Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

March 23, 2018 **BY EMAIL**

Environment & Lands Tribunals Ontario
655 Bay Street, Suite 1500
Toronto, Ontario
M5G 1E5

**RE: COMMENTS ON PROPOSED RULES OF PRACTICE AND PROCEDURE FOR THE LOCAL PLANNING APPEAL TRIBUNAL**

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On behalf of the Canadian Environmental Law Association (CELA), I am writing to provide CELA's comments to the Environment & Lands Tribunals Ontario (ELTO) on the proposed Rules of Practice and Procedure (Rules) for the Local Planning Appeal Tribunal (LPAT).

## Background

For the past several decades, CELA lawyers have represented individuals and groups in numerous hearings held by the Ontario Municipal Board (OMB), Environmental Review Tribunal (ERT), Joint Boards under the *Consolidated Hearings Act*, Niagara Escarpment Hearings Office, and other administrative bodies, tribunals and commissions at the provincial and federal level.

In these types of hearings, CELA's clients have variously participated as appellants, respondents or intervenors in order to safeguard the environment, conserve natural resources and protect public health and safety.

On the basis of this extensive hearing experience, CELA has carefully reviewed the proposed Rules from the public interest perspective of our client communities, and through the lens of ensuring access to environmental justice.

## Overview

At the outset, CELA must express serious concern over the unduly compressed nature of the current public consultation on the proposed LPAT Rules.

For example, the public comment period has been less than 30 days in length, ending on March 23, 2018. Since the new Rules must be in place by April 3, 2018, this timeframe appears to leave insufficient time for ELTO officials to carefully review all submissions received, or to develop amendments to the proposed Rules in order to address public concerns or to act upon appropriate recommendations for clarifying or improving the Rules. CELA further notes that the ELTO's explanatory webinars on the substantially revised LPAT regime only occurred during the last few days of the public comment period.

It is CELA's understanding that the LPAT intends to review the track record under the new Rules after several months' experience has been gained. Given the novelty, significance and complexity of many new provisions in the Rules, such a review is undoubtedly necessary in order to draw some early lessons learned and to make appropriate adjustments to the practice and procedure before the LPAT.

To date, however, CELA has seen no indication whether this will be an internal review conducted solely by ELTO officials, or whether it will be a more systematic public review that solicits the input of stakeholders who have been engaged in the first round of LPAT hearings. CELA strongly recommends the latter approach, and we urge the ELTO to formally invite public feedback on LPAT hearings and Rules before the end of 2018.

In terms of procedural reform, CELA's overall conclusion is that the proposed Rules are clearly intended to implement the sweeping changes contained in Bill 139, particularly in relation to appeals under the *Planning Act*. Given that Bill 139 abolishes *de novo* hearings, prohibits parties from examining or cross-examining witnesses, and establishes other hearing-related constraints in certain *Planning Act* appeals, CELA remains highly concerned about the fairness and efficacy of these questionable changes, as noted in our previous submissions on Bill 139 and its proposed regulations.[1] It therefore remains to be seen whether the new LPAT hearing process will be more effective, efficient and equitable than the previous OMB hearing process used to adjudicate land use planning appeals involving official plans, zoning by-laws and plans of subdivision.

Aside from the controversial statutory changes reflected in the proposed Rules, CELA has identified a number of other important matters which are not addressed adequately or at all in the proposed Rules, as discussed below. In our view, these matters must be properly addressed in the finalized Rules before they go into effect in the coming weeks.

In addition, CELA submits that to the greatest extent possible, the new Rules should be made more consistent with the relevant Rules of ERT, which is another member of the ELTO cluster. In our view, general consistency between the LPAT and ERT Rules would be beneficial in situations where a Joint Board has been established to hold a consolidated hearing on the same subject matter pursuant to applicable planning and environmental statutes.

These and other concerns are further described below in relation to Parts I, II and III of the proposed Rules.

