the alternative, the model could consist of an updated version of Ontario's previous *Intervenor Funding Project Act*.

CELA RECOMMENDATION #9: The eligibility criteria for funding public participation in OMB proceedings should include consideration of the factors set out in section 7 of the previous *Intervenor Funding Project Act*.

CELA RECOMMENDATION #10: The ELTO should ensure that all OMB members receive ongoing training and professional development in relation to procedural and substantive issues that may arise in OMB hearings. In addition, consideration should be given to cross-appointing more ERT members to the OMB.

CELA RECOMMENDATION #11: Consideration should be given to having multi-member OMB panels adjudicate *Planning Act* appeals that: (a) involve multiple parties and participants; (b) raise matters of provincial interest, or issues which are complex or environmentally significant; and (c) are anticipated to result in lengthy or phased hearings. Similarly, if more ERT members are cross-appointed to the OMB, they could be assigned to panels which are scheduled to hear and decide large-scale and/or controversial development proposals involving matters related to environmental protection, resource conservation or public health and safety.

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CELA RECOMMENDATION #19: The Ontario government should revisit and revise the current aggregate policies in the PPS, and should create a conflict resolution mechanism for addressing situations where the aggregate policies are directly at odds with other applicable PPS policies, particularly those related to natural heritage protection and agricultural land preservation.

CELA RECOMMENDATION #20: The Ontario government should reconsider its current "one window" approach under the *Planning Act*, and should enable ministries other than the MMA to independently pursue their own appeals to the OMB where appropriate.

CELA RECOMMENDATION #21: The Ontario government should not amend the current leave-to-appeal test under section 96 of the *Ontario Municipal Board Act*.

December 16, 2016