December 19, 2016

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

Re: 2016 Ontario Municipal Board Review, EBR file 012-7196

Dear Mr. Petersen,

The 120 members of the Ontario Greenbelt Alliance agree that substantive changes are needed to fix the Ontario Municipal Board ("OMB"). Reforms that restrict appeals and support citizen participation in land use planning decisions are urgently needed. Ontario’s world-class, progressive land use plans depend on meaningful changes to the way the OMB treats citizens and upholds provincial plans.

Over the years, many OGA member groups have brought cases to the OMB in an effort to protect the Greenbelt. Most have lost their cases, with grave consequences to our countryside, natural heritage, and the public interest. Most suburban development plans that were appealed to the OMB seem to have been approved over the objections of environmentalists and ecologists seeking compliance with provincial interest and planning rules.

Although not part of the four land use plans reviewed over the past 18 months, the OMB is a critical component of the land use planning architecture for the province. The OMB must be reformed if provincial land use plans are to be effective in the long term.

The members of the Ontario Greenbelt Alliance respectfully submit the following comments for your consideration.

Sincerely,

Tim Gray
Executive Director
Environmental Defence
**Issues:**

**Environmental issues need a fair hearing**
Increasingly, protection of the environment is recognized as a bedrock requirement of progressive land use planning. The OMB is a land use planning tribunal that specializes in urban design, density, massing and compatibility concerns. The OMB is not an expert environmental tribunal – it wasn’t created to deal with the rapidly evolving science of ecology or its application in municipal plans as required by the Planning Act. Board Members hearing appeals of greenfield matters, (e.g. protection of wetlands, forests, wildlife habitat, agricultural land, groundwater, First Nations’ cultural heritage, etc.) require a different knowledge base than urban appeals concerning the Growth Plan or fights over the height of a new building. Referring planning matters to the Environmental Review Tribunal ("ERT") to hear matters primarily environmental in nature would reduce the number and complexity of OMB hearings. Planning appeals relating to greenfield sites that involve environmental issues and environmental features are often complex, and benefit greatly from being decided by Board Members with knowledge of the environment and environmental law.

**Recommendation:** We recommend that hearings on environmental features, such as groundwater, natural heritage mapping, wetlands, forests, wildlife habitat, agricultural land, etc. be referred to Environmental Review Tribunal. Once those matters have been resolved any remaining planning disputes can be dealt with by the OMB.

**Support Citizen Participation**
For citizens the cost of participating in OMB appeals is expensive and time consuming. Intervenor funding similar to what exists for energy and human rights issues in the province, is needed to address the fundamental imbalance favouring the development industry.

According to the Ontario Home Builders Association, in 2015, there were 68,091 home starts in Ontario.\(^1\) Development charges and other fees paid to government make up about $100,000 of an average home cost\(^2\). So, by multiplying 68,000 home starts by $100,000 (development charges and other fees) =


$6,800,000,000. Giving 1% of this over to citizens desperately in need of intervenor funding would produce a funding pool of $68,000,000, 0.1% is $6,800,000. In other words, there is enough money in the system to level the playing field. The Ontario Energy Board Practice Direction on Cost Awards provides a relevant example of the cost and process of an intervenor funding program.

**Recommendation:** Provide intervenor funding to support full citizen participation. The OMB rules are tilted in favour of wealthy developers. Our members find it increasingly difficult to be able to participate in OMB hearings where there is a public interest. The province needs to address this imbalance by ensuring members of the public have access to intervenor funding to enable them to fully participate in OMB hearings.

**Cost of Hearings**
The cost of OMB hearings undermines objective municipal planning. The system is weighted heavily in favour of those in the development industry, who have the resources, knowledge and experience (and access to a stable of planning, environmental and other professionals with specialized expertise) to skillfully argue their case before the Ontario Municipal Board (OMB).

The Environmental Commissioners 2009 report highlights the imbalance favouring the development industry.