## Conflict with the *Statutory Powers Procedure Act*

CELA notes that the "conflict" provision outlined at the end of Rule 1.01 states that the proposed Rules prevail over the *Statutory Powers Procedure Act* (SPPA) pursuant to section 32 of the *Local Planning Appeal Tribunal Act, 2017* (LPATA). This is an incorrect statutory reference since it is subsection 31(3), not section 32, of the LPATA that enables the proposed Rules to prevail over the

[1] These previous submissions are available on the CELA website: http://www.cela.ca/collections/land/land-use-planning-ontario.

SPPA in cases of conflict. CELA trusts that this citation error will be corrected when the new Rules are promulgated in the near future.

**Comments on Part I of the Proposed Rules**

Part I of the proposed Rules broadly applies to all proceedings before the LPAT, except where the Rules expressly provide to the contrary.[2]

In many instances, the definitions and general provisions in Part I duplicate – or are substantially similar to – the existing OMB Rules, and therefore do not warrant specific comments from CELA at this time. Accordingly, this CELA brief is focused on several new or amended provisions proposed under Part I, and on key matters for which no provisions have been proposed under Part I.

For example, Rule 3.02 refers to timelines set by "Ministerial Regulations" in relation to the exercise of the LPAT's authority to commence, postpone or resume hearings. For the purposes of greater certainty (especially for unrepresented parties), CELA submits that this term should be defined in Rule 1.02 as meaning O.Reg.102/18, as may be amended from time to time.

Proposed Rule 3.05 generally empowers the LPAT to proceed with an oral or electronic hearing if a party is absent, but does not specify the practical consequences of the party's absence. Accordingly, CELA recommends the inclusion of a new sub-Rule (similar to ERT Rule 16) that authorizes the LPAT to:

- deem the absent party to have accepted the material facts set out in other parties' filed documentation;
- determine whether the absent party should be permitted to present evidence or make submissions at subsequent stages of the hearing (if any);
- proceed in the absence of the party without further notice;
- decide the matter based solely on the materials before the LPAT;
- dismiss the proceeding; or
- make any other order as may be appropriate.

CELA further submits that Part I of the proposed Rules should be amended to permit parties or participants to contact the Case Coordinator to request hearing-related accommodation if required pursuant to Ontario's *Human Rights Code.* The proposed Rules are silent on this matter, but we note that such provisions are expressly contained within the ERT Rules.[3]

[2] Rule 1.01.
[3] See, for example, ERT Rule 25.

On a related point, CELA notes that the proposed Rules do not define or even mention the term "Case Coordinator," and do not require parties and participants to communicate with an LPAT hearing panel via the Case Coordinator assigned to the proceeding.[4] These omissions should be addressed in the Rules to ensure that written communications are not sent directly to panel members, and to require that all communications provided to the Case Coordinator shall be copied to all other parties and participants.

Proposed Rule 5.04 and 5.05 require municipalities or approval authorities to compile and file their written records in relation to appeals of "planning matters." However, it appears to CELA that Rule 5.04 needlessly creates an additional workload for municipal clerks, who are compelled to create "certified" summaries of all oral submissions made during the statutory public meeting, and to forward audio/video recordings (if available) of such meetings.

We are unclear about the value, utility or rationale of requiring this extra work and expense, particularly where a party may subsequently dispute the accuracy or content of the clerk's summaries. Thus, CELA suggests that the filing of the complete written record (without annotations, summaries or commentary by municipal staff) is likely to be sufficient for LPAT hearing purposes.

Rule 6.03 requires the LPAT's hearing notice to specify the hearing venue, which must "belong" to the municipality. This ownership restriction does not currently exist under OMB Rules or ERT Rules. For cost savings purposes, it may well be desirable in many cases for LPAT hearings to be held in local council chambers or municipally owned halls or buildings. However, in order to facilitate public access to, and involvement in, the LPAT hearing process, this Rule should be amended to provide that hearing shall be held in the community where the subject property is located (unless the LPAT decides otherwise), and that the hearing shall be conducted in a municipally owned facility "or other suitable venue."

Rule 6.04 sets out notice periods for certain types of appeals. CELA has no objection in principle to the 30 and 60 day notice requirements prescribed by the chart in Rule 6.04, particularly since these periods are, for the most part, similar to the 35 and 60 day periods in OMB Rule 17.2. However, given that some of the notice periods pertain to *Planning Act* appeals affected by Bill 139, CELA suggests that it may be advisable to relocate these notice periods to Part II of the proposed Rules. On this point, we note that Rule 26.02 provides that Rule 6.04 does not generally apply to hearings subject to Part II of the proposed Rules. Accordingly, it seems necessary to amend the proposed Rules to address this apparent internal inconsistency.

Rule 8.02 empowers the LPAT to add non-appellants as parties, but CELA submits the criteria to be used to grant or refuse party status are far too narrow. For example, this Rule requires the LPAT to consider applicable legislative standing requirements (if any), and whether the person's involvement is "necessary" to enable the LPAT to "effectively and completely" adjudicate the issues before it. In CELA's view, given that the LPAT will often be determining issues of public

[4] See, for example, ERT Rules 20-21.

interest (not a *lis* between private parties), Rule 8.02 should be reframed to more closely resemble the broader considerations outlined in ERT Rule 63.[5]

More alarmingly, Rule 8.03 prohibits non-appellant parties from raising any new issues at LPAT hearings. Instead, this Rule provides that non-appellant parties can only "shelter" under the specific issues raised by the appellant.

In CELA's view, this prohibition is overbroad and unjustified, particularly if it prevents non-appellant parties from making cogent submissions or presenting probative evidence on other issues that are relevant to the subject matter of the hearing. At the very least, Rule 8.03 should be amended to confer discretion upon the LPAT to grant permission to a non-appellant party to raise other relevant issues, subject to such conditions as may be appropriate.[6]

CELA further notes that Rule 8.03 specifies that a non-appellant party cannot pursue any issues, and the hearing cannot be continued by the non-appellant party, where the appellant has withdrawn the appeal or the LPAT has otherwise "resolved or determined" the appeal. In our view, this restriction is unwarranted and potentially counter-productive since the LPAT will be adjudicating wide-ranging matters of public interest, especially when it is seized with *Planning Act* appeals.

In particular, CELA submits that it would be highly inappropriate to automatically terminate or discontinue an LPAT hearing where, for example, a developer negotiates a "sweetheart" deal that requires a municipality to issue (or amend) the required *Planning Act* approvals, despite residual concerns of other parties regarding consistency with the Provincial Policy Statement or conformity with an official plan or provincial land use plan. In such circumstances, CELA submits that proposed Rule 12.01 should be amended to better reflect the relevant ERT Rules[7] regarding negotiated settlements (and appeal withdrawals) by allowing other parties to make submissions on whether the proposed deal should be accepted or rejected by the panel member(s), regardless of whether this occurs prior to or during the LPAT hearing.

Proposed Rule 15 enables the LPAT to conduct an "administrative screening" to ensure that the matter has been submitted to the LPAT in accordance with prescribed timeframes, statutory requirements, and applicable Rules. CELA has no objection in principle to this preliminary review of the filed materials, particularly since this provision is similar to OMB Rules 51 to 55. However, it is unclear to us why OMB Rule 53 (dispensing with request for additional information) has not been carried forward into proposed Rule 15.

To avoid unnecessary overlap or duplication, CELA generally supports proposed Rule 16, which enables the LPAT to consolidate, and hear at the same time, two or more matters in which it has jurisdiction. These consolidation powers closely resemble those set out in OMB Rules 57 to 60.

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[5] ERT Rule 63 directs to ERT to consider "relevant matters," including whether: (a) the person's interest may be directly and substantially affected by the hearing or its result; (b) the person has a genuine interest, whether public or private, in the subject matter of the proceeding; and (c) the person is likely to make a relevant contribution to the Tribunal's understanding of the issues in the proceeding.

[6] See, for example, ERT Rules 62(c) and 64.

[7] See, for example, ERT Rules 198-202.