"**Nowhere is the asymmetry of the system more evident than in the relative economic power of the two sides involved. When the stakes are in the many millions – sometimes billions – of dollars, the resources that developers are prepared to invest to overcome residents’ objections far surpass the capacity of most citizens groups, environmental organizations, and even conservation authorities and municipalities.”** [Emphasis added]

For example, developers in a recent three-week OMB hearing spent $1.5 million to oppose a farm family seeking a 30m buffer for their livestock operation in the Greenbelt (Vaughan).

Rather than pay the cost of participating in a hearing, municipalities sometimes opt to settle with developers even when the core issue remains unresolved. This is problematic as often the settlement reached may be contrary to municipal plans developed over years with thoughtful research, studies, legal, planning expertise and public consultation.

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**Recommendation:** Reform the OMB to reduce the imbalance favouring developers. Remove Sec. 69 of the Planning Act which allows developers to pay for municipal hearing costs if the municipality supports the developer.

**Restrict Appeals**
For OGA members, it is important to restrict appeals of entire Official Plans and uphold provincial policy. But we also need to ensure that we retain the right to appeal Council decisions that are inconsistent with the Official Plan and zoning by-laws.

**Recommendation:** Restrict appeals of municipal Official Plans and provincial plans. The OMB should not be able to overrule provincial policy or rewrite municipal policy.

**OMB Cost Claims**
Awards of costs are getting larger, and even the threat of costs is becoming more worrisome. In North Dumfries, a $225,000 costs claim was requested in the end the OMB awarded $125,000. In the example cited above from Vaughan, developers sought $1.3 million in costs and were awarded 6% of this amount without producing any evidence the costs were actually incurred. The costs of defending such an outrageous claim in court is prohibitive for citizens (and cost almost as much as the hearing itself).

The new *Protection of Public Participation Act* ("PPPA") fails to meaningfully remove the threat of costs claims at the OMB. The Toronto Star and others have documented citizens that have gone on the record to say the mere threat of costs caused them to abandon their opposition at the OMB.

**Recommendation:** Limit cost awards to $5,000. The OMB has the authority to limit or refuse to undertake hearings that are without merit and developers are more than capable of taking action to dismiss unmeritorious appeals.

**Transparency and Accountability**
Board hearings are not recorded. Transcripts are extremely expensive, costing tens of thousands of dollars, and in some cases more. (The Walker Aggregates Inc. Joint Board hearing covered 139 Hearing Days, total transcript cost was $208,500 ($1,500 X 139 days) Members of the public or legal representatives are routinely prohibited from recording any part of the proceedings. This is not consistent with the rules at other tribunals or court proceedings. Due to the lack of public scrutiny some Board members, developers and lawyers have reportedly harassed,
intimidated or threatened citizens which would be less likely to occur in an open public and transparent process.

**Recommendation:** Hearings should be video recorded (publicly available) and open to the media. Hearings should be held in venues with access to high speed internet and the hearing should be streamed online in real-time.

**Qualifications of Board Members**

It’s time to upgrade the qualification standards for new OMB members and review current OMB members qualifications and performance. Decisions often take months or over a year to produce, even in limited matters (e.g. Motions). All members should be required to have professional education or qualifications in land use planning policy and urban design. In addition, a series of recent troubling decisions by the OMB has illustrated the need for a formal complaints process to stop members from unjustly penalizing citizens’ groups for perceived slights or justifiable criticism.

**Recommendation:** It’s time to upgrade the qualifications for new OMB members and review current OMB members qualifications and performance.

**Mediation**

The province is considering requiring mediation for all OMB cases. We do not agree with mandatory mediation. Mediation and Alternative Dispute Resolution is costly and not always helpful because developers have a limited interest in considering public interest issues like the preservation of farmland, biodiversity or wetland habitat. Mediation may result in resolution of a dispute but it may also result in poor outcomes. Whether a Council planning decision conforms to provincial policy requires a decision, not mediation.

Mediation is a favoured tactic of developers seeking to “bleed” poorly funded opponents, who often exhaust the entire hearing budget on costly and fruitless mediation. Further, members of the public have no leverage in a negotiation and may be excluded from participating in mediation and settlement discussions. We recommend that participants and parties be given the privilege of participating in a mediation process. Intervenor funding should be extended to ratepayer and community groups that are parties and participants in a mediation.