However, it is unclear to CELA how this arrangement may work in practice where one matter has traditionally required *de novo* hearings featuring *viva voce* evidence (e.g. referral of a quarry licence application under the *Aggregate Resources Act*), and the second matter no longer requires *de novo* hearings featuring *viva voce* evidence due to Bill 139 (e.g. appeal of official plan amendment or zoning by-law amendment for the proposed quarry). Accordingly, CELA submits that the proposed Rules should provide additional clarification about when and how disparate LPAT hearing processes will be consolidated, heard together, or heard sequentially.

During the ELTO webinar held on March 21, 2018, it was suggested by the panelists that in such cases, it may be appropriate to proceed first with the *Planning Act* hearing in order to meet the prescribed deadlines, and to determine the principle of the proposed land use before adjudicating related matters under other statutes.

CELA has two main concerns about this suggested sequencing of LPAT matters. First, there is nothing in the proposed Rules that specifically addresses this situation, or that dictates the desirable hearing order. In our view, simply leaving the sequencing question to be determined by LPAT members on a case-by-case basis may result in inconsistent approaches and/or diminish overall certainty and predictability in the LPAT hearing process. Accordingly, CELA concludes that it would be helpful for the proposed Rules to provide appropriate guidance to help resolve these types of consolidation issues.

Second, if LPAT hearings are sequenced in the manner suggested by the ELTO webinar, then CELA is concerned about the prospect of conflicting decisions, duplicative hearings, and increased costs for parties. For example, if a proposed quarry requires planning instruments affected by Bill 139, then any appeals will be subject to the new hearing process (e.g. oral submissions based on the municipal record, without allowing the parties to call or cross-examine witnesses). Assuming that the planning instruments are eventually issued (whether after a first or second round of *Planning Act* appeals), then at some point the LPAT will subsequently conduct the public hearing under the *Aggregate Resources Act*, where many of the same issues may be in dispute (e.g. impacts on groundwater, surface water, air quality, wildlife habitat, species at risk, etc.). In this scenario, it is not inconceivable that after hearing *viva voce* evidence from qualified experts, the LPAT decision may direct the Minister to not issue the quarry licence under the *Aggregate Resources Act*, even though the requisite *Planning Act* approvals may have been previously obtained by the proponent.

To avoid such intractable problems, CELA submits that it would be highly advantageous (and certainly more efficient) to have all the *Planning Act* and *Aggregate Resources Act* evidence and submissions heard concurrently in a consolidated LPAT hearing. Thus, the proposed Rules should provide that in such consolidated hearings, the Part I rules shall prevail, even if there are *Planning Act* appeals subject to Bill 139. If, for whatever reason, a consolidated hearing cannot be completed within the regulatory timeframe under Bill 139, then this would offer the LPAT an opportunity to use its new powers under Rule 3.02 to "stop the clock" where necessary.

While Rule 5.06 generally leaves it open to the LPAT to decide whether to hold an oral, electronic or written hearing (unless a particular hearing format is prescribed by law or regulation), Rules 20 and 21 stipulate the factors to be considered if a party objects to an electronic or written hearing.

For example, if there is an objection to an electronic hearing, Rule 20.05 lists a number of considerations that the LPAT should take into account. However, under Rule 20.04, the objection will only be upheld (and the hearing converted to another format) if the objecting party can demonstrate that he/she may suffer "significant prejudice." In CELA's submission, this test is far too narrow, subjective and speculative. While the presence/absence of prejudice may be relevant, it is not necessarily dispositive of the objection, and the LPAT should have regard for the full range of considerations in Rule 20.05 as well as the fulfillment of the LPAT's statutory mandate.

Similarly, Rule 21.02 sets out factors to be considered by the LPAT if there is an objection to a written hearing. However, we are unclear why this list does not more closely mirror the enumerated factors in Rule 20.05 in relation to electronic hearings. In our view, the Rule 20.05 considerations are equally relevant if one or more parties are concerned about the propriety of conducting a written hearing.

Proposed Rule 23 describes the criteria and process for parties seeking costs of LPAT proceedings. In general terms, this Rule does not significantly depart from OMB Rules 96 to 104.1 in that adverse cost awards are still available to sanction hearing-related conduct that is deemed to be unreasonable, frivolous or vexatious, or undertaken in bad faith. However, in the continuing absence of a statutory intervenor funding program for LPAT proceedings, CELA submits that this cost power should be used in a more positive manner to encourage public participation in LPAT hearings.

For example, in our experience, the single greatest barrier to meaningful public participation under the *Planning Act* is the ongoing lack of funding tools intended to enable citizens and non-governmental organizations to retain the legal, technical and planning assistance often required by parties engaged in the decision-making and/or appeal process.

In CELA's view, the regrettable absence of public participation funding under Bill 139 not only impairs the ability of citizens to play a vital role in land use planning disputes, but it may also deprive decision-makers and the LPAT 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.

Although details are sparse at the present time, we are aware that the Local Planning Appeal Support Centre may be able to provide legal and/or planning assistance to eligible citizens or groups. Moreover, it was suggested during the March 21st ELTO webinar that the Centre may represent people at "certain" LPAT hearings, although it was not specified when the Centre would – or would not – provide representation services. Similarly, to our knowledge, the Centre's financial eligibility criteria have not been finalized or released, and it is unknown whether the Centre's representation activities will be limited to *Planning Act* matters, or whether the Centre's staffing will include other subject matter experts (e.g. hydrogeologists, engineers, biologists, etc.).

Accordingly, it appears to CELA that despite the creation of the Centre, there will still be a number of Ontarians who will be bearing the financial cost of pursuing (or responding to) appeals to the LPAT under various statutes. In addition, CELA questions whether limiting the Centre's

representation services at the LPAT hearing stage may be too late to be truly effective under the new Bill 139 regime since the LPAT's decision will be largely (if not exclusively) based on whatever evidence was placed in the municipal record prior to councils' decision. In our view, this is the critical upfront stage of the land use planning system where the Centre's representative services should also be available.

In any event, CELA submits that the provision of funding assistance via cost awards to public interest representatives would improve the fairness and quality of the land use planning system, and would enhance the soundness and acceptability of the LPAT's disposition of *Planning Act* appeals. Conversely, maintaining the status quo will undoubtedly perpetuate one-sided battles before municipal councils and at LPAT hearings between well-resourced developers and supportive public authorities on the one hand, and unrepresented or under-resourced citizens on the other hand.

As correctly 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 participant**s** whose involvement made a contribution to the proceedings, regardless of the outcome. Additionally, costs can be used to level the playing field by enabling parties with fewer resources to retain expert witnesses and compile necessary scientific or technical evidence to support their positions.[8]

In recent years, there has been public concern about how the OMB interpreted and applied 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.[9]

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.[10] While each case of alleged misconduct by a hearing party must be assessed on its

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[8] 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.
[9] *Re Kimvar Enterprises Inc*. (2009), 61 OMBR 293, para. 43 ($3.2 million cost claim by developer dismissed).
[10] *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

own unique set of facts, CELA remains concerned that the LPAT's continued ability to make adverse cost awards may inhibit public willingness to get involved in appeal proceedings under Bill 139.

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 LPAT should strive to use its cost powers in a more positive manner to facilitate informed, helpful and reasonable participation by hearing parties.

More specifically, CELA recommends that the LPAT cost rules should 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.[11]

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.[12] 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 Rules.

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."[13] 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;

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$110,000 to proponent); *Campione v. Vaughan*, 2016 CanLII 33681 (two residents ordered to pay two developers $68,000 and $16,000 respectively).

[11] EA Act, section 21.

[12] *Ibid*, subsection 21(4).

[13] ERT Rule 223.

- 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.[14]

However, throughout the hearing process under the EA Act, the ERT still retains its SPPA jurisdiction to make adverse cost awards intended to sanction unreasonable misconduct by hearing parties.[15]

For the foregoing reasons, CELA submits that the ERT's existing cost powers under the EA Act represent an important precedent that can be modified and adapted for use by the LPAT. We recognize, however, that this may require a further statutory amendment to subsection 33(4) of the LPATA in order to confer EA Act-like cost powers to the LPAT. In principle, there should no material difference in the nature and purpose of cost awards by ELTO tribunals under the EA Act or the *Planning Act* since both types of proceedings often involve planning matters of considerable public interest and environmental significance.