**Recommendation:** Mediation should not be mandatory, and funding should be made available to citizen’s groups for mediation.
De Novo Hearings
The OGA supports giving strong deference to municipal planning decisions that protect the environment and support community plans. We also support allowing the municipal planning report, minutes of the public hearing and Council decision used as evidence.

However, in our experience, the majority of municipal planning and development decisions in greenfield contexts approve new development in sensitive environmental features. Giving greater deference to planning decisions that do not protect the environment (bad decisions) is not a solution.

Further, many of our members express concerns that moving away from de novo hearings may result in the statutory public hearing at the municipality becoming a quasi-judicial review. This may require citizens to submit evidence and hire experts at the statutory public hearing and at the Council vote on the planning application, an expense that will have to be duplicated at the OMB hearing. In addition, overturning a Council decision (even bad decisions) will require an appellant to show the Council decision was “unreasonable”, which is an extremely high threshold. Eliminating de novo hearings will essentially eliminate the public’s ability to question poor or non-compliant planning decisions.

According to the Supreme Court of Canada, the standard of “reasonableness” is:

- The reasoning must exhibit “justification, transparency and intelligibility within the decision-making process”; and
- The substantive outcome and the reasons, considered together, must serve the purpose of showing whether the result falls within a range of possible outcomes.

See Canada (Attorney General) v. Igloo Viski Inc., 2016 SCC 38 at para. 18

Most bad municipal decisions fall within a range of possible outcome and are intelligible – this is a very low threshold. The question posed in the Planning Act, and reiterated in the Provincial Policy Statement, is much clearer: is the development good planning. Eliminating de novo hearings and replacing them with de facto quasi-judicial review proceedings using the reasonableness standard will essentially eliminate public opposition to poor planning decisions.

Recommendation: Find a way to support good municipal decision-making without empowering poor planning by forcing citizens to challenge only the
“reasonableness” of Council decisions rather than their conformity with provincial policy and law. Refer greenfield applications to the ERT. OMB decisions should be based on application of the most up-to-date planning policy.

**New Evidence and Complete Applications**
Our members support allowing new evidence to be sent back to Council for consideration but there should be a limitation on the number of times an application can be revised. While the “complete application” requirement sounds good on paper, it is rarely enforced properly. In North Kawartha Township, a developer was allowed to change his application after a hearing had started. In Oro-Medonte, Council allowed a developer to conduct Stage II archaeological investigations weeks after the OMB hearing had started. We want to ensure that if new evidence is sent back to Council, that a new planning report will be required including a pre-consultation, notification, new hearing and that the public planning process is followed for any revisions. Our preference is to extend the length of time allowed to prepare the complete planning report from 180 days to 365 days and require the municipality to follow a strict process and adhere to the requirements of a complete application. The developer should not be allowed to keep changing a planning application and sending it back Council.

**Recommendation:** Hearings should only occur after all evidence has been submitted for consideration. Any new technical studies or changes to planning applications should be sent back to Council, and hearings adjourned for a minimum of 120 days.

**Ensure First Nations have been Notified and Consulted**
Ontario’s *Planning Act* notification regulations are inconsistent with legal requirements for aboriginal consultation. For example, O/Reg 543/06 gives notice of planning decisions to municipalities, school boards, Hydro, natural gas utilities, etc. etc., but only give notice to First Nations if the project is within 1 km of a Reserve – even if the development affects First Nations’ rights. Even profound changes to Official Plans are occurring without explicit recognition of whether First Nations were consulted. OMB members need to be trained to better understand what constitutes “consultation” to identify cases where First Nations were not included in the planning process but should have been given a seat at the table.

**Recommendation:** Change Ontario’s Planning Act and regulations to explicitly require full rights of notice and consultation for First Nations as a mandatory part of OMB appeals.
Summary of Recommendations:

1) All environmental issues involving the Greenbelt, greenfield, agricultural lands, wetlands, woodlands, wildlife habitat, and groundwater should be heard by the Environmental Review Tribunal not the OMB.