**Comments on Part II of the Proposed Rules**

Part II of the proposed Rules applies specifically to certain appeals arising under the *Planning Act* (as amended by Bill 139), and does not apply to any other proceedings before the LPAT.[16]

As a preliminary observation, CELA finds that proposed Rules 26.01 and 26.02 are likely to generate considerable confusion and uncertainty due to its complex description of how the provisions of Parts I and II apply – or do not apply – to LPAT hearings on first or second appeals involving *Planning Act* matters. Accordingly, strong consideration should be given to re-wording or clarifying the intent and effect of these proposed Rules in a more straightforward manner not only in the text of the Rules, but also in any guidance materials published by the LPAT.

After an appeal has been filed, proposed Rule 26.04 requires the municipality to forward an "enhanced" record to the LPAT. However, no specific timeframe for delivery of the record is prescribed in this Rule or Rule 5.04. CELA submits that either a qualitative ("forthwith") or

[14] ERT Rule 224.
[15] ERT Rule 225.
[16] Rules 1.01 and 26.01.

quantitative ("within 10 days") timeframe should be specified so that the subsequent steps of the LPAT hearing process may occur without undue delay.

Proposed Rule 26.05 requires the LPAT to conduct a "preliminary screening" to determine the "validity" of the filed appeal. CELA submits that this screening should be administrative in nature (like Rule 15), and should not attempt to address the merits of the appeal. It should be recalled that at this early stage, all that the LPAT will have in hand is the notice of appeal, without any evidence or submissions from the appellant or other parties. In general, as long as the appeal was filed on time, and as long as the content of the notice of appeal is complete and addresses the relevant issues (e,g. the so-called "consistency and/or conformity" test under Bill 139), then the appeal should be processed by the LPAT in the normal course.

Accordingly, CELA is concerned about proposed Rules 26.06 to 26.09, which establishes a new procedure for challenging the outcome of the Tribunal's preliminary screening determination. In our view, this provision (and Rule 5.05) creates an extra interlocutory step that will inevitably invite adversarial tactics by parties interested in using every potential opportunity to delay or prevent an appeal from proceeding to the LPAT hearing.

CELA therefore submits that Part II of the proposed Rules should not allow any challenge of an LPAT administrative determination that an appeal is *prima facie* valid. Conversely, if the LPAT determines that the appeal is not *prima facie* valid, then the appellant should be notified and given an opportunity to make representations (or to remedy the alleged deficiency), failing which the appeal may be dismissed.

Where an appeal has been validly filed, proposed Rules 26.11 to 26.13 oblige the appellant to file an appeal record (including affidavits from experts) and a "case synopsis" that cannot exceed 20 pages in length. A longer synopsis can only be filed "if authorized" by the LPAT, but the proposed Rules provide no criteria or guidance on when it may be appropriate to file a longer case synopsis.

CELA is unclear how the LPAT has determined that this suggested 20 page limit is realistic or workable in all *Planning Act* appeals subject to Bill 139. By way of comparison, we note that the written argument of fact/law (factum) filed by parties in Ontario courts are subject to a 30 page limit, with the possibility of seeking permission to file a longer factum if necessary. As a default position, we recommend that the proposed Rules should be amended to permit parties to file case synopses up to 30 pages in length, and they should be able to seek permission to file longer ones in particularly complex cases.

After the parties' records and synopses have been exchanged, proposed Rules 26.17 to 26.23 require a case management conference to be held by the LPAT. Among other things, this conference will determine, on the basis of written submissions, whether additional persons should be granted party or participant status in the appeal hearing. On this point, CELA submits that the proposed Rules should include the same considerations as ERT Rule 63 for the purposes of granting standing to other persons, as described above in relation to Part I of the proposed Rules.

At the case management conference, the LPAT is empowered to provide directions on the conduct of the hearing process.[17] We presume that this includes not only setting timelines for new parties or participants to serve/file case synopses, but also establishing deadlines for completing cross-examinations (if any) on the affidavits that were filed as part of the appellant's record. On this point, we are unclear why the appellant's record may contain affidavits, but proposed Rule 26.14 does not confer the same option upon responding municipalities or approval authorities. At the case management conference, directions should also be provided for the filing of cross-examination transcripts (or excerpts thereof) before or at the hearing of the appeal. These matters are not expressly dealt with in Rule 26.20, but should be mentioned for the purposes of greater certainty.

Proposed Rule 26.24 empowers the LPAT to compel the attendance of affiants (or other persons), and to require the production of documents, in order to enable the LPAT member to question witnesses. CELA has a number of concerns with respect to this proposed Rule, which appears to have no direct counterpart in current OMB or ERT Rules.

First, it is unclear whether the LPAT member is entitled to question witnesses on his/her own initiative, or upon motion by the parties, or both. Moreover, the proposed Rule provides no criteria that explain the circumstances under which the LPAT member may elect to exercise this authority to pose questions to witnesses. Similarly, it is unclear whether the LPAT will need to issue a summons to compel the attendance of the person to be questioned; if so, then we note that Rule 26.24 does not specify who is responsible for paying the fees or disbursements of any expert witnesses whom the LPAT member wishes to examine. Given the structure of proposed Rule 26.24, CELA presumes that this provision is not intended to work in the same manner as ERT Rule 197, which enables the ERT to retain its own experts to provide opinion evidence.

Second, it must be recalled that prior to the LPAT hearing, there will likely be little or no testing of the planning and/or technical evidence presented to municipalities or approval authorities by developers, residents or other interested persons or agencies. Even where the mandatory public meeting is held under the *Planning Act*, the evidence is not tendered under oath, the authors of supporting documents are not subject to cross-examination or expert qualification, and the opportunities to make deputations are often subject to very short timelines.

Thus, if an appeal is filed, the LPAT hearing theoretically offers the first – and only – meaningful opportunity to test the evidence or opinions for and against the land use application. However, if hearing parties cannot examine witnesses at the hearing, and if the LPAT member declines to do so, then the soundness or credibility of the resulting decision may be highly suspect if the appeal record contains errors, omissions or misstatements that are left unchallenged or uncorrected by *viva voce* testimony or documentary evidence presented at the LPAT hearing. This is particularly true if the appeal is subject to a written hearing rather than an oral hearing.

CELA notes, however, that proposed Rule 26.26 enables the LPAT to send written interrogatories to be answered by the parties, and any disputes over the adequacy of the interrogatory response shall be addressed via motions. In our experience, the efficacy of interrogatory procedures can be

[17] Rule 26.20.

undermined by responses which are incomplete, incorrect or raise more questions than they answer. Thus, CELA reasonably expects that such disputes will arise under Rule 26.26, and that motions will invariably be brought in relation to interrogatory answers. If so, the proposed interrogatory mechanism has clear potential to increase cost and cause delay within the LPAT hearing process.

Therefore, while we have no objection to the judicious use of interrogatories directed to parties, we anticipate that in some instances, the forthcoming answers may not be as responsive or helpful as the LPAT might anticipate. Accordingly, further amendments to Rule 26.26 may be warranted in the near future as the LPAT gains experience with this mechanism.

In addition, CELA must point out that Part II of the proposed Rules is silent on whether LPAT parties will be able to bring motions to present fresh evidence that post-dates the land use planning decision under appeal. In this regard, CELA notes that parties in court appeals may seek leave to present new evidence (e.g. affidavits, oral testimony, etc.) in order to enable the court to determine the appeal.[18] A similar opportunity for parties to seek leave to file new evidence also exists in ERT appeals under environmental statutes.[19] In CELA's view, given that material evidence can become available after the notice of appeal has been filed under the *Planning Act*, the LPAT Rules should be amended to include provisions for receiving fresh evidence by the parties in appropriate cases.