2) Increased provincial involvement is needed to defend provincial policy and matters of provincial interest in cases where policy is misinterpreted at the municipal level and by the OMB. (Requiring intensification plans and natural heritage mapping in OP’s) Restricting appeals of provincial policy will help reduce the number of appeals but policy may still be misinterpreted.

3) Provide intervenor funding to support full citizen participation. The OMB rules are tilted in favour of wealthy developers. Our members find it increasingly difficult to be able to participate in OMB hearings where there is a public interest. The province needs to address this imbalance by ensuring members of the public have access to intervenor funding to enable them to fully participate in OMB hearings.

4) Reform the OMB to reduce the imbalance favouring developers. Remove Sec. 69 of the Planning Act which allows developer to pay for municipal hearing costs if the municipality supports the developer.

5) Restrict appeals of municipal Official Plans and provincial plans. The Board should only be able to overturn council decisions if they violate the municipal official Plan or provincial planning policies.

6) Limit cost awards to $5,000.

7) Increase time limits for municipal planning reports to one year from 180 and 120 days, to reduce the number of non-decisions of Council and ensure applications are complete. Having a completed application that has been given a thorough review by planning staff and reviewed by Council will allow the development process to proceed more quickly than having a rushed report that isn’t completed and referred to the OMB.

8) Planning is a public process. The OMB needs to respect and welcome public participation. The Board should be open and receptive to input from all parties. Procedures and practices need to be more citizen friendly, use
checklists, identify that the objective is to resolve disputes in keeping with provincial and municipal policy.

9) Improve accountability and transparency by holding open public OMB hearings. Require all OMB hearings to be video recorded, with videos accessible on the OMB website. Hold hearings in venues with access to high speed internet and stream the hearings online in real-time.

10) Support shorter hearings by encouraging written submissions for minor variances and severance appeals. Require written submissions for cost awards and motions.

11) OMB decisions should be based on the most up to date planning documents, conform to provincial and municipal policy and allow the municipal planning hearing report and minutes to be filed as evidence. OMB Hearings should only occur after all evidence has been submitted for consideration. Any new technical studies or changes to planning applications should be sent back to Council, and hearings adjourned for a minimum of 120 days.

12) Review the qualifications of Board members and develop a public complaints process. Require diversity of planning expertise on the Board. Members must have education and experience in land use planning policy, and/or urban design. Move away from reappointing members with only development approvals experience and legal knowledge.

13) Change Ontario’s Planning Act and regulations to explicitly require full First Nations rights of notice and consultation as a mandatory part of OMB appeals.

14) Mediation should not be mandatory, and funding should be made available to citizen’s groups for mediation.

15) Find a way to support good municipal decision-making without empowering bad planning by forcing citizens to challenge the “reasonableness” of Council decisions. OMB decisions should be based on the most up-to-date planning policy.
The Ontario Greenbelt Alliance

The Ontario Greenbelt Alliance is a defender of Ontario’s innovative Greenbelt and proponent of Smart Growth in Ontario. The Alliance brings together more than 125 environmental and public health organizations, community groups and local environmental organizations from across the Greenbelt’s landscape and throughout the GGH. Founded in 2004, The Ontario Greenbelt Alliance believes that a strong economy and a beautiful well-protected Greenbelt go hand in hand. Our groups know first-hand the impacts bad planning decisions have had in Ontario, impacts that affect the quality of our water, our health, and our economy. The Greenbelt and Growth Plan must be strengthened if we want to have a healthy environment, a successful and robust rural economy and vibrant natural areas that connect and support Ontario’s rich biodiversity.
MEMBER LIST

- Altona Forest Stewardship Committee
- AWARE Simcoe
- A Rocha Canada
- Best Environment for Streetsville/Sierra Club Peel/NICO
- Blue Mountain Watershed Trust Foundation
- Bond Head/BWG Residents for Responsible Development
- Brampton Environmental Community Advisory Panel
- Bruce Peninsula Biosphere Association
- Burlington Green
- Canadian Association of Physicians for the Environment
- Canadian Institute for Environmental Law and Policy
- Canadian Network for Respiratory Care
- Canadian Organic Growers
- Canadian Parks and Wilderness Society (CPAWS)-Wildlands League
- Canadian Society of Iranian Engineers and Architects
- Castle Glen Ratepayers’ Association
- CELA
- Children of the Greenbelt
- Citizens Environment Alliance of Southwestern Ontario
- Clear the Air Coalition
- Coalition of Concerned Citizens of Caledon
- Coalition on the Niagara Escarpment
- Community Preservation Initiative
- Conservation Council of Ontario
- Conservation Development Alliance of Ontario
- Concerned Citizens of King Township
- Couchiching Conservancy
- GRAND
- Credit River Alliance
- David Suzuki Foundation
- Earthroots
- Ecological Farmers of Ontario
- EcoSpark
- Environment Hamilton
- Environmental Defence
- Federation of Urban Neighbourhoods (Ontario) Inc.
- Food Forward
- Food & Water First
- Friends of Boyd Park
- Friends of East Lake, Prince Edward County.
- Friends of Fairy Lake
- Friends of Hope Conservation Group Inc.
- Friends of Pittock
- Friends of Rural Communities & the Environment (FORCE)
- Friends of the Farewell
- Friends of the Fraser Wetland
- Friends of the Rouge Watershed
- Friends of the Twelve (FOTT)
- German Mills Ratepayers Association
- Global Environmental Action Group
- Grand Erie Energy Quest
- Grand River Environmental Network
- Green Incorporated
- Greening Niagara
- Greenlands Centre Wellington
- Greenpeace Canada
- Halton Environmental Network
- Halton - Peel Woodlands and Wildlife Stewardship Council
- Heritage Speed River Working Group
- Innisfil District Association
- Kawartha Land Trust
- King Environmental Groups
- The Lakewater Society
- Land Over Landings
- Langford Conservancy
- Lincoln Green
- Moraine Partnership
- North East Sutton Ratepayers Association
- Oak Ridges Moraine Land Trust
- Oakville Green
- Ontario Farmland Trust
- Ontario Land Trust Alliance
- Ontario Nature
- Ontario Smart Growth Network
- Palgrave Residents Association
- Peel Environmental Network
- Pembina Institute/York U
- Personal Computer Geographic Education System/Software (PCGES)
- PitSense Niagara Escarpment Group
- Preston Lake Environmental Association (PLEA)
- Protecting Escarpment Rural Land (P.E.R.L.)
- Protect our Water and Environmental Resources (P.O.W.E.R.)
- Public Spaces Appreciation Association of Ontario
- Registered Nurses Association of Ontario
- Preservation of Agricultural Lands Society
- Rare Charitable Research Reserve
- Rescue Lake Simcoe Coalition
- Richmond Hill Naturalists
- Riversides
- Rural Burlington Greenbelt Coalition
- St.Catharine’s CAN (Climate Action Now)
- Save the Maskinonge
- Save the North Gwillimbury Forest
- Save The Rouge
- Save the Oak Ridges Moraine - STORM Coalition
- Save Our Ravines - Halton Hills
- Sierra Club of Canada (Ontario Chapter)
- Simcoe County Greenbelt Coalition
- South Lake Simcoe Naturalists
- South Peel Naturalists Club
- Stop the Quarry - Save Luther Marsh
- Sunfish Lake Association
- Sustainable Cobourg
- Sustainable Brant
- Sustainable Urban Development Association
- Sustainable Vaughan
- Toronto Environmental Alliance
- The Humane Society of Canada
- The Lakewater Society
- Urban Green Environmental Organization
- Willow Park Ecotology Centre
- Valley Voices Residents Association
- Wainfleet Ratepayers Association
- Wellington Water Watchers
- West Whitby Community Against 407 Link Location (WW-CALL)
- West Oro Ratepayers Association Inc.
- York Region Environmental