This matter raises the additional question of whether the affidavit(s) filed as part of the appellants' record can address events, correspondence, reports or other documents that are relevant to the subject matter of the hearing, but that occur or are generated after the impugned *Planning Act* decision has been made by a municipality or approval authority. It was suggested during the March 21st ELTO webinar that allowing post-decision evidence to be adduced by LPAT parties would be contrary to the legislative intent of Bill 139, which requires some degree of deference to *Planning Act* decisions made by elected officials, and which restricts appeals to the municipal record.

In reply, CELA submits that under Bill 139, there is no presumption that the municipality or approval authority correctly interpreted and applied the applicable requirements of the Provincial Policy Statement, official plans, or provincial land use plans. Accordingly, no deference should be accorded by the LPAT, which, as an independent and specialized administrative body, must come to its own conclusion (after receiving evidence and argument) on whether or not the "consistency and/or conformity" test is satisfied. If not, then pursuant to proposed Rule 27, the matter is remitted back to the municipality or approval authority for further consideration, subject to any options that the LPAT decision may suggest for resolving inconsistency and/or non-conformity.

Accordingly, the LPAT is not performing a narrow judicial review function under Bill 139, nor is the LPAT attempting to usurp or duplicate the Divisional Court's role under the *Judicial Review Procedure Act*. For example, the LPAT is not deciding appeals on the basis of a "reasonableness" or "correctness" standard of review, nor is the LPAT scrutinizing *Planning Act* decisions (or non-decisions) for jurisdictional error. Thus, the Divisional Court's general rule against admitting

[18] See section 134(4)(b) of the *Courts of Justice Act* and Rule 61.16(2) of the *Rules of Civil Procedure*.
[19] ERT Rules 233 to 234.

affidavits to supplement the record of decision[20] is wholly inapplicable to the LPAT's statutory mandate and duties under the *Planning Act*, as amended by Bill 139.

In principle, CELA submits that there is no compelling reason for the LPAT to disregard (or strike out) portions of affidavits on the mere grounds that they may relate to post-decision matters. If such matters are relevant to the decision under appeal, or if they otherwise assist the LPAT in understanding and adjudicating the issues in dispute, then the proposed Rules should be amended to clarify that affiants may include or address them in their affidavits. Since such evidence is admissible, the LPAT panel can then give it whatever weight may be appropriate in the circumstances.

Proposed Rules 26.02 and 27.03 provide, in effect, that where the planning dispute has been remitted back to the municipality or approval authority, and where there is a second appeal of the new decision (or non-decision), then Part I of the Rules apply to the second appeal filed with the LPAT. After hearing the second appeal, the LPAT panel will make a final decision on the planning instrument (e.g. approval, modification or refusal) that may be appropriate under the *Planning Act*. For this reason, CELA agrees that the provisions of Part I (including oral hearings that allow parties to call and cross-examine witnesses) should apply to second appeal. However, it appears highly incongruous that second appeals will receive a broader and more robust hearing process than first appeals under Bill 139.

## Comments on Part III of the Proposed Rules

Part III of the proposed Rules applies specifically to matters arising under the *Expropriations Act*, and does not apply to any other proceedings before the LPAT.[21]

While CELA has occasionally represented parties in consolidated hearings involving the *Expropriations Act* (e.g. municipal landfill cases), we generally do not represent expropriating authorities or claimants under this Act. Moreover, Part III of the proposed Rules largely replicates the existing provisions under Rules 120 to 142 of the OMB Rules.

Accordingly, we have no substantive comments on the procedural requirements set out in Rule 28 of the proposed Rules.

## Conclusions

In summary, it appears that CELA's concerns about the regressive nature of Bill 139 have been affirmed by the proposed LPAT Rules, particularly in relation to certain *Planning Act* appeals.

However, CELA submits that these concerns may be partially alleviated if the proposed Rules are amended in the manner outlined in this brief.

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[20] *Re Keeprite Workers Independent Union and Keeprite Products Ltd.* (1980), 29 OR (2d) 513 (Div.Ct.).
[21] Rule 1.01.

Please contact the undersigned at your earliest convenience if you require any additional information about CELA's submissions on the proposed LPAT Rules.

Yours truly,

**CANADIAN ENVIRONMENTAL LAW ASSOCIATION**

